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File: 569-02-144

Citation: 2015 PSLREB 78

Public Service Labour Relations Act Before an adjudicator

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: John G. Jaworski, adjudicator

For the Bargaining Agent: Craig J. Stehr, counsel

For the Employer: Sean F. Kelly, counsel

Heard at Ottawa, Ontario,
September 2, 2014.

I. Policy grievance referred to adjudication

[1] On October 10, 2013, the grievor, the Association of Justice Counsel ("the AJC"), filed a policy grievance under subsection 220(1) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22 ("the *PSLRA*"). The grievance alleges that the employer has violated clauses 15.03, 19.03(g), 19.06(g) and Appendix "A" of the collective agreement entered into between the grievor and the employer for the Law Group (All Lawyers) dated March 12, 2013 and expiring May 9, 2014 ("the current collective agreement"). The grievance, more specifically, states as follows:

> 1. *On September 18th, 2013, the Association of Justice Counsel (the "AJC") was notified by John Pombert, DOJ compensation advisor, that individuals on maternity or parental leave without pay who are now on a lockstep pay system since May 10th, 2013, following the coming into force of the new collective agreement, were not eligible for a pay increment if they received an "Unable to assess" performance evaluation due to their absence from work.*
>
> 2. *Prior to May 10th, 2013, members on maternity or parental leave found their performance pay prorated in accordance with the length of time actually worked during the year where such an evaluation could be performed.*
>
> 3. *Since May 10th, 2013, the LPs' rates of pay are now governed by a lockstep system comprised of "increments"*
>
> 4. *Members on maternity and parental leave should, according to the rationale provided in the* Association of Justice Counsel v. Treasury Board *decision [2012 PSLRB 32] and articles 19.03(g), 19.06(g), therefore be entitled to a pay increment unless they receive an "unsatisfactory" evaluation.*

[2] The grievor requested as relief that all departments comply with clauses 15.03, 19.03(g), 19.06(g) and Appendix "A" of the current collective agreement; that there be pay adjustments for all lawyer practitioners who were on maternity or parental leave who met the eligibility requirements for the May 10, 2013 incremental increase; and any other relief that is deemed just in the circumstances.

[3] 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 Board") to replace the

former Public Service Labour Relations Board ("the PSLRB") 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.

[4] At the outset of the hearing, an issue was raised with respect to the admissibility of extrinsic evidence.

[5] No witnesses were called.

[6] The parties filed an agreed statement of facts (ASF).

II. Admissibility of Extrinsic Evidence

[7] Attached to the ASF are four documents identified as Exhibits 1 through 4. Only Exhibit 1, being the collective agreement between the employer and the AJC for the Law Group (All Lawyers) dated July 27, 2010 and expiring May 9, 2011("the expired collective agreement"), was agreed to between the parties. The other three exhibits were submitted by the parties as a matter of expediency with the understanding that their admittance into evidence would be argued at the outset of the hearing and that I reserve on that issue and hear their submissions on the grievance and deal with both issues in my decision.

[8] Exhibit 2 was submitted by the AJC, and Exhibits 3 and 4 were submitted by the employer. Exhibit 2 to the ASF is a document entitled "AJC Collective Agreement FAQ, posted on June 17, 2012 with subsequent updates on August 1, September 14, 2012, March 18, and April 10, 2013." Exhibit 3 is a document entitled "AJC Announcement, *AJC Pulls out of Performance Management Consultations with Treasury Board*, November 27, 2013", and Exhibit 4 is a document entitled "AJC Submissions, Reference File 585-02-25."

[9] It was the employer's position that Exhibits 3 and 4 should be accepted for context, and it was the AJC's position that they should not. The AJC further submitted

that in the event that Exhibits 3 and 4 were accepted into evidence, then Exhibit 2 should also be admitted.

A. <u>For the grievor</u>

[10] The position of the AJC is that the language as set out in the collective agreements is clear and unambiguous.

[11] Paragraph 3:4400 of *Canadian Labour Arbitration,* 4th edition, by Donald Brown and David Beatty ("Brown and Beatty"), sets out the general rule with respect to the use of extrinsic evidence when a tribunal is tasked with interpreting a written agreement. The general rule is that extrinsic evidence is not admissible to contradict, vary, add to or subtract from the terms of an agreement reduced to writing. If the written agreement is ambiguous, however, such evidence is admissible as an aid to the interpretation of the agreement to explain the ambiguity but not to vary the terms of the agreement. The two most common forms of such evidence in labour arbitrations are the negotiating history of the parties leading up to the making of a collective agreement and their practices before and after the making of the agreement.

[12] In *DHL Express (Canada) Ltd., v. National Aerospace, Transportation and General Workers of Canada (CAW Canada) Locals 4215, 144 and 4278*, 2004 CarswellNat 2975 (paragraph 51), the arbitrator states as follows:

. . .

