Federal Court  Cour fédérale

Date: 20110506

Docket: T-2179-09

Citation: 2011 FC 530

Ottawa, Ontario, May 6, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

ASSOCIATION OF JUSTICE COUNSEL

Respondent

Docket: T-2080-09

AND BETWEEN:

ASSOCIATION OF JUSTICE COUNSEL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Court files T-2179-09 and T-2080-09 are both applications pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, for judicial review of an arbitral award dated October 23, 2009, issued by Chairperson Michael Bendel, pursuant to section 149 of the *Public Service Labour Relations Act* (PSLRA), SC 2003, c 22, s 2 (the arbitral award). The arbitral award was issued to settle the terms and conditions of employment for employees of the Treasury Board of Canada in the Law Group bargaining unit.

[2] Court File No. T-2179-09 is an application by the Attorney General of Canada requesting that the overtime provisions and the travelling time provisions be set aside. Court File No. T-2080-09 is an application by the Association of Justice Counsel to set aside paragraph 21 of the award and declare that the overtime and travelling time provisions of the award are to be implemented within 90 days from October 23, 2009.

[3] The Attorney General of Canada (the AG) requests:

1. An order setting aside paragraphs 17 and 19 of the arbitral award or, in the alternative, an order remitting these paragraphs back to the arbitrator for redetermination in accordance with guidance from this Court; and

2. Costs.

[4] The Association of Justice Counsel (the AJC) requests:

1. An order setting aside paragraph 21 of the arbitral award; and

2. Costs.

Background

[5] The AJC was certified as the bargaining agent for the Law Group bargaining unit in 2006, following the passage of the PSLRA which, for the first time, permitted lawyers employed by the Department of Justice to bargain collectively.

[6] There are approximately 2,500 employees in the Law Group bargaining unit classified at the following levels: LA-01, LA-2A, LA-2B, LA-3A and LA-3B.

[7] The Treasury Board of Canada (the employer) represents the Government of Canada as the employer for members of the Law Group bargaining unit.

[8] Lawyers in the bargaining unit employed in departments other than the Department of Justice were previously represented in collective bargaining by the Professional Institute of the Public Service of Canada (PIPSC) and were previously covered by collective agreements negotiated by the PIPSC.

[9] In September 2008, the employer requested arbitration pursuant to the PSLRA as it was unable to reach a first collective agreement with the AJC.

[10] On February 12, 2009, the Public Service Labour Relations Board (PSLRB) established an arbitration board and issued its terms of reference.

[11] After the dispute had been referred to arbitration, Parliament passed the *Expenditures Restraint Act*, SC 2009, c 2 s 393, (ERA) which came into force on March 12, 2009. The ERA limits the Government of Canada's expenditures in relation to employment and contains a number of rules directly applicable to arbitral awards for employees in the Law Group.

[12] The arbitration board held hearings in June 2009 and issued its decision on October 23, 2009.

Arbitration Board's Decision

[13] Before making its award, the arbitration board noted that the ERA had come into force and recognized that the ERA established rules applicable to collective agreements and arbitral awards for the Law Group bargaining unit. The arbitration board found that the ERA limited its power to rule on matters of salary increases and performance pay plans and prohibited the introduction of new forms of additional remuneration.

[14] Only paragraphs 17, 19 and 21 of the arbitral award are contested by either party. For reference purposes, these paragraphs are annexed as Annex 2 to this decision.

[15] Paragraph 17 permits lawyers of the Law Group bargaining unit at the LA-01 and LA-2A levels to receive overtime compensation for hours worked in excess of 37.5 hours per week averaged over a four week period. This overtime is calculated after a lawyer has worked 8.5 hours

in a given day. In addition, lawyers in those levels receive overtime pay for hours worked on days of rest.

[16] The arbitral award provides, in paragraph 18, that lawyers at the LA-2B and LA-3 levels are entitled to receive discretionary leave with pay granted by management when required to work excessive hours. The maximum leave granted is five days unless exceptional leave of more than five days is approved by a deputy head.

[17] Paragraph 19 provides compensation for lawyers at the LA-01 and LA-2A levels when they are required to travel in order to fulfill their professional duties. The award includes detailed provisions that define the specific circumstances in which travelling time is compensable. The arbitral award does not provide compensation for travelling time to lawyers at the LA-2B and LA-3 levels.

[18] The arbitration board ruled that in the absence of an agreement between the parties to extend the implementation period, there is a mandatory 90 day period from the date of the award in which the provision of the award must be implemented. The arbitration board held that without the agreement of the parties, only the PSLRB has jurisdiction to authorize a longer period for implementation.

[19] In paragraph 21, the arbitration board provided that the provisions on overtime and travelling time compensation would not take effect until 120 days after the date of the award.

