Date: 20230113

File: 569-02-42485

Citation: 2023 FPSLREB 5

Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

ASSOCIATION OF JUSTICE COUNSEL

Bargaining Agent

and

TREASURY BOARD

Employer

Indexed as
Association of Justice Counsel v. Treasury Board

In the matter of a policy grievance referred to adjudication

Before: Amélie Lavictoire, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Bargaining Agent: Sean McGee, counsel

For the Employer: Richard Fader, counsel

Heard by videoconference,
April 27 and 29, May 18, and June 16 and 17, 2022.

I. Policy grievance referred to adjudication

[1] This case is about the "normal hours of work" of members of the Law Practitioner group (LP) as defined in the collective agreement between the Treasury Board ("the employer") and the Association of Justice Counsel (AJC or "the bargaining agent") that expired on May 9, 2022 ("the 2022 agreement" or "the collective agreement").

[2] Under clauses 13.01 (applicable to LPs at the LP-01 and LP-02 levels) and 13.02 (applicable to those at the LP-03 to LP-05 levels) of the collective agreement, the normal hours of work of full-time LPs "… shall average thirty-seven decimal five (37.5) hours per week over each four (4) week period."

[3] In March 2020, the bargaining agent filed a policy grievance, alleging that the employer breached the collective agreement by requiring or allowing members of the AJC's bargaining unit to work more than an average of 37.5 hours per week over 4-week periods. In January 2021, the grievance was referred to adjudication under s. 220 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*").

[4] Throughout these reasons, "normal hours of work" will be used to describe a work schedule of 37.5 hours per week averaged over a 4-week period. Hours worked in excess of that 4-week average will be described as "excess hours" and should not be confused with the term "excessive hours" used in the collective agreement with respect to the granting of paid management leave.

[5] According to the AJC's policy grievance, clauses 13.01 and 13.02 have clear, mandatory language that imposes a standard maximum number of hours that the employer can require an LP to work. The AJC submits that the employer contravened the collective agreement by requiring many LPs to work hours exceeding the normal hours of work on a regular and ongoing basis, resulting in an unreasonable, unfair, and bad-faith exercise of management's rights. It seeks declarations acknowledging its interpretation of clauses 13.01 and 13.02 as correct and confirming that the employer contravened them. It also seeks a declaration to the effect that the employer is required to interpret and apply the collective agreement provisions at issue in the manner defined by the Federal Public Sector Labour Relations and Employment Board ("the Board").

[6] The employer does not challenge the fact that some LPs can be required to work an average of more than 37.5 hours per week averaged over a 4-week period but denies

that the collective agreement has been breached. According to the employer, the collective agreement's terms allow it to require an LP to work more than an average of 37.5 hours per week over a 4-week period and to grant discretionary paid management leave when the hours worked are excessive. That is the agreement that the parties negotiated, and the Board must respect its terms. The employer submits that the AJC is attempting, via this policy grievance, to rewrite the deal that the parties struck when they negotiated the collective agreement.

[7] At the outset of the hearing, the AJC expanded the nature of the relief sought to include compensation for individual LPs required to work more than the normal hours. The employer objected to that request that according to it, was an attempt to change the nature of the grievance, was untimely, and sought remedies unavailable to a bargaining agent in the context of a policy grievance. An order bifurcating the proceedings was made, leaving the issue of the availability of individual remedies to be addressed at a later stage of the proceedings, were the grievance allowed.

[8] For the reasons that follow, the grievance is denied.

[9] The collective agreement that the parties negotiated allows the employer to require LPs to work more than 37.5 hours per week averaged over a 4-week period and provides a discretionary mechanism by which the employer can address excessive hours of work, which is not defined. The collective agreement is silent with respect to excess, but not excessive, hours.

[10] The Board's role is to interpret and apply the collective agreement, as worded. It cannot modify its terms or fill in gaps that the parties did not address at the bargaining table. Given the collective agreement's wording, I cannot conclude that the employer breached its terms, despite evidence that some LPs are required to work in excess of the normal hours of work.

II. Summary of the evidence

[11] The majority of LPs in the federal public service work for the Department of Justice (DOJ) and the Public Prosecution Service of Canada (PPSC). There were 2540 full-time and 100 part-time LPs working for the DOJ as of December 31, 2021, and 555 full-time and 17 part-time LPs working for the PPSC on that same date. Although LPs are also employed elsewhere in the core public administration, the evidence presented to the Board pertained only to the hours of work of represented LPs working for the DOJ and the PPSC.

[12] What constitutes the normal hours of work for LPs and how excess hours should be addressed are not new issues. The history of discussions and negotiations with respect to these issues is long.

A. History of collective bargaining and discussions between the parties

[13] Following the AJC's 2006 certification as bargaining agent for all non-excluded lawyers in the LP group (then known as the LA group), a collective agreement was imposed by way of an arbitral decision (Board file no. 585-02-25). That decision, issued in 2009, acknowledged that a major issue in dispute at that time had to do with overtime and overtime pay. The collective agreement that resulted was the agreement between the employer and the AJC that expired on May 9, 2011 ("the 2011 agreement"). It included clauses (13.01(a) and 13.02(a)) pertaining to what constituted the normal hours of work for LA-1 and LA-2As (the equivalent of LP-01 and LP-02s) and for LA-2B and LA-3s (the equivalent of LP-03 and LP-04s). Those clauses both read as follows:

> …
>
> *a. The normal hours of work for lawyers shall average thirty-seven decimal five (37.5) hours per week over each four (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.*

> […]
>
> *a. Pour les juristes, la durée normale du travail est de trente-sept virgule cinq (37,5) heures en moyenne, par semaine, pendant chaque période de quatre (4) semaines. Sous réserve de l'approbation de l'employeur, les heures de travail peuvent être établies de manière à convenir aux fonctions particulières du juriste et à lui permettre de répondre à ses obligations professionnelles.*

[14] The 2011 agreement also included provisions with respect to compensation for LA-1 and LA-2As for hours worked "in excess" of the normal hours of work (clause 13.01(e)). That compensation ("overtime pay") was at a rate of 1.5 times a lawyer's hourly rate of pay for each hour worked "… in excess of the normal hours of work …".

[15] Unlike their LA-1 and LA-2A counterparts, lawyers at the LA-2B and LA-3 levels were not entitled to overtime pay but were eligible for "exceptional leave" with pay (as management leave was then known) of up to five days per fiscal year as their delegated

manager deemed appropriate (clause 13.02(e)). The collective agreement included an example of a situation in which granting exceptional leave could be appropriate; that is, if an LA-2B or LA-3 had been "required to work excessive hours". In exceptional circumstances, a deputy head could also approve exceptional leave with pay for an additional period of up to five days (clause 13.02(f)).

[16] Changes were then made to the lawyers' classification structure. The LP group was created, and the former LA occupational group was abolished.

[17] The collective bargaining round that followed led to a collective agreement that expired on May 9, 2014 ("the 2014 agreement"). Clauses 13.01(a) and 13.02(a) continued to define the normal hours of work. Their wording remained unchanged from the 2011 agreement. However, changes were made with respect to overtime pay and paid management leave.

[18] According to Ursula Hendel, the AJC's past-president and then a member of its bargaining team, overtime pay had been widely unpopular with management and parts of the AJC bargaining unit. She testified that although LPs received overtime pay for only a short period, many of the bargaining unit members were dissatisfied, largely because only LP-01s and LP-02s (LA-1s and LA-2As) were entitled to it. Some received significant amounts of overtime pay, particularly litigators. LP-03s and LP-04s working similar hours as their more junior counterparts were not entitled to it. Ms. Hendel described situations in which junior and senior lawyers working on the same file and working similarly long hours would not be compensated in the same manner; only the junior lawyer would receive overtime pay.

[19] Ms. Hendel also described dissatisfaction with respect to overtime pay due to the requirement to obtain management's preapproval. The nature of the positions that some LPs occupied made it inherently difficult to accurately estimate in advance the amount of overtime hours that would be required. This was particularly challenging for litigators and lawyers in certain advisory roles.

[20] During the course of negotiations leading to the 2014 agreement, the parties agreed to a 2% salary increase for all LPs and removed the overtime-pay provision. The new agreement also made discretionary management leave with pay available to all LPs as of April 1, 2013, not just for the more senior ones (clauses 13.02(e) to (g)). Paid management leave of up to five days per fiscal year could be granted, as a delegated manager considered appropriate (clause 13.02(e)). That clause provided examples of

situations in which this leave could be granted, notably when an LP was required to work excessive hours or was significantly restricted as a result of being on standby duty. In exceptional circumstances and on a delegated manager's recommendation, a deputy head could also approve an additional period of management leave of up to five days (clause 13.02(f)).

[21] When the time came to negotiate the renewal of the 2014 agreement, an impasse ensued. The parties agreed that a series of outstanding issues would be resolved by binding conciliation under s. 182 of the *Act*.