> *The predominant reference point for an arbitrator must be the language in the Agreement . . . because it is primarily from the written word that the common intention of the parties is to be ascertained. Language is to be construed in accordance with its ordinary and plain meaning, unless adopting this approach would lead to an absurdity or repugnancy, but in these latter situations, arbitrators will interpret the words used in a manner so as to avoid such results. However, it must be remembered that these particular principles of interpretation are to be used in the context of the* written *Agreement itself. It is also well recognized that a counter-balancing principle is that anomalies or ill-considered results are not sufficient to cause the alteration of the plain meaning of words. Neither is the fact that one interpretation of the Agreement may result in a (perceived) hardship to one party.*

. . .

[13] At paragraph 52 of *DHL Express*, the arbitrator went on to state as follows:

> . . .
>
> *It is well accepted that 'arguability as to different constructions', standing alone, does not create an ambiguity, allowing the introduction of extrinsic evidence.*
>
> . . .
>
> *When ascertaining the* common intention of the parties *objective tests must be used and '. . . not what the parties,* post contractu*, may wish to say was their intent albeit with honesty and sincerity...'*

[14] In *Professional Institute of the Public Service of Canada v. National Research Council*, 2013 PSLRB 88, the adjudicator states as follows (at paragraph 78):

> . . .
>
> *It is well-recognized that extrinsic evidence may be used to aid in the interpretation of a collective agreement where such evidence indicates a clear mutual intention of the parties.*
>
> . . .

[15] The document found at Exhibit 3 does not disclose a mutual intent. This document is merely a statement of the AJCs position regarding the performance management consultations and initiatives that were ongoing at the time and being discussed. All this document does is state that the AJC felt that the employer's position was in conflict with the expired collective agreement and therefore they were pulling out of the discussions. There is no mutual intention disclosed in the document.

[16] There is no dispute about the performance management regime, as it is set out in the current collective agreement. The dispute is the "reach" of the performance management regime to those lawyers on maternity leave or paternal leave.

[17] The document found at Exhibit 4 is a portion of the submissions of the AJC during the interest arbitration that led to the first collective agreement between the AJC and employer. There is no question as to its authenticity; the question is whether it is relevant. The proposal contained in the submissions deals with the inclusion of a performance management plan in the initial collective agreement. This was a document that was put forward during interest arbitration that set forth a proposal at

that time. Prior to the interest arbitration, there was not a collective agreement that existed between the parties. On the second page of Exhibit 4 is a reference to "Performance Pay Plans" and also a reference in several places to subparagraph 34(1)(*a*)(iii) of the *Expenditure Restraint Act*. It is apparent that the document included does nothing more than document legislative compliance.

B. For the employer

[18] It is the submission of the employer that when the language in the collective agreement is clear, extrinsic evidence will not be accepted.

[19] Exhibits 3 and 4 to the ASF provide context for understanding the position of the employer. This is supported in *Union of Canadian Correctional Officers - Syndicat des Agents Correctionnels du Canada - CSN v. Treasury Board*, 2010 PSLRB 85, at paragraph 51.

[20] The purpose of providing Exhibits 3 and 4 is to show that the addition of the "Performance Management Program" in the current collective agreement was an AJC proposal.

C. Reasons

[21] As set out in *DHL Express Ltd.*, the predominant reference point for an arbitrator or adjudicator must be the language in the agreement because it is primarily from the written word that the common intention of the parties is to be ascertained. Language is to be construed in accordance with its ordinary and plain meaning, unless adopting this approach would lead to an absurdity or repugnancy, but in these latter situations, arbitrators and adjudicators will interpret the words used in a manner so as to avoid such results. However, it must be remembered that these particular principles of interpretation are to be used in the context of the written agreement itself. It is also well recognized that a counterbalancing principle is that anomalies or ill-considered results are not sufficient to cause the alteration of the plain meaning of words. Neither is the fact that one interpretation of the agreement may result in a (perceived) hardship to one party. It is well accepted that an "arguability as to different constructions", standing alone, does not create an ambiguity, allowing the introduction of extrinsic evidence. When ascertaining the common intention of the parties, objective

tests must be used and not what the parties, *post contractu*, may wish to say was their intent, albeit with honesty and sincerity.

[22] As set out at paragraph 3:4400 of Brown and Beatty, parol or extrinsic evidence, in the form of either oral testimony or documents, is evidence that lies outside, or is separate from, the written document subject to interpretation and application by an adjudicative body. The general rule at common law is that extrinsic evidence is not admissible to contradict, vary, add to or subtract from the terms of an agreement reduced to writing. An exception to this rule is if the written agreement is ambiguous; however, such evidence is admissible as an aid to the interpretation of the agreement to explain the ambiguity but not to vary the terms of the agreement. The most common forms of extrinsic evidence in labour cases are the negotiating history of the parties leading up to the making of a collective agreement and the practices before and after the making of the agreement.

[23] The employer has requested that I accept into evidence two documents found in the ASF and identified as follows:

1. Exhibit 3: AJC Announcement dated November 27, 2013 entitled "*AJC Pulls out of Performance Management Consultations with Treasury Board*".

