

**In the Matter of the *Federal Public Sector Labour Relations Act*
and In the Matter of a Dispute Referred to Binding Conciliation**

BETWEEN:

THE ASSOCIATION OF JUSTICE COUNSEL

Bargaining Agent

- and -

THE TREASURY BOARD OF CANADA

Employer

**OUTLINE OF ARGUMENT OF THE
ASSOCIATION OF JUSTICE COUNSEL/ ASSOCIATION DES
JURISTES DE JUSTICE**

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Pay

1. Recent settlements in the Public Service have followed a consistent pattern:
 - 4-year term
 - 1.25% annual economic increase for inflation
 - Market Adjustment in year 3
2. The size of the market adjustment has varied depending on the factual circumstances.
3. The Employer has acknowledged that the determinants of the size of the market adjustment are:

‘serious issues with external wage comparability and/or recruitment and retention issues’ (TB Submission, p. 8)

“external or internal wage comparability disparity or significant recruitment and retention pressures” (TB Submission, p. 16)

4. There is a serious disparity between the pay of lawyers employed by the federal government and lawyers employed by provincial governments.
5. Lawyers employed by provincial governments are the most valid comparator group because they perform the same work as federal government lawyers in a similar setting.
6. Federal lawyers work in all provinces and territories, but their distribution is very uneven. About 56% of the bargaining unit works in Ontario; about 15% in Quebec; 11% in B.C. and 6% in Alberta.
7. The charts at Tab 8 of the AJC Reply Submission compare federal and provincial pay rates for lawyers at the “entry level”, “working level” and “senior level”.

Comparison of Pay Rates for the Working Level

8. LP-2 is commonly referred to as the “working level”. LP-2s make up more than half of the bargaining unit. LP-2s do legal work that requires knowledge and experience

beyond that of a beginning lawyer but not requiring the most demanding level of expertise and specialization.

9. The pay comparison chart for the working level at Tab 8 of the AJC Reply Submission indicates the level in each provincial classification that is equivalent to the federal LP-2 level.

Ontario

10. Ontario is an important comparator because that is where more than half (approximately 56%) of the bargaining unit works. Ontario has separate bargaining units for Crown Attorneys and civil lawyers. Classification levels and pay rates are the same in both units.
11. Ontario lawyers have 3 classification levels: level 1; level 3; and level 4. Level 2 existed previously but was amalgamated into level 3 some years ago. The work done by Ontario lawyers formerly classified as level 2 is now done by lawyers classified as level 3. Lawyers at level 3 make up about 64% of the Ontario bargaining unit. Lawyers at level 1 have 1 – 6 years' experience. After 6 years, an Ontario lawyer at level 1 moves automatically to level 3. Ontario lawyers at level 3 reach the maximum of their pay scale at 16 years of experience.
12. The AJC expert report concluded that the work performed by a federal LP-2 would be classified in Ontario at the CC-3 level.
13. The Employer's expert report claims that there is no Ontario comparator at all for federal LP-2s. That defies the facts and common sense.
14. Mid-level legal work of the sort done by federal LP-2s has not disappeared in Ontario. Nor is mid-level work being done by entry level lawyers with 1 – 6 years of experience. Mid-level work is being done by Ontario level 3 lawyers, who have a minimum of 6 years' experience and reach the maximum of their pay scale at 16 years. Federal lawyers at the LP-2 level have similar years of experience as Ontario lawyers at level 3. On average a federal lawyer is promoted to LP-2 at about 9 years' experience and reaches the maximum of the LP-2 pay scale at about 16 years.

British Columbia

15. Classification of lawyers in B.C. is tied directly to years of experience: lawyers with up to 5 years of experience are at level 1; lawyers with 6 – 11 years' experience are at level 2; lawyers with 12 and more years of experience are at level 3.
16. Federal LP-2s have an average of about 13 years of experience. Federal lawyers enter the LP-2 level with 9 years' experience on average and reach the maximum of the LP-2 pay scale at 16 years.
17. A lawyer with 13 years of experience in British Columbia would automatically be classified at level 3 of the B.C. classification system.
18. The Employer's expert report claims on the basis of "job capsules" that the federal LP-2 level is comparable to the B.C. level 2. This ignores the fact that the classification of lawyers in B.C. is entirely determined by years of experience.

