

FEDERAL COURT

BETWEEN:

ASSOCIATION OF JUSTICE COUNSEL

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

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

APPLICANT'S APPLICATION RECORD

Appendices A and B

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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

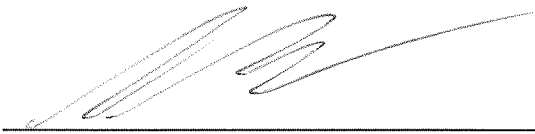
34. The arbitration board in this case sought to circumvent the 90-day period established by section 157 for implementation of overtime and travelling time compensation by purporting to postpone for 120 days the date on which those parts of the award came into force. As the board itself acknowledged, 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

APPENDIX "A": STATUTES CITED

Public Service Labour Relations Act, 2003, c. 22, s.2

Division 9

ARBITRATION

Application of Division

Application

135. This Division applies to the employer and the bargaining agent for a bargaining unit whenever

- (a) the process for the resolution of a dispute applicable to the bargaining unit is arbitration; and
- (b) the parties have bargained in good faith with a view to entering into a collective agreement but are unable to reach agreement on a term or condition of employment that may be included in an arbitral award.

Request for Arbitration

Request for arbitration

136. (1) Either party may, by notice in writing to the Chairperson, request arbitration in respect of any term or condition of employment that may be included in an arbitral award.

When request may be made

- (2) The request may be made
 - (a) at any time, if the parties have not entered into a collective agreement and no request for arbitration has been made by either party since the commencement of the bargaining; or
 - (b) not later than seven days after a collective agreement is entered into by the parties, in any other case.

Contents of notice

- (3) The party requesting arbitration must
 - (a) specify in the notice every term or condition of employment in respect of which it requests arbitration and its proposals concerning the award to be made in respect of that term or condition; and

(b) annex to the notice a copy of the most recent collective agreement entered into by the parties.

Notice to other party

(4) On receiving the notice, the Chairperson must send a copy to the other party.

Request for arbitration of additional matters

(5) The other party may, within seven days after receiving the copy, by notice in writing to the Chairperson, request arbitration in respect of any other term or condition of employment that may be included in an arbitral award and that remained in dispute when the first request for arbitration was made.

Notice to include proposal

(6) The party making the request under subsection (5) must specify in the notice its proposal concerning the award to be made in respect of every term or condition of employment in respect of which it requests arbitration.

Establishment of Arbitration Board

Establishment

137. (1) On receiving a request for arbitration, the Chairperson must establish an arbitration board for arbitration of the matters in dispute.

Delay

(2) The Chairperson may delay establishing an arbitration board until he or she is satisfied that the party making the request has bargained sufficiently and seriously with respect to the matters in dispute.

Constitution

138. The arbitration board consists of either a single member or three members, appointed in accordance with section 139 or 140, as the case may be.

Board with single member

139. If the parties jointly recommend the appointment of a person to be an arbitration board consisting of a single member, the Chairperson must appoint the person to be the arbitration board.

Board with three members

140. (1) If either party requests that an arbitration board consisting of three members be established, the Chairperson must, by notice, require each of the parties, within seven days after receipt of the notice, to nominate a person to be a member of the arbitration board, and on receipt of the nominations, the Chairperson must appoint the nominated persons as members of the arbitration board.

Failure to nominate

(2) If a party fails to nominate a person within the time provided for in subsection (1) or nominates a person who is not eligible for appointment, the Chairperson must appoint as a member of the arbitration board a person whom he or she considers suitable, and that person is deemed to have been appointed on the nomination of that party.

Appointment of chairperson nominated by parties

(3) Within five days after the day on which the second member is appointed, the two members must nominate a third person who is eligible for appointment and ready and willing to act, to be chairperson and third member of the arbitration board, and the Chairperson must appoint that person as the chairperson and third member of the arbitration board.

Failure to nominate

(4) If the two members fail to make a nomination under subsection (3) or they nominate a person who is not eligible for appointment, the Chairperson must, without delay, appoint as the chairperson and third member of the arbitration board a person whom he or she considers suitable.

Eligibility

141. No person may act as a member of an arbitration board in respect of a matter referred to arbitration if the person has, at any time during the six months before the person's date of appointment, acted in respect of any matter concerning employer-employee relations as counsel or agent of the employer or of any employee organization that has an interest in the matter referred to arbitration.

Notification of establishment

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.

Effect of notification

(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.

Death, incapacity or resignation of single member

143. (1) In the event of the death, incapacity or resignation of the member of an arbitration board that consists of a single member before the arbitration board makes an arbitral award, the Chairperson must appoint another person in accordance with section 139. That person must recommence the arbitration proceedings from the beginning.