Issues

[20] The issues are as follows:

1. What is the appropriate standard of review?

2. Did the arbitration board err in drafting an award contrary to the ERA?

    a. Is compensatory overtime pay equivalent to the performance pay plans in subparagraph 34(1)(a)(iii) of the ERA?

    b. Is compensatory overtime pay permitted under the additional remuneration of subparagraph 34(1)(a)(iv) of the ERA?

    c. Is travelling time pay permitted under the additional remuneration of subparagraph 34(1)(a)(iv) of the ERA?

3. Did the arbitration board fail to consider section 148 of the PSLRA in making its arbitral award?

4. Did the arbitration board err by delaying the date that the overtime and travelling time pay provisions of the arbitral award would come into effect?

The Attorney General of Canada's Written Submissions

[21] The AG submits that paragraphs 17 and 19 of the arbitral award should be set aside.

[22] According to the AG, the applicable standard of review of the arbitrator's interpretation of the PSLRA is reasonableness. The Federal Court has determined that some deference is owed to an interest arbitration board's interpretation and application of the factors in section 148 of the PSLRA.

Likewise, the arbitration board's interpretation and exercise of its powers under the PSLRA lies at the core of its expertise.

[23] In contrast, the AG submits that the arbitrator's interpretation of the ERA, which is a statute of general application placing limits on the jurisdiction of the arbitrator, was a pure legal question and deserves no deference. The arbitrator implicitly ruled that he was not prevented from making the overtime award by the ERA which was a conclusion on a question of jurisdiction.

[24] Where a tribunal is determining true questions of jurisdiction or *vires*, according to *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 59, correctness is the appropriate standard of review.

Overtime and Travelling Time Pay (Arbitral Award Paragraphs 17 and 19)

[25] The AG submits that the arbitral award violates both the ERA and the PSLRA.

[26] Paid overtime is similar in nature to performance pay, according to the AG, because both payments represent a financial reward for higher than usual effort on the part of an employee. Subparagraph 34(1)(a)(iii) of the ERA required the arbitration board to continue the performance pay plans that were in effect on May 9, 2006 for employees of the Law Group. By necessary inference, this prohibits any award of increased compensation for substantially the same purpose as performance pay, such as overtime pay.

[27] Subparagraph 34(1)(a)(iv) of the ERA also prevents the arbitration board from awarding any additional remuneration in the form of performance bonuses to members of the Law Group. The AG submits that overtime time pay is fundamentally a performance bonus as it rewards the hard work and long hours invested by an employee and as such, it should have been excluded from the arbitral award.

[28] Paid overtime is also contrary to the spirit and purpose of the ERA, as it represents an increase in the total compensation potentially payable to members of the Law Group and it will increase the Government's expenditures in relation to employment.

[29] The AG further submits that the arbitration board erred by failing to consider the factors in section 148 of the PSLRA. The arbitral award contradicts subsections 148(b) and 148(d) because overtime pay for lawyers is highly unusual, even amongst those lawyers who bargain collectively. In addition, overtime pay is inconsistent with the practice of law as it would be nearly impossible for management to assess the reasonableness of the number of hours a lawyer worked on a file. This type of review mechanism would lead to unprecedented levels of disruption in the workplace. Contrary to subsection 148(c) of the PSLRA, overtime and travel time pay will also disrupt the incentive for advancement in the Law Group because there will be a potential for higher compensation in LA-2A than LA-2B. Finally, contrary to subsection 148(e) of the PSLRA, the arbitration board failed to consider the dire state of the Canadian economy in 2008 and 2009 and the substantial financial pressure faced by the Canadian Government when it increased the potential compensation to the employees of the Law Group.

Timing of the Provisions (Arbitral Award Paragraph 21) (This is Court File No. T-2080-09)

[30] The AG submits that paragraph 21 of the arbitral award was appropriate and reasonable under the PSLRA.

[31] The Court must read the provisions of the PSLRA as a harmonious and coherent whole (see *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at paragraph 10). This requires interpreting the statute in a manner which avoids giving rise to a conflict between its sections and respects the purpose of the act.

[32] Arbitration boards must have the power to determine when specific provisions of an award come into effect, in order to shape awards which best reflect the needs of the parties and appropriately resolve the matters in dispute. As such, the AG submits, under section 155 of the PSLRA, an arbitration board can delay the effective date of its award. This is why prior arbitration boards have delayed the effective date of individual portions of their awards. For example, in *Canadian Merchant Service Guild v Treasury Board* (June 27, 2008) PSLRB File No 585-02-10, portions of the award did not come into effect until seventeen months after the date of the award.

[33] Sections 157 and 154 of the PSLRA stipulate that parties must implement the provisions of an arbitral award within 90 days from the date the award is made. The AG submits that section 157 cannot require the parties to implement provisions which the arbitration board has decided will not come into effect until after 90 days from the date of the award. Where the arbitration board decides

that a provision of its award shall take effect after the 90 day period, section 157 does not apply. The 90 day period continues to apply to the other provisions of the award.

