

BETWEEN

ASSOCIATION OF JUSTICE COUNSEL

Bargaining Agent

and

TREASURY BOARD

Employer

Re: Request for Arbitration

Before: Michael Bendel, Chairperson
James K.A. Hayes, Bargaining Agent Nominee
Jean-François Munn, Employer Nominee

Appearances: For the Bargaining Agent:

Dougald E. Brown, Counsel
Marco Mendicino, President

For the Employer:

Marc Thibodeau, Negotiator
Stéphane Bertrand, Counsel
Shaun Peddie, Economist

Heard at Ottawa, Ontario,
June 24 & 25, 2009.

ARBITRAL AWARD

Introduction

1. On September 24, 2008, the employer requested arbitration in respect of its dispute with the Association concerning certain terms and conditions of employment for the Law Group bargaining unit. On February 12, 2009, the Public Service Labour Relations Board established an arbitration board and issued a ruling on its terms of reference. On May 25, 2009, following the resignation of the Association's original nominee, the Board appointed the present arbitration board.

2. The arbitration board held a hearing in Ottawa on June 24 & 25, 2009, after conducting mediation between the parties on June 8, 9 & 10. The parties were given full opportunity to present evidence and make submissions at the hearing. Written presentations by each party had been exchanged and communicated to the board a few days before the mediation, and were supplemented by further written materials and oral presentations at the hearing. Following the hearing, the board met to consider its award. 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 ("the Act").

3. This dispute relates to a first collective agreement between these parties, the Association having been certified as bargaining agent in April 2006 following a change in the legislation, which, for the first time, allowed lawyers employed in the Department of Justice to be represented in collective bargaining. However, some of the employees in the bargaining unit, those employed in departments other than the Department of Justice, had been included in a bargaining unit represented by the Professional Institute of the Public

Service of Canada, which had negotiated several collective agreements for them over a period of more than 30 years.

4. A very large number of items were in dispute when this board was constituted. Despite some progress at the mediation stage, a very large number of items remained in dispute at the close of the hearing. In view of this, the board has, for the most part, not reproduced in this award the parties' proposals. Where text has been underlined in this award, it is to draw attention to changes made by the board to the parties' proposals.

5. On March 12, 2009, after this matter had been referred to arbitration, the Expenditure Restraint Act (Bill C-10) ("the ERA") came into force. It established certain rules that were to apply to any collective agreement or arbitral award for this bargaining unit. In particular, it specified the maximum salary increases that could result from collective bargaining or arbitration. (The Association stated at the hearing that it was considering a challenge to the constitutional validity of the ERA.) The ERA, it should be noted, does not limit this board's power to rule on matters other than salary increases and performance pay plans, although it does prohibit the board from introducing new forms of "additional remuneration" and from compensating employees for amounts they did not receive as a result of the restraint measures.

Management Rights

6. The board awards the following (based on the parties' proposals):

1. All the functions, rights, powers and authority which the Employer has not specifically abridged, delegated or modified in this Agreement are recognized by the Association as being retained by the Employer.

2. The Employer will act reasonably, fairly and in good faith in administering this Agreement.

Representatives

7. The board accepts the employer's proposals on this subject, which read as follows:

7.02 The Employer and the Association shall, by mutual agreement, determine the area of jurisdiction of each Representative, having regard to the plan of organization and the distribution of lawyers.

...

7.04 Operational requirements permitting, the Employer shall grant leave with pay to a lawyer to enable him to carry out his functions as a Representative on the Employer's premises. When the discharge of these functions requires a lawyer who is a Representative to leave his normal place of work, the lawyer shall report his return to his supervisor whenever practicable.

Information

8. The board awards the following on the outstanding items, based on the parties' proposals:

9.01 The Employer agrees to supply the Association on a quarterly basis with a list of all lawyers in the bargaining unit. The list referred to herein shall include the name, employing department, geographical location, classification of the lawyer and shall be provided within one month following the termination of each quarter. As soon as practicable, the Employer agrees to add to the above list the date of appointment for new lawyers.

...

6.04 The Employer shall, no less frequently than on a monthly basis, provide the Association with a list of any changes made to current excluded positions, including any positions that will no longer be excluded and any positions that have been proposed for exclusion. This information shall include the rationale for any proposed exclusion, the position number and name of the incumbent of any such positions, the employing department or agency and organizational unit, and the geographical location of the lawyer.