2. Exhibit 4: AJC Submissions, Reference File 585-02-25.

[24] The employer submitted that these documents give context to issues in the grievance. I disagree. Neither of these documents sheds any light on the negotiations with respect to the issues before me. They do not satisfy the accepted tests for the admission of extrinsic evidence and as such shall not be admitted into evidence.

[25] The grievor had submitted that if I accept these employer submitted documents into evidence, I accept the four-page document found at Exhibit 2 of the ASF and being identified as "AJC Collective Agreement FAQ, posted on June 17, 2012 with subsequent updates on August 1, September 14, 2012, March 18, and April 10, 2013." As I shall not admit into evidence nor consider the documents marked as Exhibits 3 and 4 to the ASF, I shall not accept Exhibit 2 to the ASF.

III. Summary of the evidence

[26] The parties agree that the issue in the grievance concerns whether lawyers at the LP-00, LP-01, LP-02 and LP-03 groups and levels (previously the LA-DEV, LA-1, LA-2A and LA-2B group and levels) ("the lawyer(s)") who receive a performance rating of "Unable to Assess" as a result of being on maternity and/or parental leave are entitled to receive their respective lock step pay increment for that year. There is no dispute regarding eligibility for those who receive "Unsatisfactory" ratings.

[27] Prior to May 10, 2013, including the time frame before the certification of the AJC as the bargaining agent for the Law Group in 2006, the employer had a regime of increasing a lawyer's salary following a positive performance assessment. A lawyer who received a performance assessment of "Unsatisfactory/Did Not Meet" or "Unable to Assess" did not receive an increase. However, a lawyer who was absent from work for a portion of the year as a result of taking maternity and/or paternal leave but had a sufficient period of work for assessment and performed satisfactorily was eligible to receive an in-range increase, pro-rated to reflect the months in the workplace.

[28] On October 23, 2009, an arbitration board chaired by Michael Bendel included a performance plan in the expired collective agreement (PSLRB File No. 585-02-25).

[29] Article 15 of the current collective agreement is entitled "Pay Administration." Clause 15.02 provides that a lawyer is entitled to be paid at the rate of pay specified in Appendix "A" for the classification of the position to which he or she is appointed, if the classification coincides with that prescribed in his or her certificate of appointment, or at the rate of pay specified in Appendix "A" for the classification of the position prescribed in his or her certificate of appointment, if that classification and the classification of the position to which he or she is appointed do not coincide.

[30] Clause 15.03 of the current collective agreement provides for the rates of pay, which are set out in Appendix "A" of the collective agreement and are effective on the dates specified in Appendix "A".

[31] At Appendix "A" of the current collective agreement, under the section entitled "Pay Notes" and under the further subsection entitled "Conversion to Lock Step", is the following clause:

> *(5) Effective May 10, 2013, lawyers at the LA-DEV, LA-1, LA-2A and LA-2B levels (either National or Toronto rates) shall be paid at a rate of pay on the "Y" line that is closest to but not less than the rate at which the lawyer was paid on the "C" range.*

[32] At Appendix "A" of the current collective agreement, under the section entitled "Pay Notes" and under the further subsection entitled "In-Range Pay Movement", are the following clauses:

> *(8) Prior to May 10, 2013, in-range pay movement for lawyers at all levels other than LA-DEV will be governed by the relevant performance pay regimes.*
>
> *(9) After May 10, 2013, in-range pay movement for lawyers at the LA-3A and LA-3B levels will continue to be governed by the performance pay regime at Appendix "C".*

[33] At Appendix "A" of the current collective agreement, under the section entitled "Pay Notes" and under the further subsection entitled "Lock Step Pay Range for LA-DEV, LA-1, LA-2A and LA-2B", are the following clauses:

> *(10) Effective May 10, 2013, pay increments for lawyers at the LA-DEV, LA-1, LA-2A and LA-2B levels will be to the next higher rate on the applicable lock step pay range that comes into effect on May 10, 2013.*
>
> *(11) A lawyer whose performance is assessed as "Unsatisfactory" is not eligible for a pay increment.*

[34] At Appendix "A" of the current collective agreement, under the section entitled "Pay Notes" and under the further subsection entitled "Pay Increment Administration for LA-DEV, LA-1, LA-2A and LA-2B", are the following clauses:

> *(12) Lawyers at the LA-DEV, LA-1, LA-2A and LA-2B levels who would have been eligible for an in-range increase effective April 1, 2013 under the former performance pay regime will instead receive a pay increment on May 10, 2013, immediately following the pay action associated with the conversion to lock step as set out above in clause 5 of Pay Adjustment Administration.*
>
> *(13) The pay increment period is twelve (12) months for lawyers at the LA-DEV, LA-2A and LA-2B levels and six (6) months for lawyers paid on the LA-1 scale.*
>
> *(14) A lawyer who was appointed to his or her position prior to March 31, 2013 but was not employed for a*

> *sufficient period to permit an assessment of his or her performance by March 31, 2013, shall receive an increment on the anniversary date of his or her appointment, or, in the case of a lawyers* [*sic*] *at the LA-1 level, six (6) months from his or her appointment.*

[35] Both the current collective agreement and the expired collective agreement contained an Appendix B. In both collective agreements, the heading of Appendix B is "Performance Pay Plan for Lawyers at the LA-1, LA-2A and LA-2B Levels". Both have a Part 1 and Part 2. In the expired collective agreement, Part 2 of Appendix B has the heading "Performance Pay Administration Plan for Certain Non-Management Category Senior Excluded Levels". Part 2 of Appendix B of the current collective agreement has the heading "Performance Pay Administration Plan for LA-1, LA-2A and LA-2B Levels", albeit in a different font and size than in the expired collective agreement.