[34] The AG submits that the AJC's interpretation of the PSLRA would result in conflict between sections 155 and 157 which the AJC requests the Court to resolve by determining that section 157 trumps section 155 thereby overriding the statutory right to defer the effective date to "any earlier or later day that the arbitration board may determine". Had Parliament intended to place limits on section 157 as it did elsewhere in the PSLRA, it could have done so. In the absence of explicit language, the Court should not read in new restrictions on the broad powers of an arbitration board.

[35] The AG's interpretation of the interplay of sections 154, 155 and 157 creates no inherent conflict and is faithful to the principle that arbitration boards have broad powers to fashion awards and resolve disputes. Conversely, the AJC's interpretation has the potential to significantly erode the efficacy of the interest arbitration process set out in the PSLRA by denying arbitration boards a valuable tool in drafting awards which are palatable to both parties.

[36] The AG submits that even if the Court grants the AJC's application, it would be highly onerous in this case to require the employer to retroactively assess overtime owing to employees in the Law Group in respect of the 30 days prior to the date of 120 days from the date of the award.

The Association of Justice Counsel's Written Submissions

[37] The AJC agrees with the AG that the application of the factors in section 148 of the PSLRA involved a high degree of discretion, policy and judgment and are reviewable on the standard of reasonableness (see *National Automobile, Aerospace, Transportation and General Workers' Union of Canada, Local 5454 (CAW-Canada) v Canada (Treasury Board)*, 2006 FC 989 at paragraph 20).

[38] The AJC submits, however, that reasonableness is the proper standard of review for all issues raised before the Court.

[39] Interest arbitration is a discrete and highly specialized administrative regime and members of arbitration boards have special expertise in labour relations. The AJC argues that both the interpretation and application of the PSLRA and the ERA involve issues of mixed fact and law not questions of true jurisdiction or *vires*. For example, determining whether a specific benefit awarded by the arbitration board constitutes additional remuneration within the scope of subparagraph 34(1)(a)(iv) of the ERA involves both factual and legal elements such as whether a benefit applied to a member of the Law Group on May 9, 2006. Where legal and factual issues are intertwined, the Supreme Court in *Dunsmuir* above, held that the standard of review is reasonableness (at paragraph 51).

[40] Further, this Court should not find jurisdictional issues where there are none. The Supreme Court reiterated this recently in *Nolan v Kerry (Canada) Inc*, 2009 SCC 39 at paragraph 34:

> The inference to be drawn from paras. 54 and 59 of *Dunsmuir* is that courts should usually defer when the tribunal is interpreting its own

> statute and will only exceptionally apply a correctness of standard when interpretation of that statute raises a broad question of the tribunal's authority.

[41] Finally, the AJC submits that the Supreme Court also noted in *Dunsmuir* above, that when a tribunal is interpreting its own statute or one closely related to its function, deference will usually result (at paragraph 54). Since the provisions of the ERA involve questions of hours of work and compensation, they are directly related to the expertise and function of the arbitration board. As such, deference should apply.

Overtime and Travelling Time Pay (Arbitral Award Paragraphs 17 and 19)

[42] The AJC submits that the arbitral award was reasonable, apart from paragraph 21.

[43] The AJC submits that the AG was wrong to equate performance pay or performance bonuses with overtime pay. There were two performance pay plans in effect for lawyers in the Law Group in May 2006. These plans allowed for increases in the lawyers' base salaries or lump sum payments depending on performance reviews. These performance pay plans were not intended as compensation for working excessive hours. For non-PIPSC employees, overtime hours were compensated through management leave with pay where employees were credited with allowable days off at management's discretion as a reward for excessive hours worked over the normal hours per week. Had the performance pay plan been intended to compensate overtime hours, as the AG submits, the management leave with pay would have been unnecessary and redundant.

[44] The AJC argues that overtime pay is allowable as additional remuneration under subparagraph 34(1)(a)(iv) of the ERA. In 2006, lawyers covered by the PIPSC collective agreement were entitled to overtime pay at the rate of time-and-a-half for all work beyond the normal weekly hours of work, including LA-01 and LA-2A lawyers. The arbitral award is not higher than the rate provided in the 2006 PIPSC collective agreement and is not in violation of the ERA.

[45] Paid travelling time is not equivalent to performance pay, according to the AJC. The performance pay plans of 2006 contained no reference to travelling time compensation. They were not the vehicles used to compensate employees who were required to travel during periods outside normal work hours. Paid management leave was used to compensate employees who worked or travelled on a day of rest or holiday. The arbitral award provisions on travelling time pay are not higher for LA-01 and LA-2A levels than the PIPSC collective agreement and there was no error.