[22] As is the practice in binding conciliation, the AJC presented a brief that contained its proposal. That proposal included a request that all LPs receive 45 hours of paid management leave per year – regardless of the hours worked – "… in recognition of the additional hours that lawyers are routinely required to work in order to meet their professional obligations"; see *Conciliation Brief of the Association of Justice Counsel/Association des juristes de justice*, June 27, 2017, at paragraph 159. It also requested that the management leave provision be modified to include a staged component according to which an increasing number of management-leave hours would be granted to an LP based on the number of excess hours worked. This staged component would apply to LPs working 180 hours or more averaged over a 4-week period.

[23] In July 2018, a binding conciliation board rendered its decision with respect to outstanding issues related to the renewal of the 2014 agreement (Board file no. 591-02-01). Among the topics it addressed was the issue of the compensation, through paid leave, of LPs called upon to work an excessive number of hours. It dismissed the AJC's proposals as follows:

…

> *[70] The proposals formulated by the AJC on this point, to the extent that they result in paid leave, have a clear pecuniary or economic aspect for they involve a decrease in actual working time.*
>
> *[71] The fact that the parties agreed in the last round to waive paid overtime for a 2 % general salary rate increase, in addition to adopting compensatory leave provisions, is not here in dispute.*
>
> *[72] The history of the negotiations that were concluded is relevant to this proceeding, and its significance not to be ignored. If this entire group still benefits from that compromise, one freely agreed to in negotiation, it is not appropriate to intervene or, by way of*

> *consequence, to accept this proposal; it would amount effectively to a unilateral step backward.*
>
> *[73] This said, the* [Treasury Board] *has an interest in ensuring that the managers responsible for administering the relevant clauses interpret them in a way that ensures a consistent and fair implementation. If they fail, there is a risk that the bargaining agent could exercise its recourse in the presence of arbitrary, discriminatory, or abusive actions.*
>
> …

[24] David McNairn has been the AJC's president since 2020. He was a member of the AJC's Governing Council during the round of collective bargaining that led to the 2014 agreement examined by the binding conciliation board. As a member of the Governing Council, he was briefed about the progress made at the bargaining table. In their testimony, both he and Ms. Hendel took issue with the conciliation board's description of the deal that the parties struck but acknowledged that the overtime-pay provision was removed in exchange for a package of concessions that included, but that was not limited to, a salary increase for all LPs and the availability of paid management leave for all LPs, regardless of classification.

[25] Following the binding conciliation board's decision, a new collective agreement was ratified. It expired on May 9, 2018 ("the 2018 agreement"). Clauses 13.01(a) and 13.02(a) of that agreement, with respect to the normal hours of work, remained the same as in the previous collective agreements.

[26] During the negotiations for the 2022 agreement, the interpretation and application of which is at issue in this case, the employer is alleged to have briefly proposed a change to clauses 13.01(a) and 13.02(a).

[27] Ms. Hendel and Mr. McNairn testified that the employer presented a written proposal on introducing minimum hours of work for LPs. No copy of that proposal was entered into evidence. Ms. Hendel remembered its content generally; namely, the employer wanted to modify the language of clauses 13.01(a) and 13.02(a) to require an average of "not less than" 37.5 hours of work per week over a 4-week period. She testified that the AJC sought clarification from the employer with respect to the practical application or effect of the proposed language but received no explanation. The proposal was not discussed in any detail, and the employer subsequently withdrew it. The language of the clauses remained unaltered.

[28] The following are the provisions of the 2022 agreement at the heart of this dispute:

…	[…]
Article 5: management rights	***Article 5 : droits de la direction***
…	[…]
5.02 *The Employer will act reasonably, fairly and in good faith in administering this agreement.*	***5.02*** *L'employeur agit raisonnablement, équitablement et de bonne foi dans l'administration de la présente convention collective.*
…	[…]
*****Article 13: hours of work***	*****Article 13 : durée du travail***
Effective April 1, 2013, 13.02(i), (j) and (k) will apply to all lawyers (Management leave).	***À compter du 1er avril 2013, les alinéas 13.02(i), (j) et (k) s'appliqueront à tous les juristes (Congé de Direction).***
****	****
13.01 *The following applies to lawyers at the LP-01 and LP-02 levels:*	***13.01*** *Ce qui suit s'applique aux juristes des niveaux LP-01 et LP-02 :*
a. The normal hours of work for lawyers shall average thirty-seven decimal five (37.5) hours per week over each four (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.	*a. Pour les juristes, la durée normale du travail est de trente-sept virgule cinq (37,5) heures en moyenne, par semaine, pendant chaque période de quatre (4) semaines. Sous réserve de l'approbation de l'employeur, les heures de travail peuvent être établies de manière à convenir aux fonctions particulières du juriste et à lui permettre de répondre à ses obligations professionnelles.*
b. 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	*b. En prenant les dispositions relatives aux heures de travail normales, le juriste se verra accorder dans la mesure du possible une certaine flexibilité, qui peut s'étendre*

departure from the workplace, to enable them to balance work and family responsibilities.

…

(Binding Conciliation Decision dated July 10, 2018, provision of paragraphs 13.01(d), (e), (f), (g) and (h) effective November 7, 2018)

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***13.02** The following applies to lawyers at the LP-03 and LP-04 and LP-05 levels. Effective April 1, 2013, paragraphs (i), (j) and (k) will apply to all lawyers.*

a. The normal hours of work for lawyers shall average thirty-seven decimal five (37.5) hours per week over each four (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.

b. 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.

…

j. Lawyers are eligible for management leave with pay, as the delegated manager

aux heures d'arrivée et de départ, afin de lui permettre de concilier ses obligations familiales et professionnelles.

[…]

(Décision de conciliation exécutoire datée du 10 juillet 2018, disposition des alinéas 13.01(d), (e), (f), (g) et (h) en vigueur le 7 novembre 2018)

****

***13.02** Les alinéas suivants s'appliquent aux juristes des niveaux LP-03, LP-04 et LP-05. À compter du 1er avril 2013, les alinéas (i), (j) et (k) s'appliqueront à tous les juristes.*

a. Pour les juristes, la durée normale du travail est de trente-sept virgule cinq (37,5) heures en moyenne, par semaine, pendant chaque période de quatre (4) semaines. Sous réserve de l'approbation de l'employeur, les heures de travail peuvent être établies de manière à convenir aux fonctions particulières du juriste et à lui permettre de répondre à ses obligations professionnelles.

b. En prenant les dispositions relatives aux heures de travail normales, le juriste se verra accorder dans la mesure du possible une certaine flexibilité, qui peut s'étendre aux heures d'arrivée et de départ, afin de lui permettre de concilier ses obligations familiales et professionnelles.

[…]

j. Le juriste est admissible à un congé de direction payé que le gestionnaire délégué

considers appropriate. An example of a situation where such leave may be granted is where lawyers are required to work excessive hours.	*considère comme approprié. Un exemple de situation dans laquelle un tel congé peut être accordé est celui où le juriste doit travailler un nombre d'heures excessif.*
k. Management leave with pay granted under (a) above can be carried over into the next fiscal year, and is to be used within six (6) months of being granted.	*k. Le congé de direction payé accordé sous l'alinéa (a) ci-haut mentionné peut être reporté à l'exercice financier suivant et doit être utilisé dans les six (6) mois de la date où il est autorisé.*
…	[…]
(Binding Conciliation Decision dated July 10, 2018, provision of paragraphs 13.01(d), (e), (f), (g) and (h) effective November 7, 2018)	*(Décision de conciliation exécutoire datée du 10 juillet 2018, disposition des alinéas 13.02(d), (e), (f), (g) et (h) en vigueur le 7 novembre 2018)*
…	[…]

[Emphasis in the original]

[29] Mr. McNairn testified that when negotiations leading to the 2022 agreement concluded, the parties agreed to undertake good-faith discussions aimed at jointly developing directives for the DOJ and the PPSC on management leave. According to him, the goal of the exercise was to improve clarity and consistency in granting management leave by identifying circumstances in which it would be appropriate for a delegated manager to grant leave and by providing guidance with respect to the amount of management leave to grant in the circumstances. Discussions took place with both the DOJ and the PPSC but did not lead to the adoption of a co-developed directive. According to Mr. McNairn, the PPSC later unilaterally issued its own guidance on management leave, the *Directive on Management Leave for Represented and Excluded Lawyers*.

[30] Christian Roy, Senior General Counsel and Executive Director of Health Canada Legal Services, was a member of the DOJ team involved in discussions with the AJC on that issue. He testified that the parties met and exchanged proposals but that they were unable to reach an agreement. On cross-examination, Mr. Roy testified that at roughly the same time as the discussions with the AJC ceased, the DOJ made changes to the guidance it provided to delegated managers in its *Leave Guide for Managers*. An

existing limit on the number of hours of management leave that could be granted to an LP was removed, and the delegated authority to grant additional management leave was lowered.