[36] Prior to May 10, 2013, lawyers at the LA-1, LA-2A and LA-2B levels received annual increases based on a performance pay regime. Clause 15.06 of the current collective agreement states that the "Performance Pay Plan" for lawyers at the LA-1, LA-2A and LA-2B levels is set out in Appendix "B". Under this "Performance Pay Plan", lawyers were assessed on their performance and could receive one of the following four evaluations: Exceeds; Fully Meets; Unsatisfactory; and Unable to Assess. If a lawyer received either an Exceeds or Fully Meets, they would, respectively, receive a 7% and 4.6% increase. If a lawyer received either an Unsatisfactory or Unable to Assess, they would receive no increase.

[37] The expired collective agreement also contained a clause 15.06, which was worded identically to the one in the current collective agreement except for the addition of the wording "Effective November 1, 2009".

[38] "In-range increase" is defined in clause 2.2 of Part 2 of Appendix B of both the current collective agreement and the expired collective agreement in the exact same manner and states as follows:

> ***2.2 "In-range increase"*** *(*augmentation à l'intérieur de l'échelle*) means an increase in salary based on assessed level of performance, that results in an upward positioning in the range (not exceeding the job rate).*
>
> [Emphasis in the original]

[39] "Performance award" is defined in clause 2.5 of Part 2 of Appendix B of both the current collective agreement and the expired collective agreement in the exact same manner and states as follows:

> ***2.5 "performance award"*** *(*prime de rendement*) means a bonus payable to an employee whose salary has reached the job rate of the applicable salary range (or, as of May 10, 2013, the maximum of the lockstep salary range) and whose assessed level of performance is "Fully Meets" or "Exceeds". It is payable in a lump sum and must be re-earned each year.*
>
> [Emphasis in the original]

[40] Clause 3.0 of Part 2 of Appendix B of the current collective agreement is entitled "Performance Pay Administration" and states as follows:

> ***3.0 Performance Pay Administration***
>
> ***3.1*** *In-range increases that take effect on April 1, 2012 are governed by this performance pay plan. Thereafter, in-range increases for lawyers at the LA-1, LA-2A and LA-2B levels will be in accordance with the lock step salary ranges.*
>
> ***3.2*** *Lump sum performance awards payable on April 1, 2012, are governed by this performance pay plan. Effective May 10, 2013 lawyers at* the *LA-1, LA-2A and LA-2B levels whose salary is at the maximum of the lockstep pay range will continue to be eligible for lump sum performance awards under the terms of the performance pay plan. For performance during the fiscal year ending March 31, 2013, lump sum performance awards will be paid on May 10, 2013. Thereafter, performance awards will be paid on May 10th of each year for performance in the prior fiscal year. Expenditures on in-range increases and performance awards are controlled by a departmental budget, which may not be exceeded.*
>
> [Emphasis in the original]

[41] Clauses 8.0 of Part 2 of Appendix B of both the current collective agreement and the expired collective agreement is exactly the same and is entitled "Performance Pay for Employees on Leave without Pay" and states as follows:

> ***8.0 Performance Pay for Employees on Leave without Pay***
>
> ***8.1*** *Employees who have been absent on leave without pay for the full fiscal year and have not returned to work by March 31 of that fiscal year are not eligible for any*

> *performance increase. They are not to be included in the calculation of the budget.*
>
> ***8.2** Employees who have been on leave without pay for a part of the fiscal year may be eligible for a performance increase if they have been on strength for long enough to permit a meaningful evaluation of performance. Any performance pay should be prorated for the time they have been back on payroll.*
>
> [Emphasis in the original]

[42] Articles 19 of the both the current collective agreement and the expired collective agreement are worded exactly the same and are entitled "Other Leave With Or Without Pay". Clause 19.03 in both the current collective agreement and the expired collective agreement is entitled "Maternity Leave Without Pay", and clause 19.03(g) states as follows:

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

[43] Clauses 19.06 of both the current collective agreement and the expired collective agreement are worded exactly the same and are entitled "Parental Leave Without Pay". Clause 19.06(g) states as follows:

> *(g) Leave granted under this clause shall count for the calculation of "continuous employment" for the purpose of calculating severance pay and "service" for the purpose of calculating vacation leave. Time spent on such leave shall count for pay increment purposes.*

[44] Clauses 19.04 and clause 19.07 of both the current collective agreement and the expired collective agreement are respectively entitled "Maternity Allowance" and "Parental Allowance". Under both clauses 19.04 and 19.07 are identical sub-clauses at 19.04(i) and 19.07(i), which state as follows:

> *Where a lawyer becomes eligible for a pay increment or a pay revision that would increase the maternity allowance* [and/or parental allowance]*, the allowance shall be adjusted accordingly.*

[45] On September 18, 2013, the AJC was notified by the employer that lawyers on maternity leave or parental leave without pay who were on a lock step pay system since May 10, 2013 were not eligible for a lock step increase if they received an "Unable to Assess" performance evaluation due to their absence from work.