[46] The AJC submits that the arbitration board considered the factors outlined in section 148 of the PSLRA. The AG's argument is premised on speculation that overtime pay for LA-01 and LA-2A will result in a "significant increase in potential compensation". The employer would have had statistics about the number of hours worked by employees on which projections could have been made regarding potential costs, but did not present such evidence at arbitration. In addition, there was no evidence before the arbitration board that overtime provisions in past collective agreements amounted to undue cost to the employer, were unworkable or caused disruption in the workplace. The arbitration board did have evidence, however, of recruitment and retention problems in the Law Group which justified terms of employment which would attract and retain qualified staff under subsection 148(a). Furthermore, the provisions were in accordance with subsection 148(b) since

other professionals in government are entitled to an overtime averaging system. Finally, the AG cannot compare the Law Group employees to provincial government lawyers to show that compensatory overtime is unusual for lawyers, since the provincial lawyers are often paid more than Law Group lawyers and the compensation package must be viewed as a whole.

[47] The AJC submits that the overtime and travelling time pay award was a compromise between the parties and was reasonable.

Timing of the Provisions (Arbitral Award Paragraph 21) (This is Court File No. T-2080-09))

[48] The AJC submits that paragraph 21 of the arbitral award is unreasonable given the PSLRA and the board exceeded its powers with respect to the implementation of the award.

[49] Section 157 provides for a 90 day implementation period of an arbitral award unless the parties agree to a longer period or the PSLRB has ordered a longer period. Neither of these exceptions applies in this case.

[50] The arbitration board acknowledged the 90 day mandatory implementation period in its award. Pursuant to section 157, this 90 day implementation period begins at the date the award becomes binding on parties, which is the date the award is made according to section 154.

[51] Subsection 155(1) of the PSLRA provides that the entire 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(2) permits a board to give retroactive effect to part of an award but does not authorize the board to delay the date on which part of an award will come into force.

[52] The implementation period provided for in section 157 is the period during which the employer and bargaining agent must commence performing the obligations set out in arbitral award.

[53] Arbitration is intended to provide parties with an effective mechanism to resolve disputes if an impasse is reached in collective bargaining. Section 149 of the PSLRA was enacted to prevent excessive delay by requiring the arbitration board to resolve disputes as soon as possible. As such, the AJC submits that sections 149 and 157 reflect Parliament's intention to have a finite period of time in which to commence to carry out and perform the obligations in the arbitral award.

[54] Subsection 155(1) cannot permit an arbitration board to delay the coming into force of an award by more than 90 days from the date of the award, as 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 date of the award.

[55] If sections 155 and 157 are to be read harmoniously, the AJC submits, then subsection 155(1) must be interpreted to allow the arbitration board to delay the effective date of the award only up until 90 days from the date that the award is made.

Analysis and Decision

[56] **Issue 1**

What is the appropriate standard of review?

The parties agree that reviewing an arbitration board's interpretation of its home statute, the PSLRA, requires the standard of reasonableness. The AG submits, however, that the arbitration board's interpretation of the ERA was a true question of jurisdiction requiring review on the standard of correctness. I disagree.

[57] While the ERA is not the arbitration board's home statute, it deals extensively with collective bargaining matters. Section 34, of principal concern in this application, directly addresses collective agreements and arbitral awards for members of the Law Group. Arbitration board members have specific expertise in labour relations within the specialized administrative regime of interest arbitration, for which they are owed a level of deference.

[58] The AG submits that I should determine the standard of review to be correctness as did Madam Justice Danièle Tremblay-Lamer in *Canada (Attorney General) v PIPSC*, 2010 FC 578. In that case, however, the arbitration board failed completely to consider the impact of the ERA in drafting the arbitral award.

[59] The case at bar more closely resembles the facts of *Canada (Attorney General) v PIPSC*, 2010 FC 728, where the arbitration board in question was aware of and considered the application of the ERA. In that case, Mr. Justice Leonard Mandamin held that:

> 33 The question before the Board and now before the Court is whether Article 21.02 offends the provisions of the *ERA* as being "additional remuneration" which is prohibited. This is a question of law which turns on interpretation of the language in the legislation. The nature of the legal question is not one of centralized importance to the legal system.
>
> [. . .]
>
> 35 I conclude the standard of review is reasonableness.

[60] I agree with the AJC that the arbitration board's interpretation of the ERA was of a statute closely related to its function, and that the nature of the legal question in the case at bar is not of central importance to the legal system. Therefore, as per *Dunsmuir* above, at paragraph 55, the standard of review for all issues is reasonableness.

[61] **Issue 2**

Did the arbitration board err in drafting an award contrary to the ERA?

a. Is compensatory overtime pay equivalent to the performance pay plans in subparagraph 34(1)(a)(iii) of the ERA?

Subparagraph 34(1)(a)(iii) required the arbitration board to include in its arbitral award any performance pay plans which were in effect on May 9, 2006 for lawyers of the Law Group.