Quebec

19. Quebec has separate bargaining units for Crown prosecutors and for civil lawyers. The terms of employment for civil lawyers are unsettled and a matter of great dispute. Quebec civil lawyers and the Province have been engaged in a long-running dispute involving a lengthy strike, back-to-work legislation, unsuccessful mediation, and ongoing judicial proceedings.
20. Crown prosecutors in Quebec have a single pay scale. They move through the 18 steps on the pay range on the basis of years of experience. Quebec prosecutors progress through the first 8 steps in their first 4 years and thereafter move up a step each year. The maximum of the pay scale is reached when a Quebec lawyer has 14 years' experience.
21. A lawyer with 14 years of experience would be at the LP-2 level in the federal system and at the top of the pay range in the Quebec system.

Job Rate

22. The Job Rate (i.e., the maximum pay rate attainable in the comparable classification levels) is used to measure the difference in pay between comparable levels in different jurisdictions. A “total compensation” approach is not necessary for comparative purposes because all jurisdictions have similar pensions and supplementary benefits.
23. Job rates reported on the charts at Tab 8 of the AJC Reply Submission do not include performance bonuses.
24. The pay system for Quebec prosecutors is complex and results in variation between lawyers. Pay rates in their collective agreement are for a 35-hour week, but most prosecutors have opted to work a 37.5 hour week and this automatically increases pay by 7.14%. Overtime is a regular recurring element of pay for most prosecutors. The Quebec government has reported that the value of paid overtime is approximately 5% of base salary. There are also other payments that are an integral part of the pay package: 1.87 % of base salary is paid for “special mandates” (art 7.1.09); a “prime” of 10% is paid for work on major criminal cases (art. 7.3.19). Primes ranging from 5% to 8% are paid for working in remote locations (art. 7.3.20 and 7.3.21). In addition, primes ranging from 3% to 8% are paid for various “special mandates” that are agreed to between the Employer and union each year. All these additional payments are cumulative.

Average Provincial Pay Rates

25. In order to fairly compare federal and provincial pay rates, a simple unweighted average of provincial rates cannot be used because the distribution of federal lawyers across the provinces is very uneven.
26. An unweighted average gives undue significance to small provinces where few federal lawyers work.
27. A weighted average, in contrast, provides a result that fairly reflects the economic reality that provinces where a large number of federal lawyers work have much greater significance as market comparators.
28. The charts at Tab 8 of the AJC Reply Submission show the pay gap between the LP-1, LP-2 and LP-3 levels and the comparable weighted provincial averages.

The Employer's national averages are faulty and not credible

29. The Employer claims, on the basis of its expert report, that LP pay rates are higher than the national average of provincial rates.
30. For example, the Employer contends that LP-2 pay is higher by 8.4% than the average of comparable provincial rates. (TB Submission, p. 17) To generate this result, the Employer excludes Ontario from the average, despite the fact that more than half the LP bargaining unit works in Ontario. In addition, the Employer uses an unweighted average, which gives undue significance to small provinces where few federal lawyers work and which have the lowest pay rates.
31. The Employer suggests that Ontario should be excluded from the national average because Ontario rates should only be compared to the LP-Toronto rates. There is no principled basis for excluding Ontario. The Ontario rates apply across the entire province, not just in Toronto. More Ontario Crowns work outside Toronto than in Toronto.
32. The Employer also presents an alternative national average, which it says includes Ontario (TB Submission, p. 17). The Employer says that LP-2 pay is 8.4% higher than the national average including Ontario. However, the Employer's expert has generated this result by excluding any Ontario comparator for the LP-2 level, notwithstanding that LP-2 is the "working level" and there are more than 600 LP-2s working in Ontario. As discussed above, the Ontario counterpart for the federal LP-2 level is the Ontario level 3. Including Ontario level 3 pay in the calculation of the average produces a very different result.
33. The Employer also suggests that LP-1 and LP-3 pay rates are higher than its national average that includes Ontario. The Employer's calculation of the national average for these levels includes an Ontario comparator, but once again the result is the product of using an unweighted average. Less than 1% of the LP bargaining unit works in each of PEI, Newfoundland and New Brunswick. But in the Employer's calculation of average provincial pay rates, those provinces have the same weight as Ontario, Quebec, BC and Alberta, where almost 90% of the bargaining unit work.