Vacancy — board with three members

(2) If a vacancy occurs in the membership of an arbitration board that consists of three members before the arbitration board makes an arbitral award, the vacancy must be filled by the Chairperson by appointment in the manner provided in section 140 for the selection of the person in respect of whom the vacancy arose.

Referral to Arbitration

Referral to arbitration

144. (1) Subject to section 150, after establishing the arbitration board, the Chairperson must without delay refer the matters in dispute to the board.

Subsequent agreement

(2) If, before an arbitral award is made, the parties reach agreement on any matter in dispute that is referred to arbitration and enter into a collective agreement in respect of that matter, that matter is deemed not to have been referred to the arbitration board and no arbitral award may be made in respect of it.

Duty and Powers

Assistance to parties

145. As soon as possible after being established, the arbitration board must endeavour to assist the parties to the dispute in entering into or revising a collective agreement.

Procedure

146. (1) Except as otherwise provided in this Part, the arbitration board may determine its own procedure, including the date, time and place of its proceedings, but both parties must be given a full opportunity to present evidence and make representations.

Quorum and absence of members

(2) The chairperson of the arbitration board and one other member constitute a quorum in the case of an arbitration board consisting of three members but, in the absence of a member at any proceedings of the board, the other members may not proceed unless the absent member has been given reasonable notice of the proceedings.

Powers

147. (1) The arbitration board has all the powers of the Board set out in paragraphs 40(1)(a), (d), (e) and (h) to (j).

Delegation

(2) The arbitration board may authorize any person to exercise any of its powers set out in paragraphs 40(1)(d), (e), (i) and (j) and require that person to report to it on the exercise of those powers.

Factors to be considered

148. In the conduct of its proceedings and in making an arbitral award, the arbitration board must take into account the following factors, in addition to any other factors that it considers relevant:

- (a) the necessity of attracting competent persons to, and retaining them in, the public service in order to meet the needs of Canadians;
- (b) the necessity of offering compensation and other terms and conditions of employment in the public service that are comparable to those of employees in similar occupations in the private and

public sectors, including any geographic, industrial or other variations that the arbitration board considers relevant;

(c) the need to maintain appropriate relationships with respect to compensation and other terms and conditions of employment as between different classification levels within an occupation and as between occupations in the public service;

(d) the need to establish compensation and other terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered; and

(e) the state of the Canadian economy and the Government of Canada's fiscal circumstances.

Making of Arbitral Award

Making of arbitral award

149. (1) The arbitration board must make an arbitral award as soon as possible in respect of all the matters in dispute that are referred to it.

Award to be signed

(2) The arbitral award must be signed by the chairperson of the arbitration board, or by the single member, as the case may be, and a copy must be sent to the Chairperson.

Award not to require legislative implementation

150. (1) The arbitral award may not, directly or indirectly, alter or eliminate any existing term or condition of employment, or establish any new term or condition of employment, if

(a) doing so would require the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating money required for the implementation of the term or condition;

(b) the term or condition is one that has been or may be established under the *Public Service Employment Act*, the *Public Service Superannuation Act* or the *Government Employees Compensation Act*;

(c) the term or condition relates to standards, procedures or processes governing the appointment, appraisal, promotion, deployment, rejection on probation or lay-off of employees;

(d) in the case of a separate agency, the term or condition relates to termination of employment, other than termination of employment for a breach of discipline or misconduct; or

(e) doing so would affect the organization of the public service or the assignment of duties to, and the classification of, positions and persons employed in the public service.

Matters not negotiated

(2) The arbitral award may not deal with a term or condition of employment that was not the subject of negotiation between the parties during the period before arbitration was requested.

Decision of majority

151. (1) If the arbitration board consists of three members, a decision of a majority of the members in respect of the matters in dispute is a decision of the board on those matters and is the arbitral award in respect of those matters.

Decision where majority cannot agree

(2) If a majority of members of the arbitration board cannot agree in respect of the matters in dispute, the decision of the chairperson of the board is the arbitral award in respect of those matters.

Form of award

152. The form of the arbitral award must, wherever possible, permit the award to be

(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 arbitral award applies; and

(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 arbitral award.

Copy sent to parties

153. On receipt of a copy of the arbitral award, the Chairperson must, without delay, send a copy to the parties and may cause the award to be published in any manner that the Chairperson considers appropriate.

Duration and Operation of Arbitral AwardBinding effect

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.

When arbitral award has effect

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.