B. Evidence with respect to hours of work

[31] Much of the evidence presented to the Board pertained to hours of work. This included evidence of the personal experiences of Mr. McNairn and Ms. Hendel as well as a significant amount of data pertaining to the hours of work recorded by DOJ and PPSC LPs. The evidence will be summarized in that order.

1. Mr. McNairn

[32] Mr. McNairn has more than 18 years of work experience as an LP with the DOJ, in addition to numerous years of legal experience with the Canadian Armed Forces. Before he became the AJC's president, he was a senior national-security law practitioner in the DOJ's Office of the Legal Advisor to the Department of National Defence and Canadian Armed Forces. He was previously counsel in the DOJ's Criminal Convictions Review Group.

[33] His workload and the number of hours he worked per week were largely determined by client needs, the nature and the volume of the work assigned to him, and the size of the team of which he was a member at the time. He carried out the work that had to be done and put in the required hours. He did not think about whether he was working more than an average of 37.5 hours per week over a 4-week period and did not claim overtime. He had no recollection of discussing with management the excess hours that he worked.

[34] Like others at the DOJ, he recorded his hours of work. He testified about the DOJ's National Timekeeping Protocol, a framework governing timekeeping that requires LPs to keep and record the time spent on client and corporate matters. Mr. McNairn described timekeeping as an important billing and cost-recovery measure that helps ensure that client departments properly fund the legal services provided to them by the lawyers employed by the DOJ.

[35] Mr. McNairn's timekeeping practices evolved over time, particularly after timekeeping became mandatory around 2010. He recorded his hours daily in iCase (the timekeeping software used by the DOJ and the PPSC). When he worked in the Criminal Convictions Review Group, his hours of work averaged 37.5 per week over 4-week

periods. They were higher when he worked in national-security law. He described the 2017-2018 fiscal year as particularly busy. When the hours he recorded in that year are averaged over the year and adjusted for the fact that he worked a compressed work schedule at the time, the average number of hours he worked was 8.88 per day. Counsel for the AJC suggested to him that an average of 8.88 hours per day amounted to a total of 176 hours of work in excess of the normal hours over the course of the fiscal year, again adjusted for a compressed schedule. He agreed.

[36] The 2017-2018 fiscal year was also the only year in which Mr. McNairn was granted management leave. He was granted 5 days (or 37.5 hours) of paid management leave. He testified that to his knowledge, there was no set standard for granting management leave. He believed that a ratio of 1:5 was often used; that is, 1 hour of management leave was granted for every 5 hours worked in excess of the normal hours. He agreed with the calculations that the AJC's counsel proposed to him, according to which the 5 days of management leave he was granted in 2017-2018 equalled 61 hours, leaving 115 excess hours uncompensated.

[37] Data produced by the employer and presented to the witness showed that 2017-2018 was Mr. McNairn's peak year in terms of recorded hours of work. On cross-examination, the witness acknowledged that in addition to receiving management leave that year, he also received a performance rating of "exceeds" that according to him, resulted in him receiving a performance bonus of 6 or 7%. He did not dispute that his recorded hours were significantly less in other years and that in one year, his excess hours averaged 1.9 per month.

2. Ms. Hendel

[38] Ms. Hendel worked at the PPSC from 2004 to 2016 and then from 2020 to her retirement in late 2021. She was senior counsel and the national terrorism prosecutions coordinator from 2009 to 2021, except when she was the AJC's president and on leave.

[39] According to Ms. Hendel, workload and hours of work were perennial concerns within the PPSC, as they were within the bargaining unit generally. The issue of resourcing was frequently raised in the context of discussions within her team and during bilateral meetings between the AJC and both the DOJ and the PPSC. Although the PPSC made staffing efforts, problems with respect to hours of work and workload were ongoing.

[40] Like Mr. McNairn, Ms. Hendel recorded her time in iCase. Although she testified that cost recovery was not a significant factor at the PPSC, nonetheless, she described the timekeeping practices at the PPSC in a manner that was generally reflective of those at the DOJ. She described an evolution in the amount and sophistication of timekeeping practices at the PPSC from 2013 to 2021 but added that prosecutors with frequent court appearances and unpredictable schedules were often unable to track and record their time accurately or contemporaneously. According to her, by 2014 or 2015, and after a leave-reconciliation exercise that identified significant gaps in timekeeping practices, the LPs at the PPSC knew that timekeeping had to be done. An improvement in timekeeping ensued.

[41] According to Ms. Hendel, in some years, it was common for her to record more than the normal hours of work. At no point did a manager communicate with her with respect to the periods during which she worked excess hours. It was not her experience that managers would proactively review her recorded hours and take action when they were excessive.

[42] With the exception of one occasion on which she raised an issue with respect to her workload and hours of work, no steps were taken to address the fact that she regularly worked excess hours or to compensate her for those hours. The only time she raised a concern with respect to her hours of work followed a dramatic increase in her workload due a national-security incident. She characterized this period of increased workload as being “virtually 24/7” and as leading her to inform her supervisor that she would not be able to sustain the workload much longer. Work was eventually redistributed, reducing her hours of work, but not to a level averaging 37.5 hours per week over a 4-week period.

[43] Ms. Hendel testified that she received an “exceeds” performance rating several times over the course of her career. She was never told that the performance pay that she received was meant to compensate her for the number of hours she had worked.

3. Data pertaining to hours of work

[44] Each party called a lay witness to present data with respect to the hours of work recorded by LPs. Dr. Farid Asey testified for the bargaining agent, and Cameron Sorlie testified for the employer.

[45] Dr. Asey is a research analyst for the AJC. He prepared 38 pages of graphs and data tables analyzing the hours of work recorded by LPs. The data used by him was

provided by the employer under a memorandum of agreement that the parties entered into in preparation for the hearing. According to Dr. Asey, pursuant to that agreement, the employer undertook to provide data with respect to the hours of work of LPs employed by the DOJ and the PPSC for the period from March 5, 2015, to December 31, 2021 (“the reporting period”) but in a manner that ensured the LPs’ privacy and anonymity. No personal record (PRI) or other identifiers were included in the data. The employer randomly assigned each LP a number (“the LP ID”) that was then associated with the number of hours recorded by that individual.

[46] Mr. Sorlie, a senior data analyst in the DOJ’s Business Analytics Group, testified that the data provided to the AJC was the complete and raw employee-generated timekeeping data of LPs occupying represented positions within the DOJ and the PPSC. It was pulled from the employer’s timekeeping systems. To ensure that an LP’s identity could not be ascertained by comparing hours of work year after year, the employer assigned a new LP ID to each individual for each fiscal year. According to Mr. Sorlie, changing LP IDs for each year was necessary to ensure anonymization while also providing the AJC with the most detailed data possible.

[47] According to Dr. Asey, his ability to analyze the data that the employer provided to him was complicated by two factors. The first was the employer’s assignment of a new LP ID to each LP for each fiscal year, which made it impossible to detect or analyze patterns, year over year, with respect to an individual’s hours of work. The second issue was attributable to the fact that the employer provided the data in a fiscal-year format rather than in a calendar-year format. That required him to convert the data from a fiscal-year to a calendar-year format to conduct certain analyses. According to him, these factors — along with the fact that the reporting period (March 5, 2015, to December 31, 2021) did not coincide with the start and end of fiscal years — resulted in analyses that were likely to underreport the number of times LPs worked more than the normal hours.

[48] Dr. Asey analyzed the data with respect to hours of work recorded daily, weekly, and over four-week periods. He did not examine, or account for, paid leave granted or taken; nor did his analyses account for compressed work schedules. The following is a summary of his testimony with respect to the results of his analyses.

[49] When he examined the recorded hours of work per day, he found that the majority of DOJ LPs, regardless of classification, did not report working more than 7.5 hours per day during the reporting period. The opposite was true at the PPSC, where

between 50% and 58% of LPs (depending on their classification) had reported working more than 7.5 hours per day during the same period. The LP-02 group reported the highest rate of hours worked in excess of 7.5 per day, and LPs working in litigation and advisory functions accounted for the majority of hours worked in excess of 7.5 per day. Year over year, recorded hours in excess of 7.5 per day have been increasing. He described a "clear trend" at the DOJ and a discernable increase at the PPSC.

[50] Dr. Asey also analyzed data with respect to weekly recorded hours of work. He testified that between 16% (in the 2015-2016 fiscal year) and 24% (in 2020-2021) of DOJ LPs worked more than 37.5 hours per week at least once during the fiscal year. The frequency at which a DOJ LP worked more than 37.5 hours in a week ranged from once to 14 times in a fiscal year. The majority did so only once in a fiscal year. At the PPSC, between 95% (in 2016-2017) and 97% (in 2021-2021) of LPs worked more than 37.5 hours per week at least once during the fiscal year. This ranged between 1 and 51 times in a fiscal year. One individual worked more than 37.5 hours per week for 51 out of 52 weeks. Dr. Asey testified that although the data did not reveal the frequency at which an LP worked more than 37.5 hours per week in a given fiscal year or how much excess time was worked — whether the excess was 1 hour or 20 hours — the data did show an upward trend developing over time.