Leave with or without pay for Association business or for other activities under the PSLRA

9. The board has decided to accept the employer's proposal on this subject, which reads as follows:

11.01 Public Service Labour Relations Board Hearings

(1) Complaints Made to the Public Service Labour Relations Board Pursuant to Section 190 (1) of the *Public Service Labour Relations Act*

Where operational requirements permit, in cases of complaints made to the Public Service Labour Relations Board pursuant to section 190 (1) of the *Public Service Labour Relations Act* ("PSLRA") alleging a breach of sections 157, 186 (1) (a), 186 (1) (b), 186 (2) (a) (i), 186 (2) (b), 187, 188 (a) or 189 (1) of the PSLRA, the Employer will grant leave with pay:

- (a) to a lawyer who makes a complaint on his own behalf before the Public Service Labour Relations Board,
- and
- (b) to a lawyer who acts on behalf of a lawyer making a complaint, or who acts on behalf of the Association making a complaint.

(2) Applications for Certification, Representations and Interventions With Respect to Applications for Certification

Where operational requirements permit, the Employer will grant leave without pay:

- (a) to a lawyer who represents the Association in an application for certification or in an intervention,
- and
- (b) to a lawyer who makes personal representations with respect to a certification.

(3) Lawyer Called as a Witness

The Employer will grant leave with pay:

- (a) to a lawyer called as a witness by the Public Service Labour Relations Board,
- and
- (b) where operational requirements permit, to a lawyer called as a witness by a lawyer or the Association.

11.02 Arbitration Board, Public Interest Commission and Alternative Dispute Resolution Process

- (1) Where operational requirements permit, the Employer will grant leave with pay to a lawyer representing the Association before an Arbitration Board, Public Interest Commission or in an Alternative Dispute Resolution Process.

(2) Lawyer Called as a Witness

The Employer will grant leave with pay to a lawyer called as a witness by an Arbitration Board, Public Interest Commission or an Alternative Dispute Resolution Process and, where operational requirements permit, leave with pay to a lawyer called as a witness by the Association.

11.03 Adjudication

(1) Lawyer who is a Party

Where operational requirements permit, the Employer will grant leave with pay to a lawyer who is a party.

(2) Lawyer who acts as Representative

Where operational requirements permit, the Employer will grant leave with pay to the representative of a lawyer who is a party.

(3) Lawyer called as a Witness

Where operational requirements permit, the Employer will grant leave with pay to a witness called by a lawyer who is a party.

11.04 Meetings During the Grievance Process

(1) Lawyer Presenting Grievance

Where operational requirements permit, the Employer will grant to a lawyer,

(a) where the Employer originates a meeting with the lawyer who has presented the grievance, leave with pay when the meeting is held in the headquarters area of such lawyer and "on duty" status when the meeting is held outside the headquarters area of such lawyer;

and

(b) where a lawyer who has presented a grievance seeks to meet with the Employer, leave with pay to the lawyer when the meeting is held in the headquarters area of such lawyer and leave without pay when the meeting is held outside the headquarters area of such lawyer.

(2) Lawyer Who Acts as Representative

Where a lawyer wishes to represent at a meeting with the Employer, a lawyer who has presented a grievance, the Employer will, where operational requirements permit, grant leave with pay to the representative when the meeting is held in the headquarters area of such lawyer and leave without pay when the meeting is held outside the headquarters area of such lawyer.

(3) Grievance Investigations

Where a lawyer has asked or is obliged to be represented by the Association in relation to the presentation of a grievance and a lawyer acting on behalf of the Association wishes to discuss the grievance with that lawyer, the lawyer and the representative of the lawyer will, where operational

requirements permit, be given reasonable leave with pay for this purpose when the discussion takes place in the headquarters area of such lawyer and leave without pay when it takes place outside the headquarters area of such lawyer.

11.05 Contract Negotiations Meetings

Where operational requirements permit, the Employer will grant leave without pay to a lawyer for the purpose of attending contract negotiations meetings on behalf of the Association.

11.06 Preparatory Contract Negotiations Meetings

Where operational requirements permit, the Employer will grant leave without pay to a lawyer to attend preparatory contract negotiations meetings.