IV. Summary of the arguments

A. For the grievor

[46] On May 10, 2013, the parties replaced the previous in-range performance pay scheme for annual pay increases with a lock step pay increase framework.

[47] On September 8, 2013, the employer advised the AJC that lawyers who are on maternity leave or paternal leave are not eligible for the scheduled lock step pay increase if they received an "Unable to Assess" rating during their performance review due to their absence from work due to being on either maternity or paternal leave.

[48] Time spent on maternity or paternal leave must count for pay increase purposes, and the only eligibility restriction to a lock step pay increase that the parties have placed in the current collective agreement is when a lawyer receives a performance rating of "Unsatisfactory".

[49] It is the AJC's position that the denial of a lock step pay increase to any lawyer due to an "Unable to Assess" rating because they were on either maternity or paternal leaves, is a breach of the current collective agreement.

[50] Pay rates and ranges were contained in the expired collective agreement at Appendix "A". Appendix "B" of the expired collective agreement set out the "Performance Pay Plan" for all lawyers. Lawyers' pay increases, through the pay ranges, were through a series of variable increases based on the lawyer's assessed level of performance. The lawyers would get an increase in their salary based on an assessed level of performance that would result in an upward positioning of their salary in the range but not exceeding the job rate. The in-range increases were a percentage of salary, which was tied to the assessment rating and tied to the departmental budget.

[51] There are key differentiators when determining how the lock step framework is intended to operate. Paragraphs 7 through 10 of *Association of Justice Counsel v. Treasury Board*, 2012 PSLRB 32 ("*AJC v. TB*"), is an explanation of how the pre-lock

step in-range performance pay model ("performance pay regime") operated. This pre-lock step model (performance pay regime) did not include fixed increases at set intervals. Lawyers were evaluated, and, depending on the outcome of that evaluation, received an increase in salary at the percentage, which was attached to the rating. In the current collective agreement, the parties moved away from the performance pay regime increase framework. The parties have moved to a quasi-automatic lock step pay framework.

[52] The question in *AJC v. TB* was very similar to the issue being asked here: whether a lawyer who was absent due to maternity or paternal leave and unable to be assessed was eligible for their in-range performance pay increase for the period that was being evaluated. However, in *AJC v. TB*, the lock step pay increase framework had not yet come become operational. In that case, the AJC argued that "pay increase" was to be read as "in-range movement". The adjudicator disagreed and explained, at paragraph 37, the difference between an in-range performance pay increase and a lock step pay increase, as follows:

> *I do not agree with the bargaining agent's argument that in-range progression by performance pay is a pay increment as per the collective agreement. A pay increment, as per the collective agreement, is a quasi-automatic progression that occurs at a set date, by a pre-set amount. Instead, in-range performance increases and performance awards outside that range are compensation to reward performance and not pay increments based on time of service. They are two separate and distinct schemes, one of which ended as the other began.*
>
> . . .

[53] The AJC submits that what the adjudicator set out at paragraph 37 of *AJC v. TB* is exactly the situation that exists after September 10, 2013.

[54] The AJC submits that pursuant to section 229 of the *PSLRA*, it is not an adjudicator's role to alter the language of the parties in a collective agreement or an arbitral award.

[55] *Public Service Alliance of Canada v. Communications Security Establishment*, 2009 PSLRB 121 (at para 28), states as follows:

> *Counsel for the PSAC argued that it was widely accepted in labour law that the fundamental purpose in construing the terms of a collective agreement is to discover the intent of the*

> *parties on the basis of what is written. The intent must be gathered from the written instruments. The adjudicator's function is to ascertain what the parties meant by the words they used, on the basis of what is written in the instrument, not what was intended to have been written. She relied on* Consolidated Bathurst Export Ltd. and Manulife Band of Canada v. Conlin, *[1996] 3 S.C.R. 415*.

[56] *Foote v. Treasury Board (Department of Public Works and Government Services)*, 2009 PSLRB 142 (at para 28), states as follows:

> *In determining the plain and ordinary meaning, the starting point is that the parties are presumed to have intended what they have said. Occasionally, an arbitrator or adjudicator may be required to imply a term. However, that occurs only when it is necessary to give the collective agreement "business or collective agreement efficacy" and only if it is determined that the parties would have agreed to the implied term without hesitation had they been apprised of the deficiency (see Brown and Beatty, at 4:2100).*

[57] It is the submission of the AJC that the language of the current collective agreement is clear and can be interpreted without implying a term.