Limitation on retroactive effect

(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.

Effect on previous collective agreement or award

(3) If a provision of an arbitral award is to have retroactive effect, the provision displaces, for the retroactive period specified in the arbitral award, any term or condition of any previous collective agreement or arbitral award with which it is in conflict.

Term of arbitral award

156. (1) The arbitration board must determine the term of the arbitral award and set it out in the arbitral award.

Factors

(2) In determining the term of an arbitral award, the arbitration board must take the following into account:

- (a) if a collective agreement applicable to the bargaining unit is in force or has been entered into but is not yet in force, the term of that collective agreement; or
- (b) if no collective agreement applying to the bargaining unit has been entered into,
 - (i) the term of any previous collective agreement that applied to the bargaining unit, or
 - (ii) the term of any other collective agreement that it considers relevant.

Limitation on term

(3) An arbitral award may not be for a term of less than one year or more than two years from the day on which it becomes binding on the parties, unless the arbitration board determines otherwise in any case where paragraph (2)(a) or (b) applies.

ImplementationDuty to implement provisions of the arbitral award

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.

Matters Not Dealt WithReference of matters not dealt with

158. Any party that considers that the arbitration board has failed to deal with a matter in dispute that was referred to arbitration may, within seven days after the day on which the arbitral award is made, refer the matter back to the arbitration board which must then deal with it.

AmendmentAmendment

159. The Board may, on the joint application of both parties to whom an arbitral award applies, amend any provision of the arbitral award if it considers that the amendment is warranted having regard to circumstances that have arisen since the making of the arbitral award, or of which the arbitration board did not have notice when the award was made, or to any other circumstances that the Board considers relevant.

Section 9

ARBITRAGE

Application de la section

Application

135. La présente section s'applique à l'employeur et à l'agent négociateur représentant une unité de négociation dans le cas où :

- a) d'une part, le mode de règlement des différends applicable à l'unité de négociation est le renvoi à l'arbitrage;
- b) d'autre part, les parties ont négocié de bonne foi en vue de conclure une convention collective, mais n'ont pu s'entendre sur une condition d'emploi qui peut figurer dans une décision arbitrale.

Demande d'arbitrage

Demande

136. (1) L'une ou l'autre partie peut, par avis écrit adressé au président, demander le renvoi à l'arbitrage d'un différend sur une condition d'emploi qui peut figurer dans une décision arbitrale.

Moment de la demande

(2) La demande d'arbitrage peut intervenir :

- a) à tout moment dans le cas où aucune convention collective n'a été conclue et aucune autre demande d'arbitrage n'a été présentée par l'une ou l'autre partie depuis le début des négociations;
- b) au plus tard sept jours après la conclusion d'une convention collective dans les autres cas.

Avis à donner

(3) La partie qui demande l'arbitrage :

- a) précise dans l'avis la condition d'emploi à l'égard de laquelle elle demande l'arbitrage et ses propositions quant à la décision arbitrale qui doit être rendue en l'espèce;
- b) annexe à l'avis une copie de la dernière convention collective conclue par les parties.

Avis à l'autre partie

(4) Sur réception de l'avis, le président envoie copie à l'autre partie.

Demande connexe

(5) Le destinataire de cette copie peut, dans les sept jours suivant sa réception, par avis adressé au président, demander l'arbitrage à l'égard de toute autre condition d'emploi qui peut figurer dans une décision arbitrale et qui restait en litige au moment où la demande d'arbitrage mentionnée au paragraphe (1) a été faite.

Propositions de décision

(6) La partie qui demande l'arbitrage au titre du paragraphe (5) précise, dans l'avis, ses propositions quant à la décision qui doit être rendue en l'espèce.

Établissement du conseil d'arbitrage

Conseil d'arbitrage

137. (1) Sur réception de la demande d'arbitrage, le président établit un conseil chargé de l'arbitrage du différend.

Report

(2) Le président peut attendre, avant de donner suite à la demande d'arbitrage, d'être convaincu que le demandeur a négocié suffisamment et sérieusement en ce qui touche le différend visé par celle-ci.

Composition

138. Le conseil d'arbitrage se compose d'un ou de trois membres nommés conformément aux articles 139 ou 140, selon le cas.

Conseil formé d'un membre unique

139. Si les parties recommandent conjointement la nomination d'une personne à titre de membre unique d'un conseil d'arbitrage, le président nomme la personne ainsi recommandée.

Conseil formé de trois membres

140. (1) Si l'une ou l'autre partie demande que le conseil d'arbitrage soit formé de trois membres, le président adresse à chacune des parties un avis lui demandant de proposer, dans les sept jours suivant la réception de l'avis, un candidat pour le conseil; il nomme les personnes ainsi proposées.