11.07 Meetings Between the Association and Management

Where operational requirements permit, the Employer will grant leave with pay to a lawyer to attend meetings with management on behalf of the Association.

11.08 Association Executive Council Meetings and Conventions

Where operational requirements permit, the Employer will grant leave without pay to a lawyer to attend Executive Council Meetings and Conventions of the Association.

11.09 Representatives' Training Courses

(a) Where operational requirements permit, the Employer will grant leave without pay to lawyers appointed as Representatives by the Association, to undertake training sponsored by the Association related to the duties of a Representative.

(b) Where operational requirements permit, the Employer will grant leave with pay to lawyers appointed as Representatives by the Association, to attend training sessions concerning Employer-lawyer relations sponsored by the Employer.

Membership Dues

10. Most of this provision was agreed to between the parties. On the matters still in dispute, the board adopts the employer's proposals, which are as follows:

12.03 For the purposes of applying clause 12.01, deductions from pay for each lawyer will start the first (1st) day of the month following the employment to the extent that earnings are available.

12.06 The amounts deducted in accordance with clause 12.01 shall be remitted to the Association by cheque within a reasonable period of time after deductions are made and shall be accompanied by particulars identifying each lawyer and the deductions made on his behalf.

Designated Paid Holidays

11. Here, too, the board adopts the employer's proposals on the one aspect of this subject that is still in dispute. The award is as follows:

16.01 Subject to clause 16.02, the following days shall be designated paid holidays for lawyers:

- (a) New Year's Day,
- (b) Good Friday,
- (c) Easter Monday,
- (d) the day fixed by proclamation of the Governor in Council for celebration of the Sovereign's birthday,
- (e) Canada Day,
- (f) Labour Day,
- (g) the day fixed by proclamation of the Governor in Council as a general day of Thanksgiving,
- (h) Remembrance Day,
- (i) Christmas Day,
- (j) Boxing Day,
- (k) one additional day in each year that, in the opinion of the Employer, is recognized to be a provincial or civic holiday in the area in which the lawyer is employed or in any area where, in the opinion of the Employer, no such day is recognized as a provincial or civic holiday, the first Monday in August, and
- (l) one additional day when proclaimed by an Act of Parliament as a national holiday.

Other leave with or without pay

12. The board has decided to accept the employer's proposals on this subject, which read as follows:

19.02 Bereavement Leave With Pay

...

- (a) When a member of the lawyer's immediate family dies, a lawyer:

(i) shall be entitled to a bereavement period of five (5) consecutive calendar days which must include the day of the funeral. During such period, the lawyer shall be paid for those days which are not regularly scheduled days of rest for that lawyer;

(ii) in addition, the lawyer may be granted up to three (3) days' leave with pay for the purpose of travel related to the death.

...

19.10 Leave Without Pay for the Care of Immediate Family

Subject to operational requirements, a lawyer shall be granted leave without pay for the care of immediate family in accordance with the following conditions:

(a) For the purpose of this clause, family is defined as spouse (or common-law partner resident with the lawyer), children (including foster children or children of spouse or common-law partner), parents (including step-parents or foster parents) or any relative permanently residing in the lawyer's household or with whom the lawyer permanently resides;

(b) A lawyer shall notify the Employer in writing as far in advance as possible but not less than four (4) weeks in advance of the commencement date of such leave, unless such notice cannot be given, because of an urgent or unforeseeable circumstance;

(c) leave granted under this clause shall be for a minimum period of three (3) weeks;

(d) the total leave granted under this clause shall not exceed five (5) years during a lawyer's total period of employment in the Public Service.

...

19.11 Leave Without Pay for Personal Needs

Leave without pay will be granted for personal needs, in the following manner:

(a) Subject to operational requirements, leave without pay for a period of up to three (3) months will be granted to a lawyer for personal needs.

(b) Subject to operational requirements, leave without pay of more than three (3) months but not exceeding one (1) year will be granted to a lawyer for personal needs.

(c) A lawyer is entitled to leave without pay for personal needs only once under each of (a) and (b) of this clause during his total period of employment in the Public Service. Leave without pay granted under this clause may not be used in combination with maternity, parental or adoption leave without the consent of the Employer.