[58] The current collective agreement adopted a transition period to go from the previous in-range performance pay system (performance pay regime) to the lock step pay increment. It discloses a clear intention that time spent on maternity or paternal leave shall count for determination for pay increment purposes. There is only one restriction in the provision of the pay increase and that is when a lawyer's performance is assessed and receives a rating of "Unsatisfactory".

[59] Clause 3.1 of Appendix "B" of the current collective agreement signals the change to lock step. Article 3.0 is entitled "Performance Pay Administration", and clause 3.1 states as follows:

> ***3.1*** *In-range increases that take effect on April 1, 2012 are governed by this performance pay plan. Thereafter, in-range increases for lawyers at the LA-1, LA-2A and LA-2B levels will be in accordance with the lockstep salary ranges.*

[60] Effective May 10, 2013, pay increases are no longer calculated in accordance with the performance pay plan that had previously governed increases (performance pay regime). If the parties had intended them to be so linked, the current collective agreement would have said so.

[61] Lock step is a new way to increase pay for the lawyers than what existed in the expired collective agreement. In the expired collective agreement, the pay increase was determined by the pre-lock step performance pay regime, under which the pay of any particular lawyer may or may not be increased and was entirely dependent upon the rating they received. In the current collective agreement, the transition is clear in clause 3.1 and made even more clear at clause 3.2 of Appendix "B", which states that if a lawyer governed by the current collective agreement reaches the maximum salary rate in the lock step pay range they are in, they will be eligible for a lump-sum performance award under the Performance Pay Administration portion of Appendix "B".

[62] Clause 13 of Appendix "A" of the current collective agreement states the period of time for which the pay increment is triggered. For lawyers at the LA-DEV and the LA-2A and LA-2B levels, it is 12 months, and the LA-1A level, it is 6 months. Clause 14 of Appendix "A" of the current collective agreement deals with the situation when a lawyer was appointed to his or her position prior to March 31, 2013 but was not employed for a sufficient period to permit an assessment of their performance by March 31, 2013. When this happens, the lawyer shall receive an increment on the anniversary date of his or her appointment, or in the case of lawyers at the LA-1A level, 6 months from his or her appointment. These clauses clearly indicate a move from the performance pay regime of pay increments to the lock step system of increments.

[63] When read together, clauses 8, 9, 10, and 11 of Appendix "A" of the current collective agreement clearly indicate a move from the performance pay regime of increments to the lock step system of increments. Clauses 8 and 9 of Appendix "A" of the current collective agreement state that prior to May 10, 2013, in-range pay movement for lawyers at all levels other than LA-DEV are governed by the relevant performance pay regimes, and after May 10, 2013, in-range pay movement for lawyers at the LA-3A and LA-3B levels will continue to be governed by the performance pay regime found at Appendix "C" of the current collective agreement. Clauses 10 and 11 of Appendix "A" of the current collective agreement state that effective to May 10, 2013, pay increments for lawyers at the LA-DEV, LA-1, LA-2A and LA-2B levels will be to the next higher rate on the applicable lock step pay range that comes into effect on May 10, 2013. The only lawyers who are not eligible for a pay increment are those lawyers whose performance is assessed as "Unsatisfactory".

[64] If the parties had wanted to add a restriction on payment of an increment to a lawyer at the LA-DEV, LA-1, LA-2A and LA-2B levels after May 10, 2013 to those who received a performance assessment of "Unable to Assess", due to being on maternity leave or paternal leave, they would have said so. They did not.

[65] The expired collective agreement, at Part 2 of Appendix "B", under the sub-heading "3.0 Performance Pay Administration", and clause 4.0, "In-range increases", clearly sets out that if a lawyer gets a performance rating assessed as "Satisfactory", "Unsatisfactory" or "Unable to Assess", they are not entitled to a pay increment. In the expired collective agreement, pay increments were tied to the performance assessment. This is not the case under the current collective agreement after the lock step implementation date of May 10, 2013. After May 10, 2013, the only limitation on a pay increment is where a lawyer has been assessed and has received a rating of "Unsatisfactory".

[66] The AJC submits that the employer will likely rely on clause 8.0 of Appendix "B" of the current collective agreement, entitled "Performance Pay for Employees on Leave without Pay", which provides that employees who have been on leave without pay for a part of the fiscal year may be eligible for a performance increase if they have been on-strength for long enough to permit a meaningful evaluation of performance and any performance pay should be prorated for the time they have been back on payroll. This clause is not relevant as it does not assist in determining how a quasi-automatic pay increment is to be determined.

[67] While clause 8.0 of Appendix "B" of the current collective agreement deals broadly with all leave without pay, the parties, through changes to Appendices "A" and "B" of the current collective agreement, have set out a transition to lock step in which the only restriction is if an "Unsatisfactory" performance rating is given to a lawyer, which will keep the lawyer from receiving the lock step increment.

