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Public Service Labour Relations and Employment Board Act and *Public Service Labour Relations Act*

Before a panel of the Public Service Labour Relations and Employment Board

BETWEEN

JOHN HUTCHISON

Grievor

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as
Hutchison v. Treasury Board (Department of National Defence)

In the matter of an individual grievance referred to adjudication

Before: Augustus Richardson, a panel of the Public Service Labour Relations and Employment Board

For the Grievor: Raymond Larkin, QC/Jillian Houlihan, co-counsel

For the Employer: Sean Kelly, counsel

Heard at Halifax, Nova Scotia,
January 8, 2015.

I. Introduction

[1] Can a sleeping employee ever be considered to be “at work” and so entitled to be compensated? This is the question before me.

[2] The Federal Government Dockyard Trades and Labour Council (East) (the “Council”) is the bargaining agent for employees who are members of ten affiliate unions working at Fleet Maintenance Facility Cape Scott (“FMF-CS”) in Halifax, Nova Scotia. The grievor, John Hutchison, is a member of the bargaining unit represented by the Council. At all material times, the Department of National Defence (that is, the Treasury Board or “the employer") and the Council were parties to an agreement between them with an expiry date of December 31, 2011 (the “collective agreement”). The parties agreed that the collective agreement remained in effect for the purposes of this grievance.

[3] The grievor is an Electronic Technician employed at the employer’s Fleet Maintenance Facility-Cape Scott (“FMF-CS”) dockyard located in Halifax, Nova Scotia. On December 1 to 2, 2012 he was on board the HMCS *Toronto* during sea trials that were being conducted, first outside and then inside the Halifax harbour limits. During part of that time, the grievor was working performing various tests on electronic equipment on board the ship. During the rest of the time, he was off-duty, and spent the time talking, eating or reading. The ship began its return to Halifax harbour sometime during the early evening of December 1, 2012. The grievor went to bed while on board that evening. The ship crossed the harbour limits sometime around midnight, while the grievor was sleeping, and entered Bedford Basin to conduct some additional testing (which did not involve the grievor). The grievor was taken off the ship by a Rigid-Hulled Inflatable Boat (“RHIB”) sometime around 09:00 on Sunday, December 2, 2012, and returned to shore.

[4] The issue that then arose concerns the grievor’s entitlement, if any, to compensation for the period of time between one hour after the ship’s crossing of the harbour limits (sometime around midnight) and his return to shore around 09:00. The grievor’s position is that he is entitled to double time pay pursuant to the provisions of the collective agreement. The employer’s response, on the other hand, was twofold. Either the grievor was not entitled to compensation under the collective agreement on the facts in this case, or he was entitled to no more than regular pay. It accordingly

paid him at the regular hourly rate. The grievance before me seeks to determine whether the grievor or the employer was right.

[5] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the new Board") to replace the former Public Service Labour Relations Board ("the former Board") as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 396 of the *Economic Action Plan 2013 Act, No. 2*, an adjudicator seized of a grievance before November 1, 2014, continues to exercise the powers set out in the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s.2) as that *Act* read immediately before that day.

II. The hearing

[6] The Council called the grievor to testify. He was cross-examined. The employer called Chief Petty Officer James Pitt, who had been responsible for the organization of the tests to be conducted during the sea trials. He was cross-examined. As may be clear from the introduction, there really was no contest on the facts. There is no need then to clarify the testimony of either. I will simply set out the facts based on that testimony, as well as the few documents that were entered into evidence.

III. The facts

[7] The grievor works at the FMF-CS dockyard in Halifax, Nova Scotia as an electronics technician. His work involves corrective and preventative maintenance on the electrical systems of vessels. This work is usually carried out at the dockyard, or on vessels while berthed there. However, the testing of a vessel's electrical systems is sometimes such that it must be performed at sea away from the harbour limits. For example, it may be necessary to test a vessel's aircraft sighting and tracking equipment. Such tests cannot be carried on in Halifax harbour because of electrical interference. They are accordingly conducted during sea trials outside the harbour limits. During these sea trials, technicians like the grievor will travel on board the vessel while it sails to the testing site. During such sea trials a number of different tests may be carried out on various equipment. Once the work or tasks to which any

particular technicians were assigned are finished, their remaining time on board is their own: they may eat, play cards, watch movies, read or sleep while they await the vessel's return to port. If the vessel returns to berth, the technicians simply walk off. If the vessel remains in the harbour to conduct other tests the technicians who are no longer needed can be taken off the ship by an RHIB (Rigid-Hulled Inflatable Boat).

