REPORT OF AJC NOMINEE

It is with regret that I disagree with the decision of the Chairperson. However, in my view, his decision has fundamental errors which have led it to an unreasonable and very unfair result. Although the Chairperson is critical of the parties' lack of efficiency and transparency in their shared data upon which they relied, he does not analyze the data nor explain why the process was not efficient nor transparent. Moreover, the lawyers bear the brunt of this alleged failure even though it was the employer who came forward with inadequate data in an untimely way. The evidence is clear that the employer was consistently late in furnishing relevant information and, when it did, the information lacked credibility and reliability. In short, the employees should not be penalized for the failure of the employer to be more efficient and transparent in the process.

The applicable legal principles and considerations are not really in dispute. Both parties refer to the replication principle which posits that an interest arbitration board should seek to determine the result which the parties would have achieved in free collective bargaining. As the Chairperson states, the non-exhaustive relevant factors to be considered are barrowed from section 148 of the *Public Service Labour Relations Act* ("*PSLRA*") which provides:

> "148. In the conduct of its proceedings and in making an arbitral award, the arbitration board must take into account the following factors that it considers relevant:
>
> (a) the necessity of attracting competent persons to, and retaining them in, the public service in order to meet the needs of Canadians;
>
> (b) the necessity of offering compensation and other terms and conditions of employment in the public service that are comparable

> to those of employees of similar occupations in the private and public sectors, including any geographic, industrial or other variations that the arbitration board considers relevant;
>
> (c) the need to maintain appropriate relationships with respect to compensation and other terms and conditions of employment as between classification levels within an occupation and as between occupations in the public service;
>
> (d) the need to establish compensation and other terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered; and
>
> (e) the state of the Canadian economy and the Government of Canada's fiscal circumstances."

The relevant provision of the agreement between the parties dated February 28, 2017, which provides for binding conciliation is paragraph 2(n) which provides:

> "Factors to be Considered by the Binding Conciliation Board
>
> (n) In making a final and binding determination, the Binding Conciliation Board shall take into account, in addition to any other factors that it considers relevant, the factors listed in (a) to (e) of s. 148 of the PSLRA as it read prior to the 2013 amendments. The Binding Conciliation Board may give weight to the factors as it sees fit, without regard to preponderance."

Three considerations arise from the agreement. First, all of the statutory factors must be considered. Second, the list of factors is not exhaustive. Finally, the board has discretion to attribute whatever weight it deems appropriate to each factor.

Further, at paragraph 55, the Chairperson refers to 5 other considerations which he believes are important to any decision it reaches. I refer to the first three considerations which I view to be particularly relevant to the evidence which we have heard:

> "1. The solution must be balanced, namely feasible for the employer and equitable for the employees as well as between them. The feasibility and equity sought for are weighted based on the economic, financial, and social environment found in the evidence filed in the record.
>
> 2. The rationality sought for is subject to a rigorous review of the relevant reference data - the famous "comparables". Their relevance and persuasive value will be appreciated as much by their size and nature as by their actual weight, according to their similarities and distinctions with the target group.
>
> 3. When faced with one unit that is part of a large group, the accepted solution must fit in rationally because that is an inescapable reality that a lucid negotiating party does not want to or know how to avoid. To that end, the Binding Conciliation Board will take it for granted that articulate parties negotiating in good faith would not knowingly opt for solutions that are possibly attractive at first sight but that rationally on review would be dysfunctional or unfair when placed in context."

With these considerations in mind, I now refer to the issues between the parties and where I must disagree with the Chairperson's decision.

1. Annual Rates of Pay

In his decision to accept the employer's proposal on the economic increase to the annual salary rates from 2014 to 2017, the Chairperson relies on four reasons. However, before addressing these reasons, I refer to paragraph 67 of the decision:

> "The only mandate of the decision maker is to imitate the parties. In this case, in the circumstances and based on a rigorous review of the adduced evidence, most likely, such an adjustment would not have been negotiated

As will be seen from the remainder of my report, it is my view that the Chairperson's decision is not "based on a rigorous review of the adduced evidence…".

The first reason given by the Chairperson for refusing to give the lawyers an economic adjustment as was given to other occupations and professions is that the lawyers had received a similar economic adjustment in the previous round of bargaining. Moreover, the Chairperson speculated that nothing indicated that these other occupations and professions received a similar adjustment in the last round of bargaining. Indeed, the Chairperson concluded that. "The contrary is more likely". Unfortunately, there was no evidence whatever whether this was the case or not. Indeed, all other collective agreements between the Treasury Board and the bargaining agents are publicly available. A cursory review of this publicly available information shows that some of these occupations and professions received a market adjustment in the last round of bargaining. That is why it is dangerous to rely on information which was not provided by the parties.