34.(1) The following rules apply in respect of any collective agreement or arbitral award that governs employees in the Law Group whose employer is Her Majesty as represented by the Treasury Board, and in respect of any period that begins during the restraint period:	34.(1) Les règles ci-après s'appliquent à l'égard de toute convention collective ou décision arbitrale régissant les employés du groupe du droit dont l'employeur est Sa Majesté, représentée par le Conseil du Trésor, et de toute période commençant au cours de la période de contrôle :
(a) in the case of a collective agreement entered into — or an arbitral award made — after the day on which this Act comes into force,	a) dans le cas d'une convention conclue — ou d'une décision rendue — après la date d'entrée en vigueur de la présente loi :

. . .	. . .
(iii) it must provide, for all employees in the Law Group, for the same performance pay plans that were in effect on May 9, 2006 for any employees in the Law Group and, in relation to any particular position level, those plans must be at the same amounts or rates that were in effect for that position level on that date, but those plans may not have retroactive effect, . . .	(iii) elle doit prévoir pour tous les employés du groupe les mêmes régimes de rémunération au rendement — et les mêmes montants ou taux pour un niveau de poste donné — que ceux en vigueur le 9 mai 2006 pour des employés de ce groupe, mais ces régimes ne peuvent avoir d'effet rétroactif, . . .

[62] Two performance pay plans were in place for lawyers employed by the Department of Justice on May 2006; one plan for lawyers at the LA-01, LA-2A and LA-2B levels and another for lawyers at the LA-3 levels. These plans were located in the *Performance Pay Administration Policy for Certain Non-Management Category Senior Excluded Levels* and the *Directives for the Performance Management Program (PMP) for the Executive Group*.

[63] Under the performance pay plan for levels LA-01 to LA-2B, a lawyer's performance was assessed on a range from unsatisfactory to outstanding and lawyers who received a performance review as fully satisfactory, superior or outstanding were eligible for a base salary increase of 5 to 10 percent respectively. After reaching the maximum rate of pay for his or her level, a lawyer was eligible to receive a lump sum payment based on the same standard of assessed performance.

[64] The performance pay plan for levels LA-3A and LA-3B operated in a similar manner. An LA-3 level lawyer could receive a base salary increase until the maximum rate or a lump sum payment of up to 10 percent of his or her salary dependent on the lawyer achieving his or her ongoing or key commitments. These commitments were found in the lawyer's Performance Agreement.

[65] Neither of these performance plans referred to compensation for work in excess of normal hours. Both plans indicated that their purpose was to recognize and reward differing degrees of performance of individuals in relation to their peers.

[66] Compensation of employees for working in excess of the normal working hours was achieved through management leave for all levels of employees with the Department of Justice (see Management Leave, *Terms and Conditions of Employment for the Law Group, Department of Justice, LA-01 and LA-2A*; Management Leave, *Consolidated Terms and Conditions of Employment Regulations for the Law Group, Department of Justice, LA-2B, LA-3A to LA-3C*).

[67] The AG submits that paid overtime is similar in nature to performance pay because both provide a financial reward for higher than usual effort on the part of the employee. However, the AG recognizes that the purpose of paid overtime is to compensate employees for working long hours (see *Ontario Hydro and CUPE, Loc 1000, Re*, [1991] OLAA No 46 at paragraph 20 for the purpose of overtime). The AG submits that whether an employee is willing to work the overtime necessary to accomplish his or her tasks is related to whether or not that employee will be entitled to receive a pay increase under the performance plan.

[68] While it may be the case that an employee whose performance is outstanding also works hours in excess of normal working hours, I do not agree with the AG that this is necessarily the case. On the contrary, the previous system for assessing performance was separate from that for compensating excessive hours worked. I agree with the AJC that if compensation for working

excessive hours was provided under the performance pay plans, then the management leave with pay would have been unnecessary and redundant.

[69] As such, it cannot be the case that the provisions in the arbitral award for compensatory overtime pay are equivalent to the performance pay plans mentioned in subparagraph 34(1)(a)(iii) of the ERA as the AG submits.

[70] **Issue 2**

Did the arbitration board err in drafting an award contrary to the ERA?

b. Is compensatory overtime pay permitted under the additional remuneration of subparagraph 34(1)(a)(iv) of the ERA?