[8] The grievor's regular hours of work are from 07:45 to 16:15 Monday to Friday.

[9] In December 2012, the HMCS *Toronto* was scheduled for sea trials. The grievor was notified that he would be assigned to perform certain tests of certain equipment on board. He was notified that he had to be on board the vessel at 06:45 on the morning of Saturday, December 1, 2012. The vessel left the dock at 07:00. and sailed out of the harbour. Once on board, the grievor was assigned a cabin where he could store his personal items and where he could sleep. The expectation at the time was that the sea trials would take him away from port overnight. It took the ship a few hours to get to the location where the trials were to be conducted. During that time the grievor and the other technicians just sat around talking and waiting.

[10] The trials started that afternoon. The grievor's own work commenced at that time and was essentially finished by supper at 18:00. The grievor had no further duties at that point. He ate and then went to bed. (He had worked late that Friday, and was tired.) He was awoken at 07:00 on Sunday, December 2, to learn that the ship was conducting some tests in Bedford Basin (which is located in the upper reaches of Halifax harbour). He discovered that the ship had entered Halifax harbour (crossing the outer limits of the harbour) some time the previous night, he thought perhaps around 23:00. Chief Petty Officer James Pitt testified that to his recollection the ship entered the harbour limits around midnight.) The grievor also learned that around 01:00 or 01:30 that morning, another group of technicians had been taken by RHIB to the ship after it entered the harbour so that the additional tests could be carried out. The grievor had breakfast, and was then taken off the ship by RHIB around 09:00.

[11] I should note here that there was no contest that the grievor could have been taken off the ship by the RHIB that had brought the other workers to the ship earlier that morning. He was sleeping at the time. Nevertheless, he could have been woken up and asked whether he wanted to leave then or await the ship's return to berth later that morning. Chief Petty Officer James Pitt testified, and I accept, that his decision not

to wake the grievor to give him that option was based on his concern for the grievor's safety (believing correctly that he would be driving home very early in the morning). In saying this, I do not mean to say that there was any evidence of a real safety concern-only that Chief Petty Officer Pitt's decision was one taken in good faith.

IV. The collective agreement

[12] I set out here the relevant portions of the collective agreement.

[13] The first portions concern the definitions contained in Article 2 (Interpretation and Definitions). Clause 2.01 includes the following definitions:

> …
>
> *(k)* ***"harbour limits"*** *means an East-West line of 063 degrees (true) from York Redoubt through Maughers Beach on McNabbs Island. The area north of this line constitutes the Halifax harbour area and includes Bedford Basin;*
>
> …
>
> *(o)* ***"overtime"*** *means time worked by an employee outside of the employee's regularly scheduled hours;*
>
> …
>
> *(q)* ***"sea trials"*** *means trials conducted outside the harbour limits;*

[14] As noted above, the grievor's normal hours of work were from 07:45 to 16:15 hours, Monday to Friday under clauses 15.01(b)(ii) and 15.02(b).

[15] Clause 15.10(a) sets out the compensation rate for employees required to work on a day of rest (which, in this case, would have been Saturday and Sunday):

> ***15.10 Overtime Compensation***
>
> *Subject to clause 15.14, overtime shall be compensated at the following rates:*
>
> *(a) double (2) time for all hours worked in excess of eight (8) hours in a continuous period of work or in excess of eight (8) hours in a day to a maximum of sixteen (16) hours in a continuous period of work; and for all hours worked on a day of rest to a maximum of sixteen (16) hours...*

[16] Article 23 (Allowances) contains clause 23.04, on which much of the argument focused:

> ***23.04 Sea Duties Aboard Surface Vessels***
>
> *When an employee is required to go to sea (i.e. beyond the harbour limits) in a vessel for the purpose of conducting trials, repairing defects, dumping ammunition, etc., the employee shall be compensated, from the time he/she reports aboard until one (1) hour after reaching the harbour limits on the final return, as follows:*
>
> *(a) for the first twelve (12) hours aboard or less, at the applicable rate of pay;*
>
> *(b) for all hours aboard in excess of twelve (12) hours, at the applicable rate of pay for all hours worked and at the regular rate of pay for all unworked hours.*
>
> *For the purpose of this clause, an employee is considered to be working if he/she is actually performing or assisting in the performance of the duties of the job or has received specific instructions to remain available for work at the specific location where the work is being performed.*

V. Submissions of the parties

A. For the Council

[17] Counsel for the Council submitted that there were two issues that had to be addressed:

a. did clause 23.04 apply to an employee who was on board a surface vessel one hour after it had crossed the harbour limits, and

b. if not, was his or her time on board the vessel "time worked" within the meaning of the overtime provisions of clause 15.10(a).

[18] Counsel submitted that the answer to the first issue was "no," and to the second was "yes."

[19] With respect to the first issue, counsel noted that the facts were clear and uncontested. The HMCS *Toronto* had been on sea trials outside the harbour limits. While it was outside those limits, clause 23.04 applied. However, the ship had re-entered Halifax harbour and crossed the harbour limits around midnight on the

morning of Sunday, December 2, 2012. By its wording, clause 23.04 ceased to apply one hour after that point. Hence the period from about 01:00 that morning until about 09:00, when the grievor was returned to shore, could not be covered by clause 23.04. Compensation for that time, if payable, had to be found under another clause in the collective agreement.

[20] This brought counsel to the second issue. He submitted that the adjudicative jurisprudence was clear that "captive time"–that is, time during which an employee's time was not his or her own–could be considered "work" within the meaning of clause 15.10(a).

[21] Counsel referred to a long line of adjudicative and judicial decisions dealing with the issue of when an employee might considered to be "at work" or "working" even though not actually performing the tasks for which he or she was employed. In essence, when an employee is required to stand by ready to perform work, or is required to travel in order to perform a task, or is required to stay at the work site even though not working–such that their time can be considered to be "captive" by the employer–then they will be considered to be "working" within the meaning of the compensation provisions of a collective agreement. In making this submission, he referred to and relied upon the following decisions: *Duggan v. Treasury Board (Employment and Immigration),* PSSRB File No. 166-2-15033 (19850903); *O'Leary v. Treasury Board (Department of National Defence),* PSSRB File No. 166-2-15198 and 15199 (19950619), appeal dismissed in *Canada (Treasury Board) v. O'Leary,* [1987] F.C.J. No. 162 (C.A.); *Falconer v. Treasury Board (Department of National Defence),* PSSRB File No. 166-2-15281 and 15336 (19860619), appeal dismissed in *Canada (Treasury Board) v. Falconer,* [1987] F.C.J. No. 163 (F.C.A.); *Isnor v. Treasury Board (National Defence),* PSSRB File No. 166-2-16622 (19870909); *Apesland v. Treasury Board (Employment and Immigration Canada),* PSSRB File No. 166-2-15259 (19870727), appeal dismissed in *Apesland v. Canada (Treasury Board),* [1988] F.C.J. No. 451 (F.C.A.); *Paton v. Treasury Board (Fisheries and Oceans Canada),* PSSRB File No. 166-2-17754 (19890705), appeal allowed in *Canada (Attorney General) v. Paton* [1990] F.C.J. No. 25 (F.C.A.); *Boyd v. Treasury Board (Fisheries and Oceans Canada),* PSSRB File No. 166-2-18340 to 18344 (19891123); and *Martin v. Treasury Board (Environment Canada)*, PSSRB File No. 166-2-19004 (19891124).

[22] In the case before me, the grievor could be considered to be a captive of the employer for the time between one hour after the ship crossed the harbour limits and when he was let off onshore. It did not matter that, during much of that time, he was asleep or eating breakfast. His time was not his own. That being the case he ought to be considered to be "working" within the extended definition of work created by the "captive time" jurisprudence. Hence he was entitled to the overtime rate specified in clause 15.10(a), and should have been paid double time rather than at his normal rate.

[23] Counsel accordingly submitted that the grievance ought to be allowed.