(d) Leave granted under (a) of this clause shall be counted for the calculation of "continuous employment" for the purpose of calculating severance pay and "service" for the purpose of calculating vacation leave. Time spent on such leave shall be counted for pay increment purposes.

(e) Leave without pay granted under (b) of this clause shall be deducted from the calculation of "continuous employment" for the purpose of calculating severance pay and "service" for the purpose

of calculating vacation leave for the lawyer involved. Time spent on such leave shall not be counted for pay increment purposes.

...

19.14 Volunteer Leave

Subject to operational requirements as determined by the Employer and with an advance notice of at least five (5) working days, the lawyer shall be granted, in each fiscal year, a single period of up to 7.5 hours of leave with pay to work as a volunteer for a charitable or community organisation or activity, other than for activities related to the Government of Canada Workplace Charitable Campaign.

The leave will be scheduled at a time convenient to both the lawyer and the Employer. Nevertheless, the Employer shall make every reasonable effort to grant the leave at such time as the lawyer may request.

...

19.21 Maternity-Related Reassignment or Leave

(a) A lawyer who is pregnant or nursing may, during the period from the beginning of pregnancy to the end of the twenty-fourth (24th) week following the birth, request the Employer to modify her job functions or reassign her to another job if, by reason of the pregnancy or nursing, continuing any of her current functions may pose a risk to her health or that of the foetus or child.

(b) A lawyer's request under clause (a) must be accompanied or followed as soon as possible by a medical certificate indicating the expected duration of the potential risk and the activities or conditions to avoid in order to eliminate the risk. Dependent upon the particular circumstances of the request, the Employer may obtain a medical opinion from Health Canada or its authorized agent.

Standards of Discipline

13. On the outstanding aspects of this subject, the board awards the following, based on the parties' proposals:

35.03 When a lawyer is required to attend a meeting, the purpose of which is to conduct a disciplinary hearing concerning him or her or to render a disciplinary decision concerning him or her, the lawyer is entitled to have, at his or her request, a representative of the Association attend the

meeting. Where practicable, the lawyer shall receive a minimum of one (1) day's notice of such a meeting.

...

25.03 Any disciplinary notation placed on any file relating to a lawyer will be removed and will no longer be relied upon for any purpose after two (2) years have elapsed since the disciplinary action was taken, provided that no other related disciplinary action has been taken during this period. Furthermore, the employer agrees not to rely upon any adverse document or notation concerning the conduct or performance of a lawyer which was not communicated in writing to the lawyer at the time.

Existing Benefits

14. One of the recurring issues in this arbitration was whether employees who had previously enjoyed certain "executive level" benefits (or benefits above the standard benefits of other professional groups in the Public Service) should retain them. We refer here to life insurance, supplementary health coverage, accidental death and dismemberment insurance, dependents' insurance, long-term disability insurance, vacation leave, sick leave, and parking privileges. The employer was seeking to lower several such benefits to the level of other unionized Public Service employees, while the Association maintained there was no justification for any reductions.

15. As a general proposition, the board accepts the Association's position. Our decision on the subject of vacation leave and sick leave benefits is recorded later in this award. As regards insurance coverage and parking privileges, the board awards the following:

Lawyers shall be provided with the following insurance coverage and benefits:

(a) SUPPLEMENTARY HEALTH INSURANCE

All lawyers shall be covered under the Public Service Health Care Plan as set out in the Public Service Health Care Plan Directive.

Lawyers at the LA-2B and LA-3 levels are entitled to full Employer-paid coverage under the family Hospital Provision Level III of the Public Service Health Care Plan.

(b) DENTAL INSURANCE

All lawyers shall be covered under the Public Service Dental Care Plan for employees of Public Service Departments and Eligible Agencies (the NJC Plan).

(c) LIFE INSURANCE

For lawyers at the LA-1 and LA-2A levels:

Basic life insurance (annual salary rounded to nearest \$1,000) and Supplementary life insurance (additional one year's salary rounded to nearest \$1,000) on the same terms as the Public Service Management Insurance Plan (PSMIP) – Main Plan. Premiums will be payable by the lawyer at the same rate as the PSMIP – Main Plan.