[71] Subparagraph 34(1)(a)(iv) states that:

34.(1) The following rules apply in respect of any collective agreement or arbitral award that governs employees in the Law Group whose employer is Her Majesty as represented by the Treasury Board, and in respect of any period that begins during the restraint period:	34.(1) Les règles ci-après s'appliquent à l'égard de toute convention collective ou décision arbitrale régissant les employés du groupe du droit dont l'employeur est Sa Majesté, représentée par le Conseil du Trésor, et de toute période commençant au cours de la période de contrôle :
(a) in the case of a collective agreement entered into — or an arbitral award made — after the day on which this Act comes into force,	a) dans le cas d'une convention conclue — ou d'une décision rendue — après la date d'entrée en vigueur de la présente loi :
. . .	. . .
(iv) it may provide for any additional remuneration — other than a performance bonus — that applied to any position level in the Law Group on May 9, 2006, but the amount or rate of that additional remuneration for a particular position level may not be greater than the	(iv) elle peut prévoir toute rémunération additionnelle — autre qu'une prime de rendement — s'appliquant à tout niveau de poste de ce groupe le 9 mai 2006, mais le montant ou le taux de celle-ci ne peut, pour un niveau

highest amount or rate that applied to employees of that position level on that date, and . . .	donné, être supérieur au plus élevé des montants ou taux de la rémunération additionnelle applicable à tout employé occupant un poste de ce niveau à cette date, . . .

[72] The AG submits that since subparagraph 34(1)(a)(iv) excludes performance pay from the permitted additional remuneration, then equivalent forms of compensation such as overtime pay must also be excluded.

[73] However, as I have rejected the submission that performance pay is necessarily the equivalent of overtime pay as the AG submits that it is, I also reject the AG's related submission regarding subparagraph 34(1)(a)(iv). Rather, I would agree with the AJC that compensatory overtime pay can be considered additional remuneration in the context of subparagraph 34(1)(a)(iv).

[74] The question then becomes whether any lawyers in the Law Group received compensatory overtime pay on May 9, 2006 and, if so, at what rates?

[75] As mentioned above, before collective bargaining, lawyers of the Department of Justice at all levels were entitled to management leave to compensate them for excessive hours worked. However, those lawyers covered by the PIPSC collective agreement, including LA-01 and LA-2A levels, were entitled to overtime pay at the rate of time-and-a-half for all work beyond the normal weekly hours of work of 37.5 hours and for work on a day of rest. This rate was increased to double time when a lawyer was required to work on his second day of rest, provided he had worked on the first day of rest.

[76] The compensatory overtime pay in paragraph 17 of the arbitral award, which applies only to lawyers at the LA-01 and LA-2A levels, do not provide for payment of overtime at a rate higher than was in place in May 2006 for some lawyers now part of the Law Group. Under the arbitral award, lawyers at the LA-01 and LA-2A levels are entitled to compensatory overtime pay at a rate of 1.5 times their normal rate which begins to be calculated after a lawyer has worked 8.5 hours per day. As such, the overtime provision is less generous than the provisions in the PIPSC collective agreement which was in effect on May 9, 2006 and are in compliance with the ERA, subparagraph 34(1)(a)(iv).

[77] **Issue 2**

Did the arbitration board err in drafting an award contrary to the ERA?

c. Is travelling time pay permitted under the additional remuneration of subparagraph 34(1)(a)(iv) of the ERA?

Similar to the compensatory overtime provisions of the arbitral award, the performance pay plans in effect in May 2006 contained no reference to travelling time compensation. This was not the method used to compensate employees who were required to travel during periods outside normal working hours. Rather, this was done through paid management leave. I agree with the AJC that travelling time compensation is additional remuneration under subparagraph 34(1)(a)(iv) of the ERA. Under management leave, if a lawyer was required to travel on a normal working day in excess of 7.5 hours, he or she would receive his normal rate of pay for the 7.5 hours and overtime pay at 1.5 hours for anything in excess of 7.5 hours. For travel on a day of rest, he or she would receive overtime pay at a rate 1.5 times his normal rate of pay for the hours spent travelling.

[78] Consequently, as with compensatory overtime pay, paragraph 19 of the arbitral award dealing with travelling time compensation for lawyers at the LA-01 and LA-2A levels does not provide a greater benefit than the travelling time provisions that were included in the PIPSC collective agreement in effect in May 2006 and these provisions are in compliance with subparagraph 34(1)(a)(iv) of the ERA.

[79] The AG submits that the compensatory overtime pay and travelling time pay was contrary to the spirit and purpose of the ERA because it represents a significant increase in the potential remuneration of lawyers at the LA-01 and LA-2A levels and the purpose of the ERA is to restrain spending on employment by the government of Canada at a time when the Government was facing unprecedented financial pressures. However, as discussed above, the award does not provide an increase in additional remuneration to what was available in 2006 for some employees of the Law Group. Thus, the provisions of the award fall within the scope of what is permitted by section 34 of the ERA and as such, they cannot be contrary to the spirit and purpose of the ERA.

[80] **Issue 3**

Did the arbitration board fail to consider section 148 of the PSLRA in making its arbitral award?

In addition to complying with the ERA, the arbitration board was under a duty to consider the factors listed in section 148 of the PSLRA when drafting its award.