B. <u>For the employer</u>

[24] Counsel for the employer commenced by agreeing that there was no contest on the facts. He agreed with counsel for the Council's characterization of the first issue-that is, whether clause 23.04 applied–but argued that the second issue was slightly different, and was this: does sleeping on a ship constitute "work" within the meaning of the collective agreement?

[25] Counsel submitted that clause 23.04 did apply, and that sleeping on board did not constitute work.

[26] Counsel for the employer submitted that the onus was on the bargaining agent to establish that there was a breach of the collective agreement: *Canadian Association of Professional Employees v. Treasury Board (Department of Human Resources and Skills Development),* 2013 PSLRB 100. He did agree, however, with my observation that questions of interpretation are not determined by onus, though once the correct interpretation is arrived at the burden of establishing a breach falls on the proponent.

[27] Counsel submitted that an entitlement to a monetary benefit or compensation must be clearly established: *Chafe et al. v. Treasury Board (Department of Fisheries and Oceans),* 2010 PSLRB 112 at paras. 50 and 51; *Wamboldt v. Canada Revenue Agency,* 2013 PSLRB 55 at paras. 25 to 27. He further submitted that clauses must be interpreted within the overall context of the agreement as a whole: *Chafe* at para 51. Moreover, a specific provision overrode a general provision. Hence the provisions of Article 15 (Hours of Work and Overtime), which were general in nature and designed (he said) for the usual or ordinary case, were supplanted by the specific provisions of clause 23.04. In this he meant that, since the grievor was at sea during a sea trial, the

parties must have intended that compensation for such events–when and how it was to be calculated–was to be dealt with under clause 23.04, not clause 15.04. (I note here that counsel did agree that, in normal course, it was likely that it would take a surface vessel about an hour to travel from the harbour limits to its berth at the dockyard.)

[28] Counsel also submitted that, as noted in *Isnor*, the earlier decisions involved collective agreements that only had regular and overtime compensation provisions. They did not have–and did not deal with–a collective agreement that contained a clause that dealt specifically with a situation where employees were "captive" on board a vessel. The parties in the case before me, on the other hand, had expressly dealt with that specific situation–and so must be taken as having agreed that clause 23.04 would apply–and would apply so as to replace or oust the "captive time" jurisprudence.

[29] Counsel further submitted that the fact that compensation under clause 23.04 ceased one hour after the ship crossed the harbour limits did not mean that the clause ceased to apply at that point. Rather, it simply set the outside limit for compensation while on a sea trial. Counsel submitted that, in fact, the employer had not actually been obligated to pay the grievor anything one hour after the ship crossed the harbour limits–and that it had done so only for good labour relations.

[30] Counsel then turned to what he termed his alternative submission. Sleeping on board could not be considered "work" within the meaning of clause 15.10. For the same reason, it could not be considered "overtime" as defined in the collective agreement, because it was not "time worked."

[31] Counsel for the employer did not take issue with the general history of the concept of "captive time" as outlined in the decisions referred to by counsel for the Council. He submitted, however, that that jurisprudence was outdated and had been superseded (or perhaps refined) by the more recent decisions in *Martin v. Canada (Treasury Board)*, [1990] F.C.J. No. 939 (C.A.); *Lecours v. Treasury Board (Transport Canada),* 2002 PSSRB 28; and *BC Ferry Services Inc. v. British Columbia Ferry and Marine Workers' Union (Captive Time on Northern Vessels Grievance)* [2007] B.C.C.A.A.A. No. 188. He submitted that in all these cases–and in the Federal Court of Appeal's decision in *Paton*–an attempt to apply the extended definition of work to employees on board ships who were not actually working had failed. It would further be absurd, he submitted, to end up with a situation where employees were paid

straight time (under clause 23.04) while at sea (but not working), but were paid double time once they crossed the harbour limits (while still not working).

[32] Counsel for the employer accordingly submitted that the grievance ought to be dismissed.

C. Reply on behalf of the Council

[33] In reply, counsel for the Council submitted that clause 23.04 was not a comprehensive code that excluded all other provisions. It rather applied according to its terms. Once those terms ceased to apply clause 23.04 ceased to have any application. The question of compensation for an employee's time outside of the limits specified in clause 23.04 thus had to be determined in accordance with the general compensation provisions. He further submitted that if counsel for the employer's submission on this point were correct, then an employee could be held on ship for hours without any compensation at all–and that, he submitted, would be absurd.