For lawyers at the LA-2B and LA-3 levels:

1. Basic life insurance (two times annual salary rounded to \$1,000) on same terms as PSMIP – Executive Plan. Premiums will be paid by the Employer.
2. Supplementary life insurance (additional one year's salary rounded to nearest \$1,000) on same terms as PSMIP – Executive Plan. Premiums will be paid by the lawyer at the same rate as PSMIP-Executive Plan.
3. Post-retirement life insurance of one year's salary (adjusted to next highest multiple of \$250) at date of retirement on same terms as PSMIP – Executive Plan. Premiums will be paid by the Employer.

(d) ACCIDENTAL DEATH & DISMEMBERMENT INSURANCE (AD &D)

For lawyers at the LA-1 and LA-2A levels:

Up to \$250,000 coverage in units of \$25,000 on same terms as PSMIP – Main Plan.

Premiums to be paid by the lawyer at the same rate as PSMIP - Main Plan.

For lawyers at the LA-2B and LA-3 levels:

\$250,000 on same terms as PSMIP – Executive Plan.

Premiums to be paid by the Employer.

(e) DEPENDENTS' INSURANCE

For lawyers at the LA-1 and LA-2A levels:

Life insurance and AD & D insurance for dependents as set out in PSMIP – Main Plan.

Premiums to be paid by the lawyer at the same rate as PSMIP – Main Plan.

For lawyers at the LA-2B and LA-3 levels:

Life insurance and AD & D insurance for dependents as set out in PSMIP – Executive Plan.

Premiums to be paid by the Employer.

(f) LONG-TERM DISABILITY INSURANCE

All lawyers shall be covered under the Disability Insurance Plan.

Lawyers at the LA-1 and LA-2A levels shall pay 15%, and the Employer shall pay 85%, of the required premiums.

For lawyers at the LA-2B and LA-3 levels, the required premiums shall be paid by the Employer.

(g) PARKING

For lawyers at the LA-2B and LA-3 levels, the Employer shall pay 50% of either:

- (i) the monthly parking rate charged for Crown parking facilities; or
- (ii) the monthly rate charged for commercial facilities, limited to a maximum of the amount payable in (i).

At locations where, as of April 28, 2006, this benefit was provided to lawyers at the LA-1 or LA-2A level, it shall continue to be provided to such lawyers on a "present incumbents only" basis.

Hours of Work, Overtime & Travelling Time Compensation

16. A major issue in this dispute had to do with overtime compensation. The Association proposed that employees in this unit should have the same rights to overtime and travelling time compensation as other professional groups in the Public Service. The employer argued that it would be inconsistent with the performance pay régime for this unit (which the board is required to maintain by the ERA) to compensate

these employees for overtime. However, the employer did make a proposal for Time Management Leave with Pay, which 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.

17. The board has decided that the following will apply to lawyers at levels LA-1 and LA-2A:

(1) The normal hours of work for lawyers shall average 37.5 hours per week over each 4-week period. Subject to the approval of the Employer, the hours of work shall be arranged to suit a lawyer's individual duties and to permit the lawyer to carry out his or her professional responsibilities.

(2) In making arrangements for hours of work, lawyers will be permitted reasonable flexibility in the times during which they perform their work, including arrival and departure from the workplace, to enable them to balance work and family responsibilities.

(3) The normal work week shall be Monday through Friday, except where a lawyer is required to work on what would normally be a day of rest or a paid holiday in order to carry out his or her professional responsibilities.

(4) A reconciliation of hours of work will be made by the lawyer and his or her immediate supervisor for each 4-week period. In computing the hours of work within the period, vacation, paid holidays, and other leaves of absence will account for 7.5 hours per day.

(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.

18. For lawyers at levels LA-2B and LA-3, the board awards the following, based on the parties' proposals:

(1) The normal hours of work for lawyers shall average 37.5 hours per week over each 4-week period. Subject to the approval of the Employer, the hours of work shall be arranged to suit a lawyer's individual duties and to permit the lawyer to carry out his or her professional responsibilities.

(2) In making arrangements for hours of work, lawyers will be permitted reasonable flexibility in the times during which they perform their work, including arrival and departure from the workplace, to enable them to balance work and family responsibilities.

(3) The normal work week shall be Monday through Friday, except where a lawyer is required to work on what would normally be a day of rest or a paid holiday in order to carry out his or her professional responsibilities.