[68] If there is any dispute to the intent of the parties, the AJC submits that this is clarified by looking at clauses 19.03(g) and 19.06(g) of the current collective agreement; both clauses indicate that time spent on either maternity or paternal leave shall count for pay increment purposes. This is an explicit referral to an entitlement for a pay increment. A person on maternity or paternal leave may be unable to be assessed, but that does not disentitle them to their lock step increment. The only

restriction on their lock step pay increment is if they are assessed and receive an "Unsatisfactory" performance assessment.

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

[69] The employer does not dispute that the parties have negotiated and implemented the lock step pay increment system; however, they have not dispensed with performance evaluations. For a lawyer to be eligible for an increase, they must receive a positive performance assessment.

[70] The AJC states that unless it is expressly set out in a collective agreement, the employer cannot do it. This is not the case. Whatever is not expressly prohibited by a collective agreement, the employer can do.

[71] Sections 7 and 11 of the *Financial Administration Act*, R.S.C. 1985, c. F-11 ("the *FAA*"), provide the employer with broad unlimited powers in human resources management. In this regard, the employer referred me to *Babcock v. Canada (Attorney General)*, 2005 BCSC 513; *P.S.A.C v. Canada (Canadian Grain Commission)* (1986), 5 F.T.R. 51 (F.C.T.D.); *Peck v. Canada (Parks Canada)*, [2009] F.C.J. No. 1707 (QL); and *Brescia v. Canada (Treasury Board)*, 2005 FCA 236.

[72] An adjudicator must look at the ordinary meaning of the words used by the parties unless doing so would lead to an absurd result or unless the agreement defines them in a special or particular way. Where there is a direct monetary cost, it must be clearly and expressly granted in the agreement. In support of this, the employer relied upon *Wamboldt v. Canada Revenue Agency*, 2013 PSLRB 55, and *Chafe et al. v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112.

[73] Clause 8.0 of Appendix "B" of the current collective agreement specifically provides that an employee on leave without pay is not entitled to performance pay; however, they may be entitled to performance pay if they are on-strength long enough to permit a meaningful evaluation. The use of the term "may", coupled with the condition "if", confirm that the employer has the discretionary authority to refrain from paying a performance pay increase, which includes a lock step increase to a lawyer on leave without pay, if the employer is unable to assess him or her (see *O'Brien v. Treasury Board*, 2012 PSLRB 45, at paragraph 27.)

[74] Contrary to the submissions of the AJC, Appendix "B" of the current collective agreement applies to lock step increases. Clause 15.06 of the current collective agreement, which is under the "Pay Administration" section, states that the performance pay plan in Appendix "B" of the current collective agreement applies to lawyers at the LA-1 and LA-2 levels and the performance pay plan in Appendix "C" of the current collective agreement applies to lawyers at the LA-3 level. Clause 15.06 of the expired collective agreement, again under the "Pay Administration" section, provides that effective November 1, 2009, the performance pay plan in Appendix "B" will apply to lawyers at the LA-1 and LA-2A and LA-2B levels and the performance pay plan in Appendix "C" will apply to lawyers at the LA-3 level.

[75] Contrary to the AJC's submissions, Appendix "B" of the current collective agreement, when read together with clause 15.06 of the current collective agreement, coupled with the definition of "in-range increase" in clause 2.2 of Part 2 of Appendix "B" of the current collective agreement, confirms that Appendix "B" applies to lock step increases and those increases are performance based.

[76] The second sentence of clause 3.1 of Part 2 of Appendix "B" of the current collective agreement clearly specifies that the in-range increases include the increases in lock step salary ranges. The definition of "in-range increase" in the same appendix further specifies that the same is "based on assessed level of performance", and therefore, the lock step increases are still considered a type of in-range increase, which requires a performance assessment before any payment.

[77] Clauses 15.06 and 3.1 and article 8 of Part 2 of Appendix "B" of the current collective agreement and the words, "thereafter, in-range increases for lawyers at the LA-1, LA-2A and LA-2B levels will be in accordance with the lock step salary ranges" in article 3 of Appendix "B" must be given some meaning to avoid redundancy. By adding such words, the parties clearly intended that any lock step increases were still subject to a positive assessment (see *Stevens v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 34, at paragraph 21).

[78] Acceptance of the AJC's argument would require an amendment of the current collective agreement, and this is contrary to section 229 of the *PSLRA*. It would have the effect of deleting clause 15.06 and clauses 3.1 and 8.0 of Part 2 of Appendix "B" of the current collective agreement.

[79] A further review of the current collective agreement discloses that lock step increases are not automatic. The use of the term "eligible" throughout the current collective agreement clearly specifies that all increases, including lock step, are conditional upon positive performance appraisals. Pay note 12 under Appendix "A" of the current collective agreement uses the term "eligible" when referring to an in-range pay increase effective April 1, 2013 under the former performance pay regime. Therefore, one still has to be eligible under the performance pay plan. So, if the lawyer is present during the fiscal year and a meaningful assessment can be done, if he or she is eligible, he or she will receive a lock step increase.