[34] Counsel for the Council submitted that the more recent decisions relied upon by the employer were cases where the wording or the facts in issue were different. So, for example, in *Lecours,* the operative provision dealt with compensation for hours "actually worked." The adjudicator in that case not surprisingly concluded that "captive time cannot constitute actual hours worked", at para 39; see also the Federal Court of Appeal's decision in *Paton*. The decision in *Martin* was based on a conclusion that the time in question (back country patrols by park wardens) was part of the job description and so could not be considered captive time. Similarly, the *BC Ferry* case was different because it involved the crew of a ship, rather than employees taken on board to perform particular tasks.

D. Supplementary submissions

[35] Following the hearing, I commenced my review of the authorities cited by counsel. While doing so, I noted that, in the Federal Court of Appeal's decision in *Paton,* there was some criticism of an adjudicator's failure to pay close heed to a clause in the collective agreement that dealt with travel time. I also noted that the collective agreement before me also contained a travel clause: Article 17 (Travelling). In particular, clause 17.03 dealt with compensation rates for employees who were

"required by the employer to travel to a point away from the employee's normal place of work ..."

[36] No reference to Article 17 had been made by either counsel in their oral submissions to me at the hearing. I accordingly asked them for written submissions as to whether Article 17 had any application to the facts of this case.

[37] In written submissions dated January 23, 2015, counsel for the employer submitted that Article 17 (and in particular clause 17.03) did not apply because, on the facts, the vessel was the grievor's normal place of work, and because the parties had negotiated clause 23.04 to deal specifically with an employee required to go on a sea trial. He further submitted that, in any event, the issue had never been raised during the grievance process, or during oral submissions, and accordingly could not be dealt with now: *Burchill v. Attorney General of Canada,* [1981] 1 F.C. 109 (C.A.); *Grierson-Heffernan v. Treasury Board (Canada Border Services Agency),* 2013 PSLRB 30.

[38] In written submissions dated January 23, 2015, counsel for the Council noted that the issue had not been raised at the hearing and that accordingly he had not had a chance to introduce evidence on the point. He went on to submit that clause 17.03 did not apply because, on the facts, the grievor was not "travelling" in the sense contemplated by clause 17.03. Employees working on a vessel in the Bedford Basin would not, he suggested, be paid under the travel clause for transfer back and forth to the dockyards. Counsel went on to submit that, if I determined that clause 17.03 did apply, then compensation could be found payable under a number of its provisions.

[39] Having reviewed these submissions I concluded that it would not be appropriate for me to consider whether clause 17.03 applied. The primary reason is that submitted by counsel for the employer–it was never raised during the grievance process: *Burchill*. I was also persuaded, however, by counsel for the Council's point that the failure to raise the point earlier meant that he had not been able to introduce any evidence on the point. I accordingly decided to base my decision solely on the evidence and submissions introduced at the hearing.

VI. Analysis and decision

[40] The issue before me is this: how is an employee whose pay is calculated on the basis of hours worked compensated for travel to or from the place where he or she performs the actual work for which they are normally compensated? Insofar as is relevant to the facts before me, the following would appear to be the jurisprudence.

A. The general rule–work and captive work

[41] As a general rule, the time taken by an employee to travel to and from his or her normal place of operation is not compensated, subject to any provision to the contrary in a collective agreement. It is not considered to be "work" or "time at work" within the meaning of those words as used in a collective agreement, at least with respect to the issue of compensation: see for example, *Grégoire et al. v. Canadian Food Inspection Agency*, 2009 PSLRB 146; *Stafford v. Canadian Food Inspection Agency*, 2011 PSLRB 123.

[42] There are basically three exceptions to this general rule. These are situations in which the concept of work has been extended to cover time during which an employee is not actively performing his or her normal work duties.