[51] Lastly, Dr. Asey testified about the data pertaining to the LPs' hours of work when analyzed over 4-week periods. To analyze the number of times that the LPs worked more than 37.5 hours per week averaged over a 4-week period, he tracked the times an LP worked more than 150 hours in a 4-week period during a calendar year. In every calendar year of the reporting period, sometimes, at the DOJ, the 150-hour limit was surpassed. That occurred from 1 (in 2015) to 25 (in 2020) times for a total of 65 times over the reporting period. At the PPSC, it occurred much more often. It ranged from a low of 1324 times in 2015 to a high of 2077 times in 2017. When the number of times LPs worked more than 150 hours over a 4-week period was analyzed over the entire reporting period, the data for both the DOJ and the PPSC revealed an upward trend.

[52] Dr. Asey also provided a week-to-week analysis of the hours of work associated with specific LP IDs that recorded more than 37.5 hours of work per week over at least one 4-week period during the calendar year. He provided 10 examples of DOJ LPs and 5 examples of PPSC LPs, identifying consecutive weeks in which the recorded hours of work exceeded 37.5 per week. For the DOJ, the examples included LPs working more

than 37.5 hours per week for up to 7 consecutive weeks. At the PPSC, the examples ranged from an LP who worked more than 37.5 hours per week for 47 weeks of the year to 2 examples of LPs who worked more than 37.5 hours per week every week of year. On cross-examination, Dr. Asey acknowledged that the examples were of the LPs with the highest number of hours of work recorded.

[53] Mr. Sorlie testified about the analyses he conducted on the employer's behalf, which were reflected in a series of graphs. Mr. Sorlie prepared those graphs using timekeeping and leave data entered by employees in several systems that the DOJ and the PPSC used during the reporting period.

[54] Mr. Sorlie testified that he excluded from his analysis, and from the data provided to the AJC, data pertaining to LP IDs for whom there was no recorded time in a particular year. He also excluded what he described as the most extreme outliers, specifically LP IDs with a total of recorded hours of work and leave of less than 1%, or greater than 199%, of their paid hours in that year. In doing so, he removed the data of 5 to 10 outliers. He believed that an LP recording 200% of the normal hours of work over an entire year was likely reflective of a data error, as would be the case for an individual LP ID with recorded hours of work that exceeded 24 hours in a day. On cross-examination, he acknowledged that it was possible that by removing what he deemed were outliers, he could have removed the data of LPs who truly worked extraordinary hours. According to him, removing outliers at the low end (those who recorded little to no hours of work) would likely have offset the removal of outliers at the high end of the hours-of-work spectrum. However, he acknowledged that further analysis would be required to assert this with certainty. Nonetheless, he indicated that in his opinion, including the outliers in his analysis would have had virtually no impact on the results or the conclusions capable of being drawn from the data.

[55] Most of the analyses that Mr. Sorlie conducted on the LPs' hours of work during the reporting period also accounted for paid discretionary leave (all types of it, combined) and adjusted for the status of part-time LPs. The following is a summary of the results of his analyses using data that subtracted paid leave from paid hours of work. I will refer to the result of that subtraction as "adjusted hours".

[56] An analysis of the data consisting of the DOJ LP's adjusted hours of work for the reporting period reveals a common distribution that peaks at exactly 37.5 adjusted hours per week. Approximately 8% of those LPs worked exactly 37.5 adjusted hours per week, and the rest worked fewer or more hours. A graph prepared by Mr. Sorlie

showed the distribution of adjusted hours in increments roughly equivalent to 22 minutes above and below the mark of 37.5 adjusted hours per week. Approximately 7.5% of LPs worked an average of 22 minutes of excess time per week, while roughly 5.5% worked an average of 22 minutes less than 37.5 adjusted hours per week. Slightly less than 6% of LPs worked an average of 1 hour of excess time per week, while another approximate 2.3% worked an average of 3.7 adjusted hours of excess time per week over the reporting period. Mr. Sorlie testified that when this data distribution was overlaid with a graph reflecting the awarding of paid management leave to those LPs, the adjusted hours of work in excess of 37.5 hours per week and the receipt of paid management leave seemed to be related.

[57] The smaller number of LPs at the PPSC resulted in a broader distribution of the average of adjusted hours of work per week. Mr. Sorlie testified that the distribution tended toward excess hours, a finding that he described as not unexpected when examining hours of work of LPs working exclusively in litigation. Approximately 4% of the PPSC LPs worked exactly 37.5 adjusted hours per week. Roughly 4.6% of the LPs worked an average of 22 minutes of excess time per week, while approximately 2.8% worked an average of 22 minutes under the bar of 37.5 adjusted hours per week. Just over 5% of LPs worked an average of 1 hour of excess time per week, while an approximate additional 3.5% worked an average of 3.7 hours of excess time per week over the reporting period.

[58] Comparative analyses prepared by Mr. Sorlie showed that full-time LPs in advisory roles at the DOJ had higher distributions of annual recorded hours than their counterparts in the legislative and advisory sectors. A similar comparison was not conducted for the PPSC due to the near-exclusive litigation focus of the work that its LPs conducted. Part-time DOJ and PPSC LPs were found to work quite a bit less than their full-time counterparts, even when accounting for their part-time status (normally defined as working three days per week).

[59] When asked to comment upon the analyses presented by Dr. Asey, Mr. Sorlie testified that although the number of DOJ and PPSC LPs changed from 2011 to 2021, the data demonstrated that the LPs' average hours of work was consistent and stable over the reporting period. He prepared a graph showing the distribution of adjusted hours of work per week averaged over 4-week periods, factoring in paid leave and statutory holidays. When comparing the data over the reporting period, Mr. Sorlie indicated that the number of hours recorded by the DOJ LPs had been constant over

time, with the median hovering close to an average of 37.5 hours per week averaged over 4 weeks. From the fiscal years 2011-2012 to 2021-2022, the adjusted hours of work per week averaged over 4-week periods had increased by only 1.3%, which he described as nothing more than “a drift”. The only exception was the period coinciding with the early stages of the COVID-19 pandemic in which the hours of work increased for some LPs but decreased for others.

[60] Mr. Sorlie conducted a similar analysis using only the recorded hours of DOJ and PPSC LPs averaged over 4-week periods, without accounting for paid leave such as management leave. He indicated that due to statutory holidays and paid annual leave, the expected long-term average should have been below 37.5 hours, given the annual patterns in recorded hours that reflect a drop during the summer months and the end-of-year holiday period that usually extends into the start of the next year. His graph showed the expected pattern. He also indicated that the average recorded hours for the DOJ LPs hovered close to 35, and for the PPSC LPs, it was close to 37.5. Again, Mr. Sorlie testified that the COVID-19 pandemic resulted in a slight, temporary increase in the average of recorded hours over 4 weeks.

[61] Mr. Sorlie also prepared a graph charting performance ratings of “exceeds” against annual excess hours recorded by an LP. He indicated that at both the DOJ and the PPSC, a correlation existed between working in excess of the normal hours of work and receiving a rating of “exceeds” on a performance assessment. When the datasets with respect to recorded hours of work and performance ratings are examined together, the frequency at which an LP who recorded excess hours received an “exceeds” rating was clearly higher than would be expected if there was no relation between the two data elements. On cross-examination, Mr. Sorlie acknowledged that the presence of a correlation does not mean that there is causation; nor does it mean that an LP who worked excess hours could expect to receive an “exceeds” on their performance assessment.

C. Evidence with respect to timekeeping

[62] Both parties presented evidence with respect to timekeeping practices and expectations as many of the findings and analyses discussed previously used the timekeeping of individual LPs as their data source. The testimonies of Mr. McNairn and Ms. Hendel on this issue were summarized earlier as part of their testimonies on their hours of work.

[63] Mr. Roy was the only manager to testify on the employer's behalf. He has occupied numerous DOJ management and upper management positions. He oversees a team of approximately 100 employees, about 58 of whom are lawyers reporting to directors and managers who, in turn, report to him.

[64] His testimony with respect to the goal of timekeeping, its related practices and expectations, and the National Timekeeping Protocol was largely the same as those of Mr. McNairn and Ms. Hendel. According to him, timekeeping is also an important business analytics and people-management tool. It allows the DOJ to account for time spent on specific files, provides useful data to support funding requests for additional resources, can serve as a performance measure, and can help ensure the equitable distribution of work within a team.

[65] Mr. Roy testified that individual LPs are responsible for timekeeping. They receive regular reminders of the need to record time. According to him, DOJ managers are expected to regularly review the individual LPs' timekeeping and to discuss workload and hours of work with their employees. If LPs' recorded hours exceed the normal hours of work, their managers are expected to tell them to adjust their work schedules to balance the excess hours worked, as set out in the collective agreement.