[81] The arbitration board expressly stated that it considered the factors listed in section 148, however, its award must also reflect such a consideration.

[82] With regard to subsection 148(a) that the arbitration board must consider the necessity to attract competent people, there was evidence before the arbitration board concerning recruitment and retention problems in the Law Group. The Public Prosecution Service of Canada publicly stated that it suffers from a personnel shortage due to an inability to compete with compensation paid to lawyers and prosecutors in other jurisdictions.

[83] Regarding subsection 148(b), the arbitration board was obligated to consider the conditions of employment for lawyers elsewhere in the country. The AG submitted that overtime pay is highly unusual for lawyers in both the public and private sector, even those who bargain collectively. Practising lawyers are explicitly excluded from the overtime provisions of much of the employment standard legislation in Canada. However, I find the AJC's submission persuasive on this point. Stating that private sector lawyers, or those in the public sector employed at the provincial level, do not receive overtime pay may not be a fair comparison as those lawyers are often paid higher wages. In fact, compensatory overtime pay for Law Group employees may be a means of meeting the requirements of subsection 148(b) to offer compensation which is comparable to employees in similar occupations.

[84] Concerning subsection 148(d) to provide fair and reasonable compensation and terms of employment, while it may be unusual to provide overtime pay to lawyers, this does not necessarily mean such a provision will disrupt the workplace or that such pay is incompatible with the practice of law. As the AJC submitted, lawyers of the Law Group covered by the previous PIPSC collective agreement had conventional provisions for overtime and there was no evidence before the

arbitration board that this pay had entailed any undue cost to the employer or that it was unworkable.

[85] With regards to subsection 148(c) dealing with maintaining relationships between different classification levels, the AG submitted that the potential for higher compensation of the LA-2A to the LA-2B level will disrupt the internal pay relativity within the Law Group as well as the incentive for advancement. However, there was no evidence before the board that previous overtime pay for lawyers under the PIPSC collective agreement caused disruption in advancement in the workplace. In addition, lawyers at the LA-2B level would continue to receive a higher maximum salary rate than those at the LA-2A level and they would also continue to be entitled to management leave with pay as compensation for excessive hours worked.

[86] Finally, turning to the state of the Canadian economy and subsection 148(e), it is clear that the Canadian economy and the Government of Canada were under financial pressure when the arbitral award was made. As submitted by the AG, this was evidenced by the creation of the ERA and was recognized in *Aalto v Canada (Attorney General)*, 2009 FC 861 at paragraph 26. However, the ERA, drafted by Parliament, sets out rules concerning the terms that may be included in arbitral awards for the Law Group and if the award meets those rules, then it necessarily must be within what the Government of Canada envisaged as manageable despite the difficult financial pressures.

[87] I conclude that the arbitration board's award on overtime and travelling time pay was reasonable and that the arbitral award clearly reflects the board's consideration of the facts in section 148 of the PSLRA.

[88] **Issue 4 (This is Court File No. T-2080-09)**

Did the arbitration board err by delaying the date that the overtime and travelling time pay provisions of the arbitral award would come into effect?

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

[89] For ease of reference, the relevant sections of the PSLRA are reproduced here:

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

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.

[90] Paragraph 21 of the arbitral award reads:

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

[91] With respect to the proper interpretive approach, I am guided by the remarks of the Supreme Court of Canada in *Canada Trustco Mortgage Co v Canada*, above, at paragraph 10:

> 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.

[92] I note that section 149 of the PSLRA requires the arbitration board to make an award "as soon as possible in respect of all the matters in dispute that are referred to it." The matters referred to this board included overtime and travelling time.

[93] The AJC submits that making the provisions on overtime and travelling time effective 120 days from the date of the award contravenes section 157 of the PSLRA.

[94] The AG states that there is no contravention of section 157 and that the 120 day period is only the time frame for the paragraphs to come into effect. The AG compares this to other arbitral awards where a wage increase takes effect at a date later than the date of the agreement, as was done in *Canadian Merchant Service Guild v The Treasury Board* above.

[95] During the hearing, counsel for the AJC accepted that an arbitrator can make an award for future salary increases or provide for benefits that are going to take effect at some time in the future.

[96] In the present case, the arbitral award stated that all the provisions relating to overtime and travelling time would become effective 120 days from the date of the award. This is contained in the portion of the award entitled "Hours of Work, Overtime & Travelling Time Compensation". As was the case in *Canadian Merchant Service Guild* above, it is clear to me that the board was stating the date that these provisions would become effective, it was not delaying the implementation of the award. Further, it would seem that in order to have an effective arbitral award that addresses all concerns of the parties involved, the arbitrator must be able to make an award where some provisions will take effect in the future, such as salary increase or future benefits.