[43] The first exception applies where travel is a necessary incident of the specific task required by the employer to be performed (as, for example, in transporting a deportee to the country to which he or she is being deported). In such cases both adjudicators and the courts have held that the travel time necessary to accomplish that specific task, as well as the return journey and any wait time prior to commencing the return will be considered work and compensated as such: see for example, *Duggan* and *Apesland.*

[44] A second exception arises when an employee is required to standby ready and fit to perform a required task. Such employees can be considered to be at work even though the timing of the task to be done is not known, and even though the employee is otherwise free to do what he or she wants until such time as the task has to be performed (so long as they remain fit and ready to do the task): *Isnor*. As the adjudicator concluded in that case, "the expression 'hours worked' in clause 23.04(b) [of the collective agreement] is not restricted to the actual mental and physical work,

but also includes the 'waiting period' during which an employee must be available, ready and fit to work": p. 6.

[45] The third exception applies where the nature of the work requires the employee to spend extended periods of time away from his or her normal place of work. An example is the case where a maintenance person is assigned to a ship for the purpose of conducting tests or repairs of the vessel at sea. The specific task in question may only require a few hours of the employee's time, but the task itself has to be carried out at sea. Hence, in order to get to and from the place where the work is to be conducted, the employee must spend many more hours on board. In such cases, adjudicators have considered the employees to be "captives" of their employer, in the sense that their free time is no longer strictly speaking their own: see for example, *Falconer* which decision was affirmed by the Federal Court of Appeal; *O'Leary* which decision was affirmed, again by the Federal Court of Appeal. As noted by the adjudicator in *O'Leary*: "… at the end of the workday, the grievors were not able to leave the work site and occupy themselves in a manner of their own choice": p. 9. That being the case, they were "at work" and hence entitled to compensation under the applicable provisions of the collective agreement.

[46] Another example of this exception may be found in *Boyd*. The grievors in that case were members of the crew of CSS *Hudson*. Under clause 23.03 of the relevant collective agreement, members of a ship's crew were required to report on board one hour prior to the time of sailing. Clause 23.04 then provided that, while the ship was in home port, an employee who had reported on board was entitled to compensation at the greater of (a) the applicable rate "for any work performed on that day" or (b) one hour's pay at the straight time rate. On the day in question, the grievors reported on board at the specified time, but the ship did not (because of engine problems) leave port for almost 27 hours. The grievors were however required to remain on board, even though they were in home port and even though there was nothing for them to do pending the repair of the ship's engines.

[47] The grievors claimed compensation under clause 23.04(a) for the idle time prior to departure on the grounds that they had been required to remain on board and hence were in effect at work. The employer on the other hand argued that, since they had not performed any work, they were entitled only to compensation under 23.04(b).

[48] The adjudicator did not accept the employer's argument. He noted that there was a clear distinction between time spent on a vessel at sea, and when in home port. In the former case, "the vessel is in effect the crew's home, that is part of their normal environment; the concept of 'sea watches' reinforces the notion that for ships crews who are at sea a distinction is to be made between 'down-time' on the vessel and time spent performing various assigned tasks, with the latter attracting pay while the former does not": p. 8.

[49] Different considerations applied when the vessel was in home port, a fact recognized in his opinion by clause 23.04:

> *The reason for this is fairly obvious; in the latter circumstances the crew can be required to spend their 'down-time' on board, or be permitted to leave the vessel and spend their time where they choose. It is entirely logical, and indeed only fair, that if the ship's officers require the crew to stay on board in the circumstances envisaged in clause 23.04, then the time on board must be considered as time worked and the employees must be paid accordingly.* (p. 8)

[50] He accordingly allowed the grievance.

[51] By way of summary then, one may say then that, in the case of hourly paid employees, the definition of "work" in a collective agreement is not necessarily limited to that time during which an employee performs the tasks for which he or she has been employed. In the appropriate situation (subject to anything to the contrary in the collective agreement), it may be extended to include non-work time that is nevertheless no longer truly the employee's own, whether because they must travel away from their base of normal operations in order to perform the task, or because their freedom of action is restricted or limited by the employer for its own purposes in some way: see the Federal Court of Appeal decision in *Paton*.

B. <u>Response to the extended definition of work</u>

[52] This extended definition of compensable work raises obvious concerns for employers such as the DND whose operations sometimes require employees to spend large parts of their non-work time at sea while on sea trials. The problem may not be so acute with salaried employees (such as members of the Armed Forces), but the existing jurisprudence could create significant expenses in the case of hourly paid employees.