More importantly, the Chairperson did not refer to the context in which the economic adjustment of 10% prior to the last year of the agreement was given to the lawyers in the last round of bargaining. The uncontradicted evidence can be found at paragraph 47 of the AJC Brief:

> "The second collective agreement between the AJC and Treasury Board was reached through an agreement on the eve of arbitration. Treasury Board had two main objectives in that round of bargaining: to eliminate the payout of "severance pay" when a lawyer left the public service voluntarily (through resignation or retirement), and to eliminate the limited form of overtime for lawyers, which had been awarded by Arbitrator Bendel. Treasury Board achieved both of its main objectives in that collective agreement. The AJC met one of its objectives by obtaining a pay restructuring (a pay increase of 10% prior to the final year of the agreement) that bridged part – but not all – of the large pay gap between federal and provincial lawyers. The parties also agreed to shift to a system of "lock step" salary increases for LP-1 through LP-3."

These contextual circumstances are relevant in determining whether the past adjustment of 10% should disentitle the lawyers to another economic adjustment in the present round of bargaining. The evidence before this board must be rigorously reviewed in order to assess the merits of such an adjustment today.

The second reason for dismissing the AJC position is that "the AJC's study, which indicated that the ranking of federal lawyers in all of Canada plummeted to the point that it is at the bottom of the heap, is not convincing…" (para.62). This is buttressed at paragraph 15 of the decision whereat the majority states:

> "The study conducted for the bargaining agent was based on an analysis of contractual documents. It claims that AJC members are at the bottom of the market everywhere, far behind the average salaries of all the reference groups. Whether they are classified LP-1, 2, or 3, according to the study, they all receive less."

Nowhere in the AJC study is it claimed that the federal lawyers plummeted to the "bottom of the heap" of the relevant comparator group of provincial and territorial government lawyers across Canada. All of the materials filed with the board demonstrated that the federal lawyers were behind some provincial counterparts and ahead of others. For example, if we look at the working level of LP-2, we can see that federal lawyers are ahead of three provinces if we compare the national rate or six provinces and territories if we look at the Toronto rate (see AJC Reply Brief, Tab 8; Salopek & Associates Report, p.11). At no time did the federal lawyers claim that they were at the bottom of this external comparator group.

The third reason relied on by the Chairperson is that the Treasury Board study put in doubt the AJC claims as its study showed that the federal lawyers are "at the highest rank". The Chairperson goes on to say that the only exception would be the Toronto group which "[w]hile not at the peak, nevertheless it would fall within the more-or-less 10% deviation range that is deemed to guarantee an acceptable level of competitiveness".

There are two problems with this finding. First, Treasury Board ("TB") in its study never found that the federal lawyers are "at the highest rank". A review of the Treasury Board study (Deloitte, December, 2016) at pp.24 – 57 indicate that the salaries of federal lawyers are not at the top of the comparative group of provincial and territorial lawyers. Second, the reference to the Toronto rate being within the 10% deviation rate is in relation to Ontario lawyers and not the broader comparator group of provincial and territorial lawyers which is the referenced group for the finding that the federal lawyers are at the highest rank.

It would seem to me that where the parties' studies on salary are in dispute, it is incumbent on the board to determine which study is more credible and reliable. I conclude that the AJC study is far superior to the Treasury Board study conducted by Deloitte. There are so many problems with the Treasury Board study that it is difficult to know where to start. Perhaps a good starting point is that as late as November 3, 2016, the Treasury Board explained its refusal to share the Deloitte study with the AJC in the following email response:

> "Your reaction is understandable because AJC has been patient and waiting based on the Employer's information for quite some time. We

> appreciate it very much. Unfortunately, we have a study that we do not support and as such, we cannot share at this time. There are significant methodological issues with it and, based on the discussion with our ADM who supports our approach, we will have to re-survey some of the job capsules which will delay the final report by a few more weeks."