(4) A reconciliation of hours of work will be made by the lawyer and his or her immediate supervisor for each 4-week period. In computing the hours of work within the period, vacation, paid holidays, and other leaves of absence will account for 7.5 hours per day.

(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.

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.

21. All the provisions on Overtime and Travelling Time will become effective 120 days from the date hereof.

Vacation Leave

22. The board has decided that employees will earn annual vacation leave as follows:

Until 5 th year of service	15 days
5 years of service	20 days
15 years of service	22 days
17 years of service	23 days
18 years of service	25 days
25 years of service	27 days
28 years of service	30 days.

However, employees who are currently at levels LA-2B or LA-3 and who are entitled, or might become entitled, to 25 days of leave before the completion of 18 years of service, shall continue to qualify for 25 days of leave as before.

23. We reject the Association's proposal that employees should receive an additional one-time credit of 15 hours to compensate them for the cessation of Marriage Leave.

Career Development

24. Both parties made lengthy proposals on this subject, although there was agreement on most aspects. The following is the board's decision on the matters in dispute:

General

20.01 The parties recognize that in order to maintain and enhance professional expertise, lawyers, from time to time, need to have an opportunity to attend or participate in career development activities described in this Article.

...

(e) A lawyer selected for professional development under this clause shall continue to receive his normal compensation including any increase for which he may become eligible. The lawyer shall not be entitled to any compensation under Articles X, Overtime, and Y, Travelling Time, while on professional development under this clause.

(f) A lawyer on professional development under this clause may be reimbursed for reasonable travel expenses and such other additional expenses as the Employer deems appropriate.

...

Selection Criteria

(a) After consultation with the Association, the Employer shall establish Selection Criteria taking into consideration budgetary and operational constraints for granting leave under clauses 20.02, 20.03 and 20.04. Upon request, a copy of these criteria will be provided to a lawyer and/or the Association representative.

(b) The parties to this collective agreement acknowledge the mutual benefits to be derived from consultation on Career Development. To this effect, the Employer, upon request, will consult with the Association as prescribed in Article 25, Joint Consultation.

Sick Leave

25. Both parties made lengthy proposals on the subject. There was agreement on many aspects of the subject. On the aspects where there was disagreement, the board has decided to award the following, based on the employer's proposal:

Credits

18.01

(a) A lawyer shall earn sick leave credits at the rate one and one-quarter (1 1/4) days for each calendar month for which he receives pay for at least seventy-five (75) hours.

18.02 A lawyer shall be granted sick leave with pay when he is unable to perform his duties because of illness or injury provided that:

(a) he satisfies the Employer of this condition in such a manner and at such a time as may be determined by the Employer, and

(b) he has the necessary sick leave credits.

18.05 Where a lawyer has insufficient or no credits to cover the granting of sick leave with pay under the provisions of clause 18.02 above, sick leave with pay may, at the discretion of the Employer, be granted to a lawyer for a period of up to one hundred and eighty-seven decimal five (187.5) hours, subject to the deduction of such advanced leave from any sick leave credits subsequently earned.

18.05A Notwithstanding the foregoing, a lawyer at the LA-3 level who has insufficient credits to cover the granting of sick leave with pay during the lawyer's entire period of illness may be granted, at the discretion of the Employer, an advance of sick leave credits of up to one hundred and thirty (130) working days. Any amounts so granted shall not be recovered from future earned sick leave credits.

18.06 Unless the lawyer is otherwise informed by the Employer, a statement signed by him stating that because of illness or injury he was unable to perform the lawyer's duties shall, when delivered to the Employer, be considered as meeting the requirements of paragraph 18.02(a).

The Employer may obtain at any time a medical opinion from Health Canada or its authorized agent on the lawyer's ability to perform all or some of his duties.

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.

Office Space

28. The Association has proposed that employees should, in principle, have individual closed offices so as to enable them to fulfill their professional responsibilities. The employer has opposed this, but has suggested a Memorandum of Understanding whereby the Association and the main employing departments would consult on appropriate office accommodation.

29. The board awards the following:

The parties will consult, at the national level or such other level as they may agree, on the subject of appropriate office accommodation, having regard (i) to the responsibilities assigned to the members of the bargaining unit, particularly their professional obligation to maintain confidentiality and to protect solicitor-client privilege, and (ii) to the context of the federal public service.