[97] The AJC argues that the arbitration board is in effect extending the time for implementing the award beyond the 90 day period mandated by section 157 of the PSLRA. It is important to note that the arbitration board specifically dealt with the section 157 time limit in another portion of its award which is entitled "Implementation Period". Paragraphs 43 and 44 of the award state:

> 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.

The Board was clear in the award that it did not have the jurisdiction to extend the 90 day implementation period.

[98] I cannot agree with the AJC that clause 21 is an attempt by the board to do indirectly what it cannot do directly, that is, to extend the 90 day period contained in section 157 of the PSLRA. Paragraph 21 of the award simply establishes a date when the overtime and travelling time paragraphs will come into effect.

[99] The parties can still implement the agreement within 90 days of the date that the award became biding on them which, in this case, was October 23, 2009. The award contains other provisions which are effective when the award became binding on the parties. Just because the award contains provisions that commence at a later date does not mean that the parties cannot implement the award. The portions of the award dealing with overtime and travelling time can be implemented on the date that they are effective which is 120 days from October 23, 2009.

[100] As a result, the application for judicial review in Court File T-2080-09 is dismissed with costs to the AG.

[101] As both Court File Nos. T-2179-09 and T-2180-09 were argued together, I will now state my disposition with respect to Court File No. T-2179-09.

[102] For the reasons already given, the application for judicial review in Court File No. T-2179-09 is dismissed with costs to the AJC.

JUDGMENT

[103] **IT IS ORDERED that:**

1. The application for judicial review in Court File No. T-2179-09 is dismissed with costs to the respondent (Association of Justice Counsel).

2. The application for judicial review in Court File No. T-2080-09 is dismissed with costs to the respondent (Attorney General of Canada).

"John A. O'Keefe"
Judge

ANNEX 1

Relevant Statutory Provisions

Expenditure Restraint Act, 2009, c 2, s 393

2. The following definitions apply in this Act.	2. Les définitions qui suivent s'appliquent à la présente loi.
"additional remuneration"	« rémunération additionnelle »
"additional remuneration" means any allowance, bonus, differential or premium or any payment to employees that is similar to any of those payments.	« rémunération additionnelle » Allocation, boni, prime ou autre paiement semblable à l'un ou l'autre de ceux-ci versés aux employés.
34.(1) The following rules apply in respect of any collective agreement or arbitral award that governs employees in the Law Group whose employer is Her Majesty as represented by the Treasury Board, and in respect of any period that begins during the restraint period:	34.(1) Les règles ci-après s'appliquent à l'égard de toute convention collective ou décision arbitrale régissant les employés du groupe du droit dont l'employeur est Sa Majesté, représentée par le Conseil du Trésor, et de toute période commençant au cours de la période de contrôle :
(a) in the case of a collective agreement entered into — or an arbitral award made — after the day on which this Act comes into force,	a) dans le cas d'une convention conclue — ou d'une décision rendue — après la date d'entrée en vigueur de la présente loi :
(i) it may not have retroactive effect in respect of a day that is earlier than May 10, 2006,	(i) elle ne peut avoir un effet rétroactif au-delà du 10 mai 2006,
(ii) any increase to rates of pay that it provides for in respect of any period that begins during the 2006–2007 fiscal year must be based on the rates of pay set out in Schedule 2,	(ii) toute augmentation des taux de salaire qu'elle prévoit à l'égard de toute période commençant au cours de l'exercice 2006-2007 doit être fondée sur les taux de salaire figurant à l'annexe 2,
(iii) it must provide, for all employees in the Law Group, for the same performance pay plans that were in effect on May 9, 2006 for any employees in the Law Group and, in relation to any particular position level, those plans must be at the same amounts or rates that were in effect for that position level on that date, but those plans may not have retroactive effect,	(iii) elle doit prévoir pour tous les employés du groupe les mêmes régimes de rémunération au rendement — et les mêmes montants ou taux pour un niveau de poste donné — que ceux en vigueur le 9 mai 2006 pour des employés de ce groupe, mais ces régimes ne peuvent avoir d'effet rétroactif,

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

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

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

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

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

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:

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) the necessity of attracting competent persons to, and retaining them in, the public service in order to meet the needs of Canadians;

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) 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;

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) 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;

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) the need to establish compensation and other terms and conditions of employment that are fair

d) la nécessité d'établir une rémunération et d'autres conditions d'emploi justes et

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

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.

. . .

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.

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.

(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.

(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.

. . .

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

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

. . .

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.

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.

(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.

(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.

. . .

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.

ANNEX 2

Relevant Provisions of Arbitral Award dated October 23, 2009

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.

. . .

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.

. . .

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

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2179-09 and T-2080-09
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA - and – ASSOCIATION OF JUSTICE COUNSEL
AND BETWEEN:	ASSOCIATION OF JUSTICE COUNSEL - and - ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	November 8, 2010
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	May 6, 2011

APPEARANCES:

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