This is problematic for a number of reasons. First, as the email chain demonstrates the AJC had been seeking production of this study for months which shows that it was the AJC which was acting efficiently and with transparency. Indeed, the AJC's frustration with the Treasury Board's conduct during negotiations is reflected in the AJC email which led to the email quoted above:

> "I have been at a loss for a response to your email of last Friday. As you are aware, the AJC filed its notice to bargain almost three years ago. We have been attempting to negotiate a collective agreement for the past two and a half years. I was told by yourself as well as Ms. Hassan that things had changed at Treasury Board and that there was a new-found intention to negotiate in good faith.
>
> Back in June, which is 5 months ago, we were informed that a wage comparability study was underway and we have been waiting patiently for it ever since. The projected dates for the availability of the report were confirmed and reconfirmed.
>
> Under these circumstances, I trust you will understand how difficult it is to process your news that your ADM has been <u>too busy to read it."</u>

In my view, "significant methodological issues" continued in the final Deloitte study which was completed one month later. Some of the more obvious weaknesses of this report are the following:

- the study does not apply a weighted average of provincial lawyers which means that each of PEI, Newfoundland and New Brunswick where less than 1% of the federal lawyers work have the same weight as Ontario,

Quebec, British Columbia and Alberta where over 88% of the federal lawyers are employed (see AJC Reply Brief at p. 20).

- in its main comparison, the study excludes the Ontario lawyers which is by far the largest contingent of provincial lawyers in the external comparator group. To determine a national average by excluding Ontario, the most populous province, is absurd.

- even where Ontario is included in assessing the national average, the assessment does not include any Ontario comparator for LP-2s even though LP-2s compose 55% of the bargaining unit (AJC Brief, at p.18). This is the working level of the lawyers' bargaining unit. To suggest that there is no comparable classification in Ontario is incredible. Ontario has the closest bargaining unit to the federal lawyer bargaining unit. A review of the Ontario bargaining unit in light of the nature of the work, the experience of the lawyers and the progression of the lawyers through the grid suggest that the CC3 classification (the "working level" in Ontario) is the comparable group for the LP-2s. Indeed, the Ontario government takes the position that the CC3 classification is equivalent to the LP-2 level (see letter of May 1, 2018 of AJC counsel) despite the statement at p.66 of the "TB" Brief that Ontario gave "TB" information that it had no job match to LP.2.

- the study concludes that Ontario pay rates should only be compared to LP Toronto, not to LP National rates.

In my view, the AJC study is far more reliable than the Treasury Board study in that it uses weighted averages and its job matching is more credible. Once again, to suggest that Ontario has no comparable group to the federal working level defies common sense in that each bargaining unit has a working level of lawyers. Moreover, to exclude the most populous province from any national average is problematic at best.

At Tab 8 of the AJC Reply Brief the following table is produced which compares the federal lawyers to the provincial weighted average:

Weighted Average Provincial Rates of Pay

LP Level	Provincial weighted average	$ Differential between LP and provincial weighted average	Increase to LP required to match provincial weighted average
LP-1	**$114,200**	**$15,264**	**15.43%**
LP-2	**$179,575**	**$41,709**	**30.25%**
LP-3	**$199,080**	**$46,467**	**30.60%**

This table clearly shows, that the federal lawyers are clearly behind the provincial weighted average although not at "the bottom of the heap".

In any event, apart from averages, an analysis of the salaries of each group demonstrates that the federal lawyers should get a reasonable economic adjustment. A review of Tab 8 of the AJC Reply Brief shows that the federal lawyers are significantly behind Ontario, British Columbia and Alberta. I do not refer to Quebec because of the uniqueness of its salary structure and system pointed out in argument. In oral argument AJC counsel advised that with a 15% economic adjustment and taking into account 1.25% annual increase proposed by the employer, the maximum federal national rate of $166,000 would still be $13,000 less than the provincial weighted average and $33,000

less than Ontario (the Toronto maximum rate would be $192,079). In light of the Employer's own policy that "compensation should be competitive, but not lead, the market", it clearly appears that an economic adjustment in the range of 15% is called for in these circumstances.

The final reason for dismissing the AJC position is the Chairperson's conclusion that the employer does not have a recruitment or retention problem. Even discounting the survey evidence as the Chairperson has done, this particular factor must be viewed in light of the employer acknowledgement that any market adjustment must be determined on the basis of whether there is "significant justification in the form of external or internal wage comparability disparity or significant recruitment and retention pressures" . (emphasis added) (see "TB" Brief at p.16).

The disparity between federal lawyers and their historical comparator, provincial and territorial lawyers across Canada, is sufficient to justify an economic adjustment in this round of bargaining. In any event, the gravity of the disparity would more than outweigh any recruitment/retention consideration.

Although recruitment/retention issues look at past experience in any event, there are unique circumstances to suggest that retention of federal lawyers may be a problem in the near future in light of the Supreme Court of Canada's decision in *Jordan and Cody* which will require criminal trials to start within fixed time periods. Several provincial governments have announced that they will have to hire additional prosecutors. In the past, when similar situations have occurred provincial prosecution services actively

recruit federal lawyers. This recruitment will be successful if their provincial counterparts make substantially more money than federal lawyers.