Judge Advocate General lawyers

34. The federal government employs lawyers in the Office of the Judge Advocate General within the Canadian Forces. JAG lawyers perform legal work similar to LPs, including criminal prosecutions, advisory and solicitor's work. LP-1s are equivalent to JAG lawyers at the rank of Captain; LP-2s are equivalent to JAG lawyers at the rank of Major. The pay of JAG lawyers is set by Treasury Board and is directly linked to LP pay rates.
35. JAG lawyers at equivalent levels make substantially more than LPs. A JAG lawyer in Ottawa at the rank of Major at the top of the pay scale is paid \$154,200, \$16,313 more than an LP-2.
36. JAG pay includes a "military factor", a "performance pay element" and a post living differential. These factors do not justify such a large gap in pay between lawyers employed by the federal government doing substantially the same work in the same location.

A Market Adjustment is required to satisfy the Employer's own policy on competitive pay

37. The serious disparity in pay between LPs and lawyers employed by provincial governments justifies a significant market adjustment.
38. In the current round of bargaining in the Public Service, the Employer has agreed to significant year 3 market adjustments for groups that had external pay disparities: firefighters – 15% market adjustment; actuaries – 20% market adjustment; various trades – from 9% to 15% market adjustment.
39. The Board should be guided by the Employer's own policy on compensation:
"compensation should be competitive with, but not lead, the market".
40. The fairest measure of the competitive market in this case is the weighted provincial average at the entry level, working level and senior level.

Effective date for pay increases

41. Salary adjustments in prior Collective Agreements were made effective May 9th of each year. The last pay increase for the LP bargaining unit was on May 9, 2013. The Employer in its response to the request for Binding Conciliation has proposed that salary

increases should be effective on June 21st of each year. There is no justification for this change. The AJC proposes that pay adjustments be as follows:

- Effective May 9, 2014 – 1.25% economic increase
- Effective May 9, 2015 - 1.25% economic increase
- Effective May 9, 2016 - 1.25% economic increase plus market adjustment
- Effective May 9, 2017 – 1.25% economic increase

Compensatory/Management Leave (AJC proposed amendments to Art 13 of the Collective Agreement)

42. In negotiations for the last Collective Agreement, the parties agreed that lawyers who work excessive hours to meet their professional obligations would be compensated through “Management Leave” rather than by paid overtime. Management leave is provided for in Art. 13.02(e), (f), and (g) of the Collective Agreement.
43. The intent was that Management Leave would be a flexible way for managers to provide some compensation in the form of leave with pay to lawyers who were required to work excessive hours on matters such as long trials or hearings.
44. The experience has been that individual managers have adopted inconsistent approaches to granting management leave with inequitable results: some managers routinely grant management leave; some never grant it; when leave is granted, the amount of leave varies widely without any relation to the number of excess hours worked.
45. To remedy inequitable treatment and to provide the benefit that the AJC believed it had bargained for, the AJC proposes that all lawyers receive 45 hours of leave with pay each year. This would recognize that the nature of legal work frequently requires lawyers in all settings to work beyond normal hours.
46. In addition, to deal with situations where a lawyer is required to work very long hours such as in a complex trial or other proceeding, the AJC’s proposal is that the amount of leave granted should be geared directly to the number of excess hours worked. The AJC’s proposes that a lawyer who works more than 180 hours (24 days) in a 4-week period would receive one day of leave. The standard hours of work required are 150

hours in a 4-week period (20 days) so that a lawyer could work 4 additional days per month without any requirement for leave. A lawyer who works 200 hours in a 4-week period would earn 2 days of leave and 3 days of leave would be granted to a lawyer who works more than 215 hours in a 4-week period.