[53] One obvious way around this problem is to establish express limits–or definitions–of when or how such "non-work" time is to be compensated, if at all. However, at least in the case of unionized work, such limits must be found in the collective agreement itself.

[54] So, for example, *Martin* involved a Park Warden serving in Banff National Park. Park Wardens worked a cycle of 14 days, 9 days on and 5 days off. The collective agreement in question had separate regular and overtime compensation provisions for "work." Wardens were compensated at the regular rate for up to an average of 75 hours over a two-week period, and at an overtime rate of time-and-a-half or double time for all other hours worked (depending on the nature of the overtime or when it was worked).

[55] Park Wardens worked either in the "front country" or the "back country." Front country work involved normal duties performed in those parts of the park readily accessible by car, which meant that the warden could travel between home and work each day. Back country work, on the other hand, involved patrolling remote areas of the park accessible only by horseback. These back country patrols were generally performed over nine days. Wardens traveled by horseback deep into the back country, camping overnight or staying in one of a few cabins maintained by the employer in the park. Long distances would be covered each day. The wardens were expected to enforce the laws and regulations related to the park during their patrols. They spent much of their days and nights alone. Their evenings were spent reading, playing cards or sleeping.

[56] The sense of isolation and loneliness of back country patrols had led the wardens to attempt to persuade the employer during collective bargaining to provide an allowance for such work. The employer refused, being of the view that it had not been an issue in the past. The grievor, who had been part of those negotiations, then decided to obtain such compensation under the existing collective agreement. He filed a grievance alleging that being in the back country amounted to being "captive" in the same way that the grievors had been in *Falconer* and *O'Leary*.

[57] The adjudicator did not accept this argument. He noted that the overtime provisions in the collective agreement were applicable to all wardens. He then reasoned that, had the parties understood that back country patrols were comprised of

24-hour work days, there would have been no need to differentiate between regular and overtime pay rates for wardens. That being the case, the only way the overtime provisions could apply to wardens while on back country patrol would be if it was assumed by the parties that, in normal course, wardens in the back country were not "working" while on patrol. As he noted at p. 9, "… it would make no sense to provide for overtime ('work outside scheduled hours') if all scheduled hours spent on 'back country' patrol were to be considered as work to begin with." Moreover, it would have been a simple matter to make such an intent clear by stating expressly that, while on back country patrol, wardens would be considered as being continuously paid. No such wording appeared. The grievance was dismissed.

[58] In *Paton,* an employee of the Department of Fisheries and Oceans was required to spend time on board the CSS Tully to perform certain tasks. The collective agreement contained compensation provisions dealing with regular time, overtime and travelling time. The grievor claimed that he was at work the entire time he was on board. The adjudicator, applying the "captive time" extension, agreed.

[59] On appeal, the Federal Court of Appeal reversed the decision. It noted that the adjudicator had failed to apply clause M-28.05 of the collective agreement, which had expressly dealt with circumstances where an employee was required to travel "by any type of transport in which he [the employee] is required to perform work and/or which serves as his living quarters" (emphasis added). Under that clause, an employee was to be paid the greater of his or her regular pay for a normal working day, or "pay for actual hours worked." The Federal Court of Appeal held that the use of the word "actual" in the clause "was intended to convey the meaning that described work in the normal sense of doing or engaging in the specific performance of duties." As it went on: "The clause's reference to living quarters implies that if an employee is within the terms of clause 28.05 then only the time spent actually working will count for payment and that so-called 'captive time' on the ship is not to be treated as actual hours worked."

[60] That being the case, the captive time rule had been expressly ousted by the collective agreement, and the compensation provisions of M-28.05, rather than the regular pay provisions, applied.

[61] Historically, the employer in the case before me appears initially to have attempted to deal with the issue by way of Base Standing Orders ("BSO"). In *Falconer,* reference is made to the existence of a BSO for employees while at sea performing sea trials. The BSO created special compensation rules for time spent at sea while not actually working: see the discussion in *Falconer*. The difficulty (a difficulty made clear in *Falconer*) was that the BSO was not part of the applicable collective agreement, and so could not displace the meaning–ordinary or extended–of "work" in the collective agreement. As a result the captive time extension was found to be applicable in that case.