They will meet within one hundred and fifty (150) days of the issuing of this Award to begin the discussions.

Pay Administration

30. It is impossible for the board to resolve this complex and technical subject on the basis of the sparse submissions made by the parties. The matter is referred back to the parties for further negotiation.

Court clothing

31. 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.

Salaries & Term

32. As noted earlier in this award, the ERA establishes the maximum salary increases that can be awarded to employees in this bargaining unit. They are as follows (see section 16 of the ERA):

- (a) in the 2006-2007 fiscal year, 2.5%;
- (b) in the 2007-2008 fiscal year, 2.3%;

- (c) in the 2008-2009 fiscal year, 1.5%;
- (d) in the 2009-2010 fiscal year, 1.5%; and
- (e) in the 2010-2011 fiscal year, 1.5%.

33. While these percentages are the maximum increases allowed by the ERA (see section 17 (1)), the employer has proposed that the board should award these increases, to be effective on May 10 of each year. It has also proposed that the award should have a five-year term, expiring on May 9, 2011.

34. The Association does not argue with the term proposed by the employer. However, the Association has presented an argument to the effect that the board is authorized to award significantly greater salary increases than those listed above. It is necessary for us to address that argument.

35. Section 34 (1) (a) (iv) of the ERA allows the arbitral award to

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.

“Additional remuneration” is defined in section 2 of the ERA as “any allowance, bonus, differential or premium or any payment to employees that is similar to any of those payments”. The Association observes that, for many years, “additional remuneration” has been paid to lawyers in Toronto, in the form of a Toronto differential. The amount of that differential varied by level between \$11,700.00 and \$18,100.00 per year. According to the Association, the board is therefore authorized, by section 34 (1) (a) (iv), to award all

employees in the unit, except those entitled to the Toronto differential, a salary increase in the amount of the Toronto differential, over and above the percentage increases listed in section 16 of the ERA.

36. It is impossible for us to endorse the Association's argument on section 34 (1) (a) (iv).

37. In the first place, it is difficult to believe that Parliament, having enacted a carefully crafted scheme to limit salary increases in the interests of restricting government expenditures, intended to authorize this board to make substantial increases to employees' pay by bringing the pay of all employees outside of Toronto up to the level of Toronto employees. Such a result would be so obviously inimical to the declared objectives of the legislation that it would take very clear language to persuade this board that Parliament had any such intention.

38. Secondly, however the difference between Toronto rates and other rates might have been described in the past, the ERA specifically states that employees in Toronto and outside Toronto are entitled to different rates of pay. We refer here to Schedule 2 of the ERA, which lists the rates of pay for all regions except Toronto and the rates of pay for the Toronto region. The difference between Toronto rates of pay and other rates of pay cannot therefore be regarded as a "differential" and hence "additional remuneration", as that term is defined in the ERA. To characterize the difference between Toronto rates and other rates as "additional remuneration" would be to ignore the language of Schedule 2 of the ERA.

39. Thirdly, the Association has argued that the board must give some meaning to section 34 (1)(a) (iv), and that the provision has no possible meaning other than the one it has put forward. We disagree. The board accepts the employer's submission that adequate meaning can be given to section 34 (1) (a) (iv) by holding that it was intended to allow for the "upward harmonization" of allowances that had been paid to

employees who had previously been represented by the Professional Institute of the Public Service of Canada and to employees who had previously been unrepresented.

40. The board decides that the salaries listed in Schedule 2 to the ERA are to be increased as follows:

- (a) On May 10, 2006, by 2.5%;
- (b) On May 10, 2007, by 2.3%;
- (c) On May 10, 2008, by 1.5%;
- (d) On May 10, 2009, by 1.5%; and
- (e) On May 10, 2010, by 1.5%.

41. As required by the ERA, the performance pay plans in effect on May 9, 2006, will apply for the duration of this award. The performance pay plans shall be incorporated in the collective agreement as appendices.

42. As agreed by the parties, the term of this award is until May 9, 2011.

Implementation Period

43. The employer has proposed that it be allowed 150 days from the date of this award to implement it. The Association asks that all retroactive payments be made within 30 days of the award.

44. Section 157 of the Act reads as follows:

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.