[66] In his experience, LPs who were told or encouraged to adjust their schedules often did not. They are professionals focused on getting the work done. If an LP continued to work excess hours after having been encouraged to adjust their work schedule, a manager had to, according to Mr. Roy, consider why the LP worked excess hours, with a particular focus on whether the excess hours were necessary in light of the nature of the work or circumstances, whether they were indicative of a need to reassign or redistribute work, or whether they were a sign of a need for training, mentorship, or improved time management.

[67] Mr. Roy testified that based on his experience, the majority of DOJ LPs do not generally work more than 37.5 hours per week averaged over a 4-week period. As a manager, he has never directed an LP to not work more than 37.5 hours per week or to not come to work because the LP had worked more than 37.5 hours in a week. However, he testified that he has told LPs who had worked more than 37.5 hours per week for a few weeks to adjust their hours of work in the following period, for example, by coming into work later or leaving earlier. He was not always successful in his efforts. LPs would not always do as he suggested. He also testified that as a manager, he has reassigned files, encouraged LPs who had worked more than 37.5

hours per week to stop working on a particular task, instructed them not to take on new activities, and encouraged them to turn off their phones during off hours.

D. Evidence with respect to management leave

[68] The testimonies of Mr. McNairn and Ms. Hendel as to their personal experiences with respect to management leave being granted was outlined earlier as part of the summaries of their testimonies with respect to their hours of work.

[69] Ms. Hendel also testified about information that PPSC management provided to her on granting management leave to LPs who had worked a significant number of excess hours. As an AJC representative involved in discussions with the PPSC to develop guidelines for granting management leave, she received an anonymized table listing all decisions that the PPSC's deputy head made between July 2011 and April 2020 by which LPs were provided additional paid management leave; that is, leave in addition to the five days of management leave already provided to them at the managerial level. According to Ms. Hendel, the table was incomplete but nonetheless served to illustrate that LPs who worked a significant number of excess hours on a yearly basis received only a small amount of management leave as compensation.

[70] No manager testified with respect to granting management leave at the PPSC. Mr. Roy testified with respect to the practice at the DOJ.

[71] According to the DOJ's *Leave Guide for Managers*, paid management leave can be used to recognize excessive hours worked. Mr. Roy testified that the guide was created to provide guidance to managers with respect to the number of days of management leave that could be granted, along with the delegation and approval process. Under the current approval process, Mr. Roy can grant 10 days of paid management leave, and his directors can grant 5. If he would like to grant more than 10 days of management leave, he requires the assistant deputy minister's approval.

[72] According to Mr. Roy, granting management leave is a subjective exercise that requires a manager to look at the individual's case and not just their reported hours. A manager must first determine that the employer required working the excess hours. If so, the manager can grant leave but can also assess the individual's workload, review the work assigned, or consider providing additional, supporting resources. If the employer did not require working the excess hours, the manager can seek to determine whether the excess hours were a sign of inefficiencies in work habits, a need for assistance, or a lack of training.

[73] Mr. Roy testified that management leave is a form of recognition for excessive hours worked and that there is no set formula for granting it. It is not meant to be a one-for-one offset of the excessive hours worked. The amount of leave granted can vary based on the circumstances, including factors such as the significance or complexity of the legal matters for which excess hours were required. Mr. Roy testified that management leave should be granted as close in time as possible to when the excessive hours were worked so that the leave is seen as recognition for those excessive hours. However, midyear and performance appraisal discussions can also be occasions on which management leave can be granted or a previous leave grant can be increased.

III. Summary of the arguments

A. For the bargaining agent

[74] According to the bargaining agent, the plain and unambiguous language of clauses 13.01 and 13.02 of the collective agreement supports a conclusion that those clauses are mandatory and that they require the employer to ensure that LPs have a normal workweek of 37.5 hours averaged over a 4-week period. The AJC points to the use of the word “shall” and the absence of qualifying language as indicative of the clauses’ mandatory natures.

[75] The employer cannot perpetuate work schedules that negate the collective agreement’s normal-hours-of-work provision; see *Truro (Town) v. CUPE, Local 734* (2014), 247 L.A.C. (4th) 391 (“*Truro*”). It cannot require LPs to work more than 37.5 hours per week, averaged over each 4-week period. Within that maximum number of hours, the collective agreement grants flexibility for LPs to arrange their hours of work to suit their individual duties and to permit them to carry out their professional obligations, subject to the employer’s approval.

[76] When the parties wanted to make an exception to the language pertaining to what constitutes a normal workweek for LPs, they did so. The collective agreement used to include a provision with respect to the payment of overtime pay, which was a recognition that the LPs could be required to work more than normal hours of work. That clause — and that recognition — was removed from the collective agreement, and the wording of the normal-hours-of-work provision was left unchanged.

[77] According to the bargaining agent, if the employer does not limit an LP’s hours of work to the normal hours of work, the excess hours worked must be understood to

be "off duty" hours, for which premium pay must be provided under clauses 13.01(d) and 13.02(d) of the collective agreement ("the standby provisions"). The employer must compensate LPs that way for excess hours worked (see *Dufferin Construction Co. v. Universal Workers Union (LIUNA, Local 183)* (2013), 239 L.A.C. (4th) 278 at para. 34). The standby provisions are, according to the bargaining agent, a signal that the parties meant to give effect to the mandatory language of clauses 13.01(a) and 13.02(a). If the employer is not bound to respect the normal-hours-of-work provisions, there would have been no need for the parties to include in the collective agreement a requirement for the employer to provide standby pay. It could simply ask LPs to work beyond the normal hours of work.

[78] The AJC submits that the employer's proposal raised in the context of the negotiations that led to the 2022 agreement supports its interpretation of clauses 13.01(a) and 13.02(a); specifically, the parties intended for the clauses to establish a maximum number of working hours that the employer could impose on an LP. The employer's proposed amendment reveals that it understood that the collective agreement created a substantive obligation to maintain a work schedule of no more than 37.5 hours per week, averaged over 4 weeks. Otherwise, it would not have sought to propose an amendment by which the collective agreement would set the normal hours of work to a minimum of 37.5 hours per week over 4 weeks. By not pursuing its proposal further, the employer agreed to the status quo and understood that the provisions conferred a substantive benefit to an average of 37.5 hours of work per week over a 4-week period. It understood that the provisions were enforceable (see *NSUPE, Local 13 v. Halifax (Regional Municipality)*, 2021 CarswellNS 680), and *Stelco Inc. Hilton Works v. USWA, Local 1005*, 2000 CanLII 12471 (ON LRB). The employer should not now be entitled to claim that the clauses do not create a substantive obligation.

[79] In a policy grievance, there is no minimum threshold for a collective agreement violation. The AJC argues that if one LP is required to work more than the normal hours of work during the year due to the employer's interpretation of the collective agreement, the collective agreement has been breached, and the employer must take measures to comply with it. The employer must ensure that LPs work within the confines of the four-week average.

[80] According to the AJC, the evidence shows that the employer consistently allowed or required LPs to work significantly more than 37.5 hours per week averaged

over a 4-week period during the reporting period. The uncontradicted evidence shows that some DOJ LPs work more than the normal hours of work every year. Only 8% of the bargaining unit members worked exactly 37.5 hours per week averaged over a 4-week period, and up to 10% of them worked an average of between 40 and 50 hours per week over a 4-week period. Some worked more than 60 hours per week over a 4-week period. Significantly more LPs work excess hours at the PPSC, where working excess and excessive hours is common.

[81] The bargaining agent also argues that paid management leave does not serve to offset hours worked in excess of the normal hours of work; nor is it intended to. Management leave does not constitute a measure of control over the normal hours of work and is, at best, an imperfect method of partly offsetting excess hours. Management assesses the LPs' workload and work hours only infrequently. Moreover, granting management leave is a discretionary exercise that yields inconsistent results, and, at best, it provides partial recognition for lawyers working "excessive" hours (clause 13.02(j)).

[82] Despite the employer's insistence to the contrary, performance pay is not relevant to determining this policy grievance. Performance pay pertains to compensation. It does not provide a bargaining agent and bargaining unit members a measure of control over the hours of work and workload. Moreover, the uncontradicted evidence demonstrates that performance pay is not granted based on excess hours worked. A person who has worked excess hours cannot expect to receive performance pay for that reason alone.

[83] The bargaining agent submits that it did not lose the right to complain about excess hours when it agreed to withdraw the overtime provision from the collective agreement in exchange for a package that included a 2% salary increase for all LPs and broader access to management leave for all bargaining unit members. The parties had no discussions to the effect that removing the overtime-pay provision from the collective agreement would render clauses 13.01(a) and 13.02(a) unenforceable or that the AJC would be without recourse to complain about the normal hours of work.