[62] The response of the parties would appear to have been the negotiation of what became clause 23.04 in the collective agreement with which we are concerned. (I note in this regard that the wording of clause 23.04 mirrors to some degree–though is not identical to–the BSO referenced in the 1986 decision of *Falconer*.) I now turn to consider clause 23.04 within the context of the collective agreement as a whole and the arbitral and judicial jurisprudence already discussed.

C. <u>Clause 23.04</u>

[63] Based on the decisions already discussed, I think it is clear that, in the absence of clause 23.04, the grievor would have been entitled to compensation at the regular or applicable rate under the collective agreement. The grievor's time on board the ship while it sailed to and from the place where the sea trials were to be conducted was not his own. His time was captive to the operations of the employer. Hence on the authorities already discussed–such as *Falconer* and *O'Leary*–he would have been entitled to be considered to be at work–and compensated as such–under the collective agreement.

[64] The parties agreed however that during sea trials an employee in the grievor's position would be compensated on different grounds. He or she would be compensated pursuant to clause 23.04 "from the time he/she reports aboard until one (1) hour after reaching the harbour limits on the final return."

[65] Clause 23.04 says nothing about the time spent aboard after the one hour limit. That omission may be a result of an understanding on the part of the parties that, in normal course, a ship returning from sea trials would be at the dock one hour after crossing the harbour limits. Whatever the reason, clause 23.04 on its face ceases to

have any effect one hour after the ship crosses the harbour limits. That being the case, an employee in the grievor's position must return to his or her regular or applicable rates of pay under the collective agreement. And in the case before me, that would be the double time rates payable under clause 15.10(a) for work on a day of rest (subject to a deduction for anything already paid to him for that time).

[66] I appreciate that the grievor was not actually working between roughly midnight when the ship crossed the harbour limits and roughly 9:00 a.m. when it docked–he was sleeping. But the captive time jurisprudence–which the employer must be taken to have been aware of–is clear. What matters is not what the employee was or was not doing during that time, even if they did exactly what they would have done had their time been their own. What matters instead is that their time is trapped within the employer's scope of operation. It is enough that they are captive.

[67] The alternative result–that the employer had no obligation to compensate an employee for time aboard a ship one hour after it crossed the harbour limits–cannot be the correct result. The time of hourly-paid employees has value. Its use–or the restriction of its use–comes at a cost to the employer–a cost spelled out in the collective agreement. To rule otherwise would mean, in effect, that the employer could have kept the grievor on board until it suited the employer's purposes to let him or her off the ship without compensating the employee for that time. The parties could have negotiated such a result. But no such clause appears in the collective agreement before me.

[68] I should also say that the result would have been different had the grievor been woken up at 1:00 a.m. and offered the option of being RHIB'ed off the ship. Had he chosen in that event to remain in bed he would no longer have fit within the captive time exception; his time would then have been his own and he would not have been entitled to compensation: see for example, *Lecours* at para 39.

[69] One final note. The witnesses were, understandably, a little unclear as to the exact times of the ship's crossing of the Halifax harbour limits on the morning of December 2, 2012, and of its subsequent docking. This is not surprising given that the focus of their dispute was on the issue of whether or how the captive time jurisprudence meshed with clause 23.04. I accordingly think it appropriate in the circumstances for me to retain jurisdiction with respect to the calculation of the

amounts owing to the grievor, since the determination depends essentially on information most likely best available to the employer.

[70] For these reasons, I accordingly make the following order:

(The Order appears on the next page)

VII. Order

[71] The grievance is allowed, and the grievor is to be paid double time pursuant to clause 15.10(a) for the time aboard HMCS *Toronto* for the period between one hour after it crossed the Halifax harbour limits the morning of Sunday, December 2, 2012 and its docking, subject to a deduction of any lesser amounts paid to the grievor by the employer for that time period.

[72] I will remain seized of the issue of the amount to be paid for 30 days following the release of this decision in the event the parties are not able to reach agreement as to what the final amount should be.

April 7, 2015.

Augustus Richardson,
a panel of the Public Service Labour Relations and Employment Board