CONCLUSION

As stated above, the board must consider at least all of the 5 statutory criteria set out in p. 148 of the *PSLRA*. I would apply the criteria as follows:

(a) according to employer policy, recruitment/retention is not a disqualifying factor for an economic or market adjustment if there is an external wage comparability problem as I find exists on the evidence before us. In any event retention could be a real problem in the near future because of the impact of recent jurisprudence;

(b) the historical external comparator for federal lawyers is their provincial and territorial counterparts across Canada. The federal government general rule is that "compensation should be competitive, but not lead the market". On the evidence before us, an economic adjustment of 15% is fair and reasonable in light of the employer's general rule;

(c) in the past internal comparability has always played much less of a role than the external comparability referred to in (b) because of the unique nature of the legal profession;

(d) as suggested in (b), a 15% market adjustment is required in addition to the 1.25% annual economic increase proposed by the employer in light of the

legal qualifications required, the responsibility required and the nature of the legal services rendered;

(e) the uncontradicted evidence of the AJC is that there are no economic or fiscal reasons to deny the market adjustment of 15% requested by the AJC.

As the board is empowered to prioritize these statutory factors, I would suggest that (b), external comparability with provincial and territorial government lawyers across Canada, is the most important factor.

Finally, in terms of the replication principle, I am satisfied that under a free collective bargaining system that the lawyers would not settle without a fair and reasonable economic or market adjustment in light of the salaries of their counterparts across Canada.

2. **Hours of Work; Compensatory Management Leave; Excessive Hours**

I must also disagree with the Chairperson's decision on this issue to dismiss the AJC request on the basis that the lawyers are still benefiting from the exchange which was agreed to in the last round of bargaining to waive paid overtime for a 2% general salary rate increase, in addition to adopting compensatory leave provisions.

Although overtime was surrendered in the last round of bargaining, the 2% increase was not the whole bargain. A new provision (Article 13.02(e), (f) and (g)), granting "management leave" was part of the bargain to waive overtime. Unfortunately, this new provision has been applied in an unfair, unreasonable and inconsistent manner across

Canada. Some managers grant it, others do not. The Chairperson suggests that if there is a problem in the application of this new provision, the AJC can grieve the matter. The problem with this suggested solution is that the granting of management leave is discretionary whether it be at the behest of the delegated manager or the deputy head. Both parties recognize that there is a problem since the employer has drafted guidelines to assist managers in the exercise of their discretion in granting management leave in order to ensure fairness, transparency and consistency (see "TB" Brief at p.31).

In my view, when both parties agree that there is a problem with a collective agreement provision, it is best to resolve the problem in bargaining and/or arbitration. It seems clear that the AJC proposal is preferable in that it consists of language binding on both parties rather than a unilaterally drafted guideline. In conclusion, I would adopt the new Article 13.02 proposed by the AJC.

3 and 5. **Hours of Work:** travelling on weekends and statutory holidays, and including travel time in the notion of work.

The Chairperson has dismissed this AJC proposal for the same reasons he relied upon in issue #2. Once again, I disagree with the Chairperson for similar reasons. When the lawyer has to be away from family and home because of work she or he should be compensated for 7.5 hours of leave with pay for each day they are required to be away from home.

In regard to including duty-related travel time in the definition of working time under the collective agreement, I would accept the AJC proposal since every other collective

agreement in the federal public service recognize travel time as working time (AJC Brief at p.100).

4. Hours of Work: Standby Duty

I agree with the Chairperson's decision on this issue.

6. Performance Pay

I agree with the Chairperson's decision on this issue.

In conclusion, I find that a rigorous review of the relevant reference data demonstrates that the AJC study on salary is far superior to the "TB" study which is unreliable and defies common sense. Although the Chairperson suggests "that the truth is somewhere between to two studies", he accepts the employer proposal on salary in total. If the truth lies somewhere "in between", the employer should not benefit 100% particularly when it appears to have been the cause of the lack of "joinder of issue" between the parties on an appropriate salary increase. The employer relied on a study with significant methodological issues which was shared in an untimely manner. By accepting the employer's proposal on salary, the Chairperson has effectively relied on this very flawed study and disregarded a far more reliable study because he failed to rigorously review the adduced evidence.

DATED at Toronto this 30th day of July 2018.

Paul J.J. Cavalluzzo
AJC Nominee