[84] Accepting the employer's argument to the effect that the AJC is no longer entitled to complain about hours of work would fundamentally rewrite the parties' relationship. The bargaining agent submits that it would be akin to accepting that the employer has the right to require every DOJ and PPSC LP to work as many hours as it deems necessary up to the point of the hours becoming excessive, despite the

collective agreement clauses that define the normal hours of work. Accepting the employer's argument would also mean that employees would have no right to complain about their hours of work unless they could demonstrate that the decision to deny them management leave to offset excessive hours was arbitrary, discriminatory, or in bad faith.

B. For the employer

[85] The employer submits that the AJC struck a deal according to which the employer can require LPs to work more than the normal hours of work. Clearly, the parties contemplated that the employer could do that. Now, the AJC is attempting to undo or rewrite that deal. The Board does not have the authority to change the terms of the collective agreement (see s. 229 of the *Act*), and it would be inconsistent with the collective agreement for the Board to find that it was breached with respect to the normal-hours-of-work provision, given that the parties negotiated compensation for work done in excess of the normal hours of work.

[86] The AJC had a collective agreement that included overtime pay for some LPs and exceptional discretionary leave for others. It agreed to do away with overtime pay in exchange for a 2% salary increase for all bargaining unit members and for discretionary management leave to be available to all LPs. All the bargaining unit members benefited from that deal, including LPs whose duties did not require them to work overtime. It would be inconsistent with the collective agreement were the Board to conclude that it is an unreasonable exercise of management rights for LPs to regularly work more than the normal hours of work. In lieu of overtime, the parties negotiated compensation for hours worked exceeding the normal hours. That compensation took the form of a salary increase and broadening the availability of management leave.

[87] The employer submits that the clauses with respect to the normal hours of work cannot be said to be mandatory when the same clause provides compensation for LPs required to work excessive hours (clause 13.02(j)). Management leave is part of the compensation available to LPs in lieu of overtime.

[88] The parties negotiated a collective agreement that does not define "excessive hours" or provide a formula to calculate the discretionary management leave that can be granted. The deal struck does not include a fixed amount of management leave; nor

does it suggest that there is a need or obligation to offset excess hours by an hour-for-hour formula. That is the deal that was struck.

[89] According to the employer, once before, the AJC sought to broaden the scope of compensation for excess hours in lieu of overtime. A binding conciliation board rejected its request for universal and mandatory paid management leave. In rejecting the proposal, the conciliation board acknowledged that to do otherwise would amount to modifying a compromise freely agreed to in negotiation that all the bargaining unit members benefited from. The binding conciliation board's decision is key to the interpretation issue before the Board as it is deemed incorporated into the agreement under s. 182(5) of the *Act* and is expressly referred to in clauses 13.01 and 13.02.

[90] Because the AJC bargained away its right to overtime, the only issue that it can properly bring before the Board is whether the employer's approach to management leave as it applies to the bargaining unit generally, on its face, violates the discretionary paid-management-leave provision of the collective agreement. Granting management leave is a fact-specific, case-by-case exercise of discretion. A policy grievance is not the proper avenue to adjudicate such an issue; nor would it be appropriate for the Board to render a decision based on a handful of extreme cases identified by the bargaining agent. Decisions with respect to granting management leave are best addressed by individual or group grievances; see *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2008 PSLRB 84 ("*PSAC* 2008").

[91] If the Board concludes that a policy grievance can constitute a proper avenue to challenge the employer's approach to management leave, the employer submits that when the parties intended for compensation to be mandatory, they did so specifically, as in the case of standby pay (clauses 13.01(d) to (h) and 13.02(d) to (h)). The parties agreed to make granting management leave discretionary, and the choice made in collective bargaining should be respected; see *Delios v. Canada (Attorney General)*, 2015 FCA 117). The parties also agreed to a provision that does not include wording indicative of a threshold of reasonableness. As a result, the employer's exercise of its discretion to grant management leave must be assessed on a standard of whether it was exercised in a manner that was discriminatory, arbitrary, or in bad faith; see *National Arts Centre Corp. v. P.S.A.C., Loc. 70291* (1996), 56 L.A.C. (4th) 67 at paras. 28 to 30 and 42.

[92] The PPSC and the DOJ have guidance documents with respect to granting management leave. The employer argues that nothing in them fetters managerial discretion; nor do they contain anything to suggest that its assessment of management leave is discriminatory, arbitrary, or in bad faith. There are no set formulas to grant that leave and no limits on the amount of it that can be granted, and excess hours are expressly identified as a factor that can justify granting that leave. The number of days that can be granted is at the delegated manager's discretion and is based on the circumstances of each case. The discretion granted to DOJ and PPSC managers with respect to granting leave is reflective of the level and nature of discretion required by the jurisprudence on discretionary-leave provisions.

[93] Even were the Board to apply a reasonableness standard to the employer's approach to management leave, nothing suggests that how the employer grants management leave "to the bargaining unit generally" is unreasonable; see s. 220(1) of the *Act*. "Excessive" hours are not defined in the collective agreement, and the jurisprudence that has examined the meaning of "excessive" reveals that its definition is context-dependent and is to be assessed against what is normal or usual; see *International Association of Bridge, Structural and Ornamental Iron-Workers, Local Union 786 v. Stone & Webster Canada Limited*, 1989 CanLII 3067 (ON LRB). Any assessment of the reasonableness of the employer's approach with respect to management leave must account for what is normal or usual in terms of an LP's hours of work. It must also account for performance pay, as the evidence shows that there is a direct correlation between working additional hours and receiving an "exceeds" performance rating. LPs are the only represented employees in the core public administration who receive performance pay, which is a recognition of the unique nature of their work.

[94] Hours worked by DOJ LPs have been consistent year to year since 2011. Nothing suggests that the current average hours worked are excessive or different from a normal pattern of hours worked. Past practice aside, the employer's position is that the data demonstrates that the "bargaining unit generally" is not working excessive hours and that despite this, it is benefiting from management leave as well as from the negotiated 2% salary increase. Individual cases alleging that an LP has worked or is working excessive hours and is not being adequately compensated via a grant of management leave should be addressed through individual grievances.

[95] The employer submits that the parties entered into a collective agreement and that the Board's role is not to determine whether that agreement was good. The issue of the normal hours of work should be dealt with in collective bargaining.

IV. Analysis

[96] The AJC seeks declarations setting out the Board's interpretation of clauses 13.01(a) and 13.02(a) and stating that the employer contravened them. It also seeks a declaration requiring the employer to interpret and apply them in the manner described by the Board. Those declarations are reflective of the Board's limited remedial powers with respect to policy grievances; see s. 232 of the *Act*.

[97] The evidence and arguments presented by the parties focused primarily on full-time LPs. Accordingly, so too will the following analysis.

[98] According to the AJC, the Board need only decide whether the employer can require full-time LPs to work more than an average of 37.5 hours per week over a 4-week period, not accounting for the granting of paid management leave. If the employer is not entitled to do so and the Board finds that some DOJ and PPSC LPs are required to work more than an average of 37.5 hours per week over a 4-week period, the AJC argues that the Board must conclude that the employer breached the collective agreement.

[99] During the hearing, the AJC's position evolved to include a claim for compensation for excess hours. According to it, LPs who work excess hours should be entitled to premium pay.

[100] I will address the evidence with respect to hours of work and the interpretation of the collective agreement before addressing the bargaining agent's argument with respect to premium pay.

[101] Are some full-time LPs required to work more than an average of 37.5 hours per week over a 4-week period?

[102] The timekeeping data that both parties presented for the reporting period of March 5, 2015, to December 31, 2021, leads me to answer that question in the affirmative. Some LPs at the DOJ and the PPSC worked more than an average of 37.5 hours per week averaged over a 4-week period.

[103] The frequency at which LPs are required to work excess hours and the excess hours worked varied greatly from infrequent occurrences to consistently working more than the normal hours of work, and from excess time measured in minutes to a significant number of excess hours of work over a four-week period. The testimonies of Ms. Hendel and Mr. McNairn are two such examples. Ms. Hendel described her hours of work as routinely exceeding the normal hours of work, while Mr. McNairn described his work schedule as usually resembling the normal hours of work, with a few notable exceptions. Generally speaking, the data that the parties presented revealed that excess hours were a more frequent occurrence at the PPSC than at the DOJ, a pattern apparently attributable to the litigation functions of most LPs at the PPSC. LPs at the DOJ who occupied litigation and advisory roles recorded more excess hours than did their counterparts.

[104] A review of the analyses conducted using adjusted hours reveals that paid leave, management leave in particular, offset some, but not all, of the excess hours worked. That is not surprising as none of the witnesses described management leave as being meant to completely offset excess hours.

[105] In sum, some DOJ and PPSC LPs worked more than the normal hours of work, and the excess hours they worked were not entirely offset by management leave grants. A significant number of LPs worked some excess hours for which they did not receive management leave or other form of compensation.

[106] However, those findings do not mean that the collective agreement was breached. The situation is not quite so simple.