Nomination des membres par le président

(2) Si l'une des parties omet de proposer un candidat dans le délai prévu au paragraphe (1) ou si elle propose la nomination d'une personne non admissible, le président nomme la personne qu'il estime compétente. Cette personne est alors réputée avoir été nommée sur proposition de cette partie.

Nomination du président proposé par les membres

(3) Dans les cinq jours qui suivent la date de nomination de la deuxième personne, les deux personnes nommées proposent, pour le poste de membre et président du conseil d'arbitrage, le nom d'une troisième personne admissible et disposée à agir en cette qualité. Le président entérine leur choix en nommant cette personne président du conseil.

Nomination du président du conseil d'arbitrage par le président

(4) Faute de candidature proposée aux termes du paragraphe (3), ou si le nom d'une personne non admissible a été proposé, le président nomme sans délai comme membre et président du conseil d'arbitrage la personne qu'il estime compétente.

Admissibilité

141. Ne peut être nommée à titre de membre d'un conseil d'arbitrage la personne qui, dans les six mois précédant la nomination, a fait fonction de conseiller juridique ou de mandataire de l'employeur ou de toute organisation syndicale intéressée en matière de relations de travail.

Avis de l'établissement

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.

Effet de cet avis

(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.

Décès, empêchement ou démission du membre unique

143. (1) En cas de décès, d'empêchement ou de démission du membre unique formant le conseil d'arbitrage avant le prononcé de la décision, le président nomme une nouvelle personne conformément à l'article 139. Le nouveau membre unique recommence la procédure d'arbitrage.

Vacance d'un des trois membres

(2) S'il se produit une vacance parmi les trois membres formant le conseil d'arbitrage avant que celui-ci n'ait rendu sa décision, le président y pourvoit en procédant à une nomination de la manière prévue à l'article 140 pour le choix du titulaire du poste vacant.

Renvoi à l'arbitrage

Renvoi

144. (1) Sous réserve de l'article 150, dès la constitution du conseil d'arbitrage, le président lui renvoie les questions en litige.

Entente ultérieure

(2) Toute question renvoyée à l'arbitrage est réputée ne pas l'avoir été et ne peut faire l'objet de la décision arbitrale dans le cas où, avant qu'une telle décision n'ait été rendue, les parties arrivent à s'entendre et concluent une convention collective réglant la question.

Pouvoirs et obligations

Assistance aux parties

145. Le conseil d'arbitrage met tout en oeuvre, dans les meilleurs délais, pour que les parties au différend parviennent à conclure ou à réviser la convention collective.

Règles de procédure

146. (1) Sauf disposition contraire de la présente partie, le conseil d'arbitrage peut fixer ses modalités de fonctionnement, notamment la date, l'heure et le lieu de ses séances, en donnant toutefois aux parties l'occasion de présenter leurs éléments de preuve et leurs observations.

Quorum et absences

(2) Si le conseil d'arbitrage est formé de trois membres, le quorum est constitué par le président du conseil et un autre membre, à condition toutefois que le membre absent ait été averti raisonnablement à l'avance de la tenue de la séance.

Pouvoirs

147. (1) Le conseil d'arbitrage est investi de tous les pouvoirs de la Commission énumérés aux alinéas 40(1)*a*), *d*), *e*) et *h*) à *j*).

Délégation

(2) Le conseil d'arbitrage peut déléguer les pouvoirs énumérés aux alinéas 40(1)*d*), *e*), *i*) et *j*), en assortissant ou non cette délégation d'une obligation de faire rapport.

Facteurs à prendre en considération

148. Dans la conduite de ses séances et dans la prise de ses décisions, le conseil d'arbitrage prend en considération les facteurs qui, à son avis, sont pertinents et notamment :

- a*) la nécessité d'attirer au sein de la fonction publique des personnes ayant les compétences voulues et de les y maintenir afin de répondre aux besoins des Canadiens;
- b*) la nécessité d'offrir au sein de la fonction publique une rémunération et d'autres conditions d'emploi comparables à celles des personnes qui occupent des postes analogues dans les secteurs privé et public, notamment les différences d'ordre géographique, industriel et autre qu'il juge importantes;
- c*) la nécessité de maintenir des rapports convenables, quant à la rémunération et aux autres conditions d'emploi, entre les divers échelons au sein d'une même profession et entre les diverses professions au sein de la fonction publique;
- d*) la nécessité d'établir une rémunération et d'autres conditions d'emploi justes et raisonnables compte tenu des qualifications requises, du travail accompli, de la responsabilité assumée et de la nature des services rendus;
- e*) l'état de l'économie canadienne et la situation fiscale du gouvernement du Canada.