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. The proposals of both parties on this subject are therefore dismissed for lack of jurisdiction.

Final Matters

45. Except as noted elsewhere in this award, all the provisions of this award have effect as of the first of the month following the date hereof.

46. The board notes that the parties agreed upon a large number of items during negotiations and mediation, as well as during the arbitration hearing itself. No ruling is required from this board on such matters. All other proposals made to this board by either party that are not dealt with elsewhere in this award are to be considered as dismissed.

47. Where the board has numbered the provisions it has awarded (e.g., "Article 18.01"), it has adopted the numbering of the party making the proposal in question. The board leaves it to the parties to renumber the provisions.

48. The board remains seized of this dispute for the purpose of resolving, if necessary, the terms relating to Pay Administration (see paragraph 30 above), and any other matters where the parties are unable to agree on how to incorporate the provisions of this award into their collective agreement.

49. The Association also requested the board to remain seized on the subject of salaries so that, if its challenge to the constitutional validity of the ERA is successful, this board could revisit the subject. In our view, that would not be appropriate, and we reject this request.

50. The two nominees do not concur in this award. They have requested that a statement be included in the award to explain why they disagree with it.

51. Mr. Munn, the employer nominee, has provided the following reasons:

The decision to award overtime will result in a significant inequity in comparison to the rest of the public service groups. The Law group is the only group in the public service entitled to receive both overtime and subject to a performance pay regime. These elements have historically been mutually exclusive. Eligibility to both of these elements is tantamount to double dipping.

In addition, none of the comparator collective agreements provided by the bargaining agent contain overtime compensation. I suggest that this reflects the fact that traditional overtime compensation is highly unusual for lawyers and the nature of their work.

In fact, the collective agreement for the Manitoba lawyers provided by the bargaining agent includes an approach consistent with the Employer's exceptional leave with pay proposal. This latter proposal applied to the entire bargaining unit group would more adequately recognize the nature of the work of this group.

The regime envisioned by the award will create unprecedented levels of disruption in the workplace. The effects of this disruption may continue to be felt long after the award expires. A more desirable approach would be to maintain the *status quo* and leave the parties the responsibility to design a regime that better reflect their reality and priorities.

For the above reasons, I disagree with the inclusion of the proposed overtime compensation regime in the award.

52. Mr. Hayes, the union nominee, has provided the following reasons:

I am not in agreement with this award. My employer nominee colleague has commented upon the overtime provision granted by the Chair. My fundamental objections may be identified, by way of example only, also by reference to this provision.

The employer made the following principal argument: a lawyer collective agreement should mirror agreements previously reached by other bargaining units in the federal public sector. The Association presented more lawyer-focussed submissions. The Chair preferred the employer approach. In the result, there has been little effort to tailor significant provisions to circumstances applicable to lawyers-- with one notable exception.

In the case of overtime, the Chair has awarded a provision inferior to that previously applicable to those lawyers who had been members of the former PIPS LA bargaining unit. If it is agreed that the replication principle should govern interest arbitration, which no-one contests, then there is no cause for an award of anything less than that which this very employer had previously agreed to in free collective bargaining. The employer made no submissions that the application of conventional overtime clause had caused difficulties of any kind when applied to lawyers.

The overtime provision awarded in this case rolls back existing entitlements for many members of the bargaining unit, denies non-discretionary overtime entitlement altogether for members in certain classifications, and requires that lawyers, entitled to overtime, work at least an hour a day without any compensation at all. I know of no precedent anywhere for such clause.

Nor do I accept the distinction made between LA-2B and LA-3 classifications and the remainder of the lawyer group which is maintained elsewhere in the award of the Chair. In my opinion Association represented lawyers were entitled to expect a lawyer focussed collective agreement generally applicable to all of them. They have not received one. Nor have they received a collective agreement which, in the material respect cited above, matches what has become standard in other agreements in the federal public service. This regrettable outcome would have been avoided if the Chair had chosen to consistently apply the replication principle urged upon the Board so strongly by the employer. This award presents a most disappointing result particularly where the salaries of federal lawyers, hamstrung by recent legislation, have fallen so far behind lawyers employed in comparator provincial jurisdictions.

DATED at Thornhill, Ontario, October 23, 2009.

Michael Bendel,
Chairperson