[107] The disagreement between the parties was referred to the Board as a policy grievance, which is a mechanism for resolving — on a principled basis — issues relating to the interpretation and application of a collective agreement's provisions; see *PSAC* 2008, at para. 68. Under s. 220 of the *Act*, a party to a collective agreement may present a policy grievance in respect of the interpretation or application of a collective agreement as it relates to it or "to the bargaining unit generally".

[108] The adjudication of most policy grievances requires the Board to use the relevant collective agreement's terms as a starting point. This grievance is no different. My main task is to construe to the collective agreement provisions at issue. I cannot modify its terms or conditions; nor can I make new ones. I must determine and uphold

the parties' intent when they entered into the collective agreement, as it was expressed in writing.

[109] The collective agreement must be interpreted in its entirety. I must read the words that the parties used in their entire context, in their grammatical and ordinary sense, and harmoniously with the scheme of the agreement, its object, and the parties' intention (see *Beese v. Treasury Board (Canadian Grain Commission)*, 2012 PSLRB 99 at paras. 23 and 24). At issue in this case is the interpretation of clauses 13.01(a) and 13.02(a) and whether they are mandatory provisions when they are interpreted in the context of the collective agreement as a whole.

[110] Scheduling work has generally been recognized as a management right. However, a collective agreement can — and often does — impose limits on that right by including provisions that define normal working hours or a day of work. More often than not, normal working hours are defined by setting an upper limit on working hours (see, for example, *Capital Environmental Resource Inc. v. CUPE, Local 1338-01 (AR-01)*, 2004 CarswellOnt 10368 at para. 12, and *Longo Brothers Fruit Market Inc. v. U.F.C.W., Local 633* (1995), 52 L.A.C. (4th) 113, citing *Northern Electric Office Employee Ass'n v. Northern Electric Co.* (1968), 19 L.A.C. 125). Normal working hours are generally intended to identify the standard hours of work and to allow enough flexibility within those normal hours for an employer to schedule the times and duration of the hours worked (see *Capital Environmental Resource Inc.*, at para. 12).

[111] With rare exceptions, when parties to a collective agreement have expressly agreed to "regular" or "normal" work schedules, the employer cannot change those schedules without the bargaining agent's agreement. An employer cannot use its management rights to create or maintain work schedules that render meaningless the "normal" or "regular" hours and schedules of work set out in the collective agreement (see *Truro*).

[112] The cases that the bargaining agent cited with respect to interpreting collective agreement provisions on hours of work are of limited usefulness. Clauses 13.01 and 13.02 are distinguishable from the provisions at issue in those cases. The collective agreements under review in the cases cited do not resemble the generally worded collective agreement applicable to LPs. Most of those cases involved collective agreements with carefully circumscribed hours of work, with a specific number of hours of work per day and per week, as well as fixed start and end times between which the employer could schedule an employee's hours of work; see, for example,

Capital Environmental Resource Inc.; *Cloutier v. Canada Revenue Agency*, 2009 PSLRB 3, and *Truro*. Overtime-pay provisions were of central importance to the adjudicator's or the arbitrator's analysis in many of those cases; see, for example, *Homer v. Treasury Board (Department of National Defence)*, 2019 FPSLREB 55; *Longo*, citing *Northern Electric Co., St. Clair Chemical Ltd. v. Oil, Chemical & Atomic Workers, Loc. 9-14* (1973), 5 L.A.C. (2d) 50, and *Printing Specialities & Paper Products Union, Local 466 v. Interchem Canada Ltd.* (1969), 21 L.A.C. 46; *Dufferin Construction Co.*; and *United Utility Workers Assn. of Canada v. AltaLink Management Ltd.* (2009), 189 L.A.C. (4th) 408. The collective agreement at issue in this case does not include an overtime-pay provision.

[113] Clauses 13.01(a) and 13.02(a) of the collective agreement are both worded as follows:

…	[…]
a. The normal hours of work for lawyers shall average thirty-seven decimal five (37.5) hours per week over each four (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.	*a. Pour les juristes, la durée normale du travail est de trente-sept virgule cinq (37,5) heures en moyenne, par semaine, pendant chaque période de quatre (4) semaines. Sous réserve de l'approbation de l'employeur, les heures de travail peuvent être établies de manière à convenir aux fonctions particulières du juriste et à lui permettre de répondre à ses obligations professionnelles.*

[114] Generally speaking, the word "shall" is mandatory, not discretionary; see *Public Service Alliance of Canada v. Treasury Board (Correctional Service of Canada)*, 2015 PSLREB 10 at para. 61. However, the presumption that "shall" is mandatory can be rebutted, depending on the context; see *NAPE v. Newfoundland (Treasury Board)* (2019), 303 L.A.C. (4th) 355. It cannot be interpreted in a vacuum.

[115] Clauses 13.01(a) and 13.02(a) also include the word "normal" that in this context, I find to mean "usually" or "generally" (see, for example, *International Brotherhood of Boilermakers, Local 146 v. Exchanger Industries* (2014), 245 L.A.C. (4th) 41 at para. 24). Although the employer should strive to provide LPs with a work schedule that averages 37.5 hours per week over a 4-week period, the wording of the

provisions is unambiguous. Exceptions can occur. In light of the wording of the collective agreement, the employer can require LPs to work an average of more than 37.5 hours per week over a 4-week period. That interpretation is further reinforced by the inclusion, in the portion of the collective agreement with respect to hours of work, of a provision that allows for the granting of paid management leave to LPs who work excessive hours, a recognition that the LPs can be required to work more than normal hours of work.

[116] The parties acknowledge that they struck a deal that was first reflected in the 2014 agreement. It included a salary increase for all LPs, did away with overtime pay, and broadened the availability of paid management leave to all full-time LPs. The wording of clauses 13.01(a) and 13.02(a), the provisions with respect to the normal hours of work, were left unchanged.

[117] The parties do not share the same interpretation of clauses 13.01(a) and 13.02(a). They disagree as to whether they are mandatory, enforceable provisions. However, at the hearing, both parties agreed that the employer can require LPs to work more than the normal hours. The bargaining agent's insistence that LPs who are required to work more than normal hours of work must be compensated under the standby provisions of the collective agreement reveals that the heart of the disagreement lies with respect to whether the collective agreement imposes a duty on the employer to compensate LPs when it requires them to work excess hours.

[118] The bargaining agent argues that a form of compensation other than management leave must be provided for excess hours worked. Before the Board, it took the position that the compensation must take the form of standby pay. It is unclear whether it took a similar position in the internal grievance process or at the bargaining table. The employer, on the other hand, argues that its duty to employees flows from applying the management leave provisions when LPs are required to work excessive hours, which is a discretionary fact-specific measure, the application of which is not well suited to a policy grievance.

[119] The agreement allows the employer to require LPs to work an average of more than 37.5 hours per week over a 4-week period. If the parties intended for the hours of work be limited to 37.5 hours per week over a 4-week period with no possibility of uncompensated excess hours, they would have set that out explicitly in the collective agreement, as was the case when the collective agreement provided for some LPs to receive overtime pay.

[120] It is also important to note that the collective agreement provides a mechanism by which undefined “excessive hours” worked by an LP can be offset, in whole or in part, with a discretionary grant of paid management leave. The parties left it to the employer’s discretion to determine when “excessive” hours should be offset — in whole or in part — by granting management leave (see, for example, *Homer*).

[121] However, and most importantly, the collective agreement includes a significant gap. It is silent with respect to excess hours that do not reach the threshold of excessive hours. That gap is the source of the disagreement between the parties.

[122] The bargaining agent submits that the parties could not have intended to leave excess hours unaddressed, thus providing the employer with an unlimited ability to require LPs to work more than the normal hours of work.

[123] Although extrinsic evidence such as negotiation history is generally only admissible where the terms of the collective agreement are ambiguous, which the parties acknowledge is not the case here, the history of previous collective agreements is not treated in the same manner. Preceding agreements can be accepted into evidence as a contextual interpretative aid used to assist in determining the intention of the parties with regard to changes made to an agreement (see Brown and Beatty, *Canadian Labour Arbitration*, 5th edition, at paragraphs 4.36 and 4.37). However, such evidence must not be allowed to overwhelm the words of the agreement under review (see *Sattva Capital Corp. v. Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53).

[124] A review of previous collective agreements reveals that the disagreement at issue in this case arose from a deal that the parties struck.

[125] Since the parties’ first collective agreement, the provisions with respect to the LPs’ normal hours of work have been worded identically. No changes have been made to those provisions. Changes were made to other provisions that served as a means to compensate LPs working more than the normal hours of work.

[126] Some LPs used to benefit from overtime pay, which was a form of compensation that not everyone appreciated. The parties agreed to remove it from the 2014 agreement in exchange for a package of concessions that included a salary increase for all LPs, regardless of whether their duties required them to work excess hours. That package also resulted in modifying the collective agreement, making paid management leave available to all members of the bargaining unit, not just the most senior LPs. This

exchange was recognized and described in the decision of the conciliation board. The 2014 and subsequent collective agreements expressly recognized working excessive hours among the reasons for which management leave could be granted to an LP.