Établissement de la décision arbitrale

Établissement

149. (1) Le conseil d'arbitrage rend sa décision sur les questions en litige dans les meilleurs délais.

Signature

(2) La décision arbitrale est signée par le président du conseil d'arbitrage ou par le membre unique, selon le cas; un exemplaire en est transmis au président de la Commission.

Réserves

150. (1) La décision arbitrale ne peut avoir pour effet direct ou indirect de modifier, supprimer ou établir une condition d'emploi :

- a) soit de manière à nécessiter ou entraîner l'adoption ou la modification d'une loi fédérale, exception faite des lois affectant les crédits nécessaires à son application;
- b) soit qui a été ou pourrait être établie sous le régime de la *Loi sur l'emploi dans la fonction publique*, la *Loi sur la pension de la fonction publique* ou la *Loi sur l'indemnisation des agents de l'État*;
- c) soit qui porte sur des normes, procédures ou méthodes régissant la nomination, l'évaluation, l'avancement, la mutation, le renvoi en cours de stage ou la mise en disponibilité des fonctionnaires;
- d) soit, dans le cas d'un organisme distinct, qui porte sur le licenciement, sauf le licenciement imposé pour manquement à la discipline ou inconduite;
- e) soit de manière que cela aurait une incidence sur l'organisation de la fonction publique, l'attribution de fonctions aux postes et aux personnes employées au sein de celle-ci et leur classification.

Questions exclues

(2) Sont exclues du champ de la décision arbitrale les conditions d'emploi n'ayant pas fait l'objet de négociations entre les parties avant que ne soit demandé l'arbitrage.

Décision en cas de majorité

151. (1) Si le conseil d'arbitrage est formé de trois membres, la décision prise à la majorité des membres sur les questions en litige constitue la décision arbitrale du conseil sur ces questions.

Décision en cas de partage

(2) Lorsqu'il n'y a pas de majorité, la décision du président du conseil d'arbitrage constitue la décision arbitrale.

Forme de la décision arbitrale

152. La décision arbitrale est rédigée, dans la mesure du possible, de façon à :

- 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) 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.

Copies envoyées aux parties

153. Dès la réception de sa copie de la décision arbitrale, le président en envoie une copie aux parties; il peut ensuite la faire publier de la manière qu'il estime indiquée.

Durée et application de la décision arbitrale

Effet obligatoire

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*.

Entrée en vigueur

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.

Effet rétroactif

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

Effet sur une convention ou une décision arbitrale antérieure

(3) Les dispositions de la décision arbitrale qui ont un effet rétroactif l'emportent, pour la période fixée, sur les dispositions incompatibles de toute convention collective ou de toute autre décision arbitrale alors en vigueur.

Durée de la décision arbitrale

156. (1) Le conseil d'arbitrage établit la durée d'application de chaque décision arbitrale et l'indique dans le texte de celle-ci.

Facteurs

(2) Pour établir cette durée, il tient compte :

a) de la durée de la convention collective applicable à l'unité de négociation, qu'elle soit déjà en vigueur ou seulement conclue;

b) si aucune convention collective n'a été conclue :

(i) soit de la durée de toute convention collective antérieure qui s'appliquait à cette unité de négociation,

(ii) soit de la durée de toute autre convention collective qu'il estime pertinente.

Limitation de la durée d'une décision arbitrale

(3) La décision arbitrale ne peut avoir une durée inférieure à un an ou supérieure à deux ans à compter du moment où elle lie les parties, à moins que le conseil arbitral ne juge qu'une autre durée est appropriée dans les cas d'application des alinéas (2)a) et b).

Mise en oeuvre de la décision arbitrale

Obligation de mettre en oeuvre la décision arbitrale

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.

Questions non tranchées

Nouveau renvoi

158. La partie qui estime que le conseil d'arbitrage n'a pas réussi à régler une question en litige peut, dans les sept jours suivant la décision arbitrale, lui renvoyer la question et celui-ci doit alors l'examiner.

Modification de la décision arbitrale

Modification

159. Sur demande conjointe des deux parties visées par la décision arbitrale, la Commission peut modifier toute disposition de celle-ci si elle estime que la modification est justifiée par les circonstances, notamment celles survenues depuis que la décision a été rendue ou dont le conseil d'arbitrage n'avait pas eu connaissance à ce moment.