Leave for Travel on Weekends and Statutory Holidays (AJC proposed 13.02(c) of the Collective Agreement

47. In negotiations for the last Collective Agreement, the parties agreed that premium pay for travel outside normal work hours would be discontinued. The AJC does not seek to re-introduce premium pay for travel time.
48. Nor does the AJC proposal alter the Employer's authority to determine a lawyer's departure and return times.
49. The Employer's authority to schedule travel means that, in some situations, a lawyer can be required to spend considerable personal time away from home and family. In northern Canada, for example, it is not uncommon that lawyers are required to travel on a Friday or Saturday in order to be in a remote community for court on Monday.
50. In these situations, where the Employer requires a lawyer to travel on a schedule that requires the lawyer to be away from home on a weekend or on a statutory holiday, the AJC proposes that the lawyer should receive a day of leave with pay for each weekend or statutory holiday away from home.

Standby (AJC proposed addition to Art 13 of the Collective Agreement)

51. Lawyers who are required to be on standby for duties such as weekend bail court or urgent immigration matters, suffer significant limitations on their personal activities.
52. Fair compensation for standby has been a longstanding issue between the parties. In the last round of negotiations, it was agreed to include an explicit statement (Art. 13.02(e) of the Collective Agreement) that management leave "may be granted ...where a lawyer

is significantly restricted as a result of being on standby duty". The highly discretionary nature of management leave has meant that this has not been an effective or equitable approach to compensating lawyers for being on standby duty.

53. The AJC proposes that disputes over compensation for standby be put to rest and that lawyers should receive ½ hour of leave with pay for each 4 hours or part thereof on standby. Many Collective Agreements in the Public Service contain such a provision.

Travel Time to be Included in the definition of "work" (AJC proposed addition to 2.01 of Collective Agreement – new definition of "work")

54. Lawyers are required to work 150 hours in a 4-week period (art. 13.01(a)).

55. Lawyers are sometimes required to travel outside their home area for work purposes. They are required to record such travel time in the Employer's timekeeping system.

56. Managers have taken inconsistent approaches on whether time spent on such travel counts towards a lawyer's 150-hour work budget. Some managers do count this travel time toward the 150-hour work budget; some managers only count travel time if it is within normal business hours; some managers do not count travel time towards the 150-hour work budget.

57. The AJC proposal is to eliminate this inconsistency. When a lawyer is required to travel for work for the benefit of the Employer and when the Employer can determine departure and return times, travel time is properly characterized as working time for the purposes of a lawyer's 150-hour work budget.

Employer Proposal -- Performance Pay Plans

58. The Board should not entertain the Employer's proposal to substantially amend the performance pay plans in Appendices "B" and "C" of the Collective Agreement, because the Employer has not bargained its proposal.
59. The Employer put down what it describes as a "placeholder" at the outset of bargaining in 2014, stating only that it wished to discuss performance pay. However, the Employer never made any proposal or initiated any discussion during bargaining. Its Reply to the request for Binding Conciliation filed in March 2017, does not contain any proposals for specific amendments to the performance pay plans, but instead simply lists four "principles". The first time the Employer presented a performance pay proposal was in its Submission filed in August 2017. Since the Employer did not present its proposal on performance pay in collective bargaining, this Board should not entertain its late proposal.
60. Even if this Board were to entertain the Employer's proposal, the Employer has not demonstrated a need for substantial amendments to the performance pay plans. Specifically, the Employer has not demonstrated any justification to:
- a. Take away the eligibility of lawyers absent on leave without pay (including maternity and paternity leave);
 - b. Reduce the "pool" of money available from 5% of payroll to 5% of "payroll of those eligible for performance awards";
 - c. Create a new category for performance award with a lower rate than previously set (4% instead of 4.6%);
 - d. Fail to address the current practice of guaranteeing that 20% of the bargaining unit receive the top rating of "Exceeds";
 - e. Increase the period for payout from 40 days to 120 days.

All of which is respectfully submitted.

October 24, 2017.