[127] Although Ms. Hendel and Mr. McNairn took issue with how the conciliation board's decision described the parties' deal, the AJC did not seek judicial review of that decision. It is not my role to question the accuracy of the conciliation board's description of the deal struck. The conciliation board's decision is expressly referenced in clauses 13.01 and 13.02 of the collective agreement and, pursuant to s. 182(5) of the *Act,* is deemed incorporated into the collective agreement. The essence of the deal reached by the parties is described at paragraphs 71 and 72 of that decision, which are reproduced again as follows, for ease of reference:

> *[71] The fact that the parties agreed in the last round to waive paid overtime for a 2 % general salary rate increase, in addition to adopting compensatory leave provisions, is not here in dispute.*
>
> *[72] The history of the negotiations that were concluded is relevant to this proceeding, and its significance not to be ignored. If this entire group still benefits from that compromise, one freely agreed to in negotiation, it is not appropriate to intervene or, by way of consequence, to accept this proposal; it would amount effectively to a unilateral step backward.*

[128] It warrants repeating that these statements of the conciliation board were made in response to the AJC's request for mandatory paid management leave for all LPs and for a scheme providing a staged component according to which an increasing number of management-leave hours would be granted to LPs based on the number of excess hours worked. That request was denied. The conciliation board concluded that granting the AJC's request would have resulted in rewriting the deal that the parties had struck.

[129] The parties entered into an agreement in 2014 that has been maintained since then and that is reflected in the current collective agreement. That agreement is silent on the issue of excess hours and neither defines excessive hours nor provides criteria for granting management leave when excessive hours are worked. That silence does not render the collective agreement's language ambiguous. Rather, it indicates that the parties either did not address the issue (see, for example, *Wilson's Truck Lines Ltd. v. Industrial Wood and Allied Workers of Canada, Local 700* (1999), 80 L.A.C. (4th) 1 at para. 27) or did not agree to how the situation should be governed. The latter appears to me more likely, given the evidence that the parties entered into a side agreement for

good-faith discussions aimed at developing guidelines or directives to improve the clarity and consistency of granting management leave. Unfortunately, they failed in their efforts.

[130] The collective agreement is not ambiguous. When read as a whole, it provides a description of what constitutes the normal hours of work using mandatory language while also recognizing the employer's right to require LPs to work more than the normal hours of work, up to and including an undefined amount of "excessive hours".

[131] The bargaining agent sought to rely on an employer proposal made early in the collective bargaining process that led to the 2022 agreement to support its interpretation of the normal-hours-of-work clauses. According to the AJC, by proposing an amendment that would have set the normal hours of work at not less than an average of 37.5 hours per week over a 4-week period, the employer clearly understood that it had, under the existing collective agreement, a substantive obligation to maintain a work schedule of no more than 37.5 hours per week averaged over 4 weeks and understood that the provisions were enforceable (see *NSUPE, Local 13*, and *Stelco*).

[132] Evidence of such a proposal is extrinsic evidence. In certain circumstances, proposals put forward unsuccessfully in past collective bargaining sessions may be admissible (see *NSUPE*). I need not decide whether such evidence is admissible in the present case. The employer's proposal was not entered into evidence. The proposal was withdrawn by the employer without it being discussed at the bargaining table in any length. The only evidence provided with respect to it were the general recollections of Ms. Hendel and Mr. McNairn. Although I can accept that it would be unlikely that the employer proposed an amendment if it did not find the normal-hours-of-work clauses problematic in some respects, in the absence of direct and detailed evidence, it would be highly speculative for the Board to attribute to the employer an intention or understanding of its obligations with respect to the normal hours of work.

[133] The bargaining agent argued that the employer is required to compensate LPs who work more than the normal hours of work by providing them standby pay, also known as premium pay. It argued that including premium pay in the collective agreement would be meaningless if the employer were entitled to require LPs to work more than the normal hours of work. I disagree. Premium pay and standby status are relevant and serve a purpose even if LPs can be required to work more than normal hours of work under the collective agreement.

[134] Clauses 13.01(1)(d) to (h) and 13.02(d) to (h) seek to address specific situations. They pertain to situations in which LPs are off duty but are required to remain available to report to work upon request. LPs are provided compensation, known as premium pay, for the time they are on standby. That compensation is provided in exchange for an assurance of their availability during off-duty hours. If an LP on standby status is called in to work, the LP is also provided paid leave.

[135] I cannot accept the bargaining agent's argument according to which LPs required to work more than normal hours of work should be provided premium pay under the standby provision. The wording of the provisions does not support such an interpretation and the bargaining agent provided no examples of similar provisions having been interpreted in the manner proposed by it. Even if the language of the provisions could possibly support such an interpretation, I would nonetheless decline to interpret the provision in the manner sought by the AJC. Interpreting the standby provisions in the manner proposed by the bargaining agent would create confusion with respect to an LP's work status by blurring the lines between situations in which an employee is at work and situations in which an employee is off duty but required to be available to work upon request or where an employee on standby status is required to report to work.

[136] The employer presented evidence with respect to the granting of management leave to LPs who work excess hours. Part of the deal struck by the parties in the 2014 agreement was a broadening of access to paid management leave to all LPs in exchange, in part, for removing an overtime pay provision from the collective agreement.

[137] The issue of whether the employer grants management leave, to the bargaining unit generally, in an unreasonable manner is not the subject of this policy grievance. Although the AJC took the position that the Board should not disregard management leave, it also repeatedly stated that the Board should find that the collective agreement had been breached were it to find that even one LP was required to work more than normal hours of work. Its grievance, evidence, and submissions focused solely on the LPs' recorded hours of work. It made great efforts during the hearing to present a data-driven picture of the normal hours of work that disregarded the granting of management leave. It did not ask the Board to draw a conclusion with respect to the employer's compliance with the normal-hours-of-work provisions when read in the context of the whole of article 13, including management leave.

[138] Nonetheless, the evidence demonstrates that management leave is routinely, although perhaps imperfectly or inconsistently, granted to LPs who work hours that can be described as excessive. Management leave is not meant to be a complete offset for excessive hours. The collective agreement does not include such a requirement. There is nothing to indicate that a complete offset was ever contemplated. Both the DOJ and the PPSC have adopted and applied internal guidelines to help management grant paid discretionary leave for excessive hours worked. Given the discretionary fact-based nature of the exercise of granting management leave, challenges with respect to granting it to offset excessive hours worked are best addressed via individual or group grievances.

[139] Although the evidence demonstrates that some LPs are required to work more than the normal hours of work, I am unable to conclude that the employer contravened the collective agreement. It is entitled to require an LP to work more than the normal hours of work, and the collective agreement does not include a mechanism to address excess but not excessive hours. It has implemented guidelines with respect to granting management leave for excessive hours, and the evidence demonstrated that such leave is routinely granted. However, I would echo the conciliation board's words, reproduced in this paragraph, and would encourage the employer to undertake efforts to provide clarity, consistency, and accountability with respect to granting management leave for excessive hours worked:

> *[73] …* [The Treasury Board] *has an interest in ensuring that the managers responsible for administering the relevant clauses interpret them in a way that ensures a consistent and fair implementation. If they fail, there is a risk that the bargaining agent could exercise its recourse in the presence of arbitrary, discriminatory, or abusive actions.*

[140] I will close with a final word with respect to performance pay. The employer repeatedly referenced the availability of performance pay for LPs as a relevant factor in the Board's analysis, implying that its availability serves as a mechanism by which LPs working more than the normal hours may be compensated.

[141] In *Canada (Attorney General) v. Association of Justice Counsel*, 2011 FC 530 at para. 68, the Federal Court distinguished performance pay from overtime pay. As the court indicated, an employee whose work performance is outstanding will not necessarily also work more than the normal hours of work. It also cannot be said that — and Mr. Roy agreed — an LP who works excess hours can expect to receive

performance pay for that reason alone. Performance pay seeks to recognize performance excellence. It is not a means of compensating an LP for excess hours worked; nor should it be a factor when assessing whether an employer has complied with its duty with respect to the normal hours of work.

[142] The collective agreement at issue contains gaps that the Board cannot fill. The *Act* clearly prohibits it from rendering a decision that would have the effect of modifying the collective agreement. Although a policy grievance is an appropriate mechanism for the bargaining agent to bring its concerns about the interpretation and application of a collective agreement's provisions with respect to the normal hours of work before the Board, it is not a mechanism that can or should be used to seek to amend the agreement's terms. Amendments must be sought at the bargaining table. The issue that this policy grievance raises is long-standing, and it must be addressed in collective bargaining.

[143] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[144] The policy grievance is denied.

January 13, 2023.

Amélie Lavictoire,
a panel of the Federal Public Sector
Labour Relations and Employment Board