[80] The AJC does not contest that if a lawyer is at the end or final step on the pay grid, and is "Unable to Assess", there is no increase. This is the same if the lawyer is "Unsatisfactory".

[81] The purpose of performance increases is to reward positive performance. All increases are performance pay. This is what the current collective agreement states. Lock step increases do not eliminate the requirement of an employee to be eligible for an increase, and to be eligible for an increase, the employee must receive a positive performance assessment. Being eligible is a pre-condition that is found throughout the current collective agreement; it is not automatic. Pay note 11 under Appendix "A" of the current collective agreement uses the term "eligible" when referring to a pay increment effective after May 10, 2013 under the lockstep pay regime. It is also found at clauses 19.04(i) and 19.07(i) when addressing pay increments for lawyers on maternity or paternal leave.

[82] The limitation set out in the current collective agreement is the term "Unsatisfactory". How can one get to "Unsatisfactory" without an assessment? Clearly, the grievor's position is contrary to the parties' intentions. The purpose behind the pay increase is to reward positive performance. If the grievor's position is accepted, poor performance is being rewarded. Performance awards are not separate from in-range increases. Lawyers are performance assessed. If a lawyer gets a "Fully Meets" or "Exceeds", he or she moves up in-range in lock step; if he or she receives "Unsatisfactory" or "Unable to Assess", he or she does not move.

[83] The employer submitted that would be absurd to pay an increase to those lawyers on leave without pay at lock step automatically, while someone who is at the

maximum of the lock step range could not get an increase, because they cannot be assessed.

[84] With respect to *AJC v. TB*, the parties have negotiated clause 3.1 of Part 2 of Appendix "B" of the current collective agreement, which is different than what was referred to in that case.

C. Grievor's reply

[85] There is a difference between an in-range performance pay increase and a performance award. Performance awards are what are found at Appendix "B" of the current collective agreement and deal with persons who are at the top of the pay rates. If a lawyer cannot get a pay increase, they can still get a performance award. Appendix "B" of the current collective agreement stayed in place after May 10, 2013, to govern performance awards.

[86] The AJC disagrees with the employer's submissions with respect to the use of the term "eligibility". The lawyer is only required to not receive an "Unsatisfactory" rating in a performance appraisal to get an increase.

[87] At clause 8.2 of Appendix "B" of the current collective agreement, the term "performance increase" is used. This is different than the term "pay increment"; if one accepts the employer's argument, one has to merge the meaning of the terms "performance increase" and "in-range increase", and they do not mean the same thing.

[88] The AJC is not asking to rewrite the current collective agreement. The language shows a clear transition to a pay-increment model no longer governed by a performance pay plan.

V. Reasons

[89] The sole question put forward in this hearing is whether or not those lawyers at the LP-00, LP-01, LP-02 and LP-03 levels who have, during the course of the fiscal year, taken either maternity leave or paternal leave as per the current collective agreement, and who received an "Unable to Assess" performance rating during the performance assessment process, are entitled to receive a lock step pay increment.

[90] While the lawyers are currently in the law practitioner group ("LP"), until very recently they were identified as "LA", and in both the expired collective agreement and current collective agreement there were seven groups and levels: LA-DEV, LA-1A, LA-2A, LA-2B, LA-3A, LA-3B and LA-3C. As this grievance deals only with those lawyers who were at the previous LA-DEV, LA-1 and LA-2A and LA-2B levels, the term "lawyers" shall only refer to those at the LA-DEV, LA-1 and LA-2A and LA-2B levels.

[91] Lawyers are paid at an annual rate of salary based on their group and level. The annual rates of pay are set out in both the expired and current collective agreements at Appendix "A". The annual rates of pay for the seven groups and levels were the same in all regions of the country except for Toronto, and as such, in Appendix "A", there is a series of rates of pay for all groups and levels in Toronto and in the rest of the country.

[92] Prior to May 10, 2013, each group and level had a minimum annual pay rate and a maximum annual pay rate. For example, a lawyer employed at the LA-2A group and level outside of Toronto (under the expired collective agreement) would be paid somewhere in the range of $82 917.00 and $118 995.00.

[93] Prior to May 10, 2013, the pay increases for lawyers were tied to the performance rating that they received during the performance assessment process for the prior fiscal year (the performance pay regime). As set out in the expired collective agreement, the pay increase a specific lawyer would receive would be based on a percentage of his or her current salary, which percentage was based on the performance rating as found at clause 4.0 of Part 2 of Appendix B as follows:

- Outstanding up to 10%
- Superior up to 7%
- Fully Satisfactory up to 5%
- Satisfactory 0%
- Unsatisfactory 0%
- Unable to Assess 0%

[94] While clause 4.0 of Part 2 of Appendix B of the expired collective agreement uses the term "up to" before the percentage increase amount, in any given year, the employer would set the percentage amount for each of the assessment points of "Outstanding", "Superior" and "Fully Satisfactory".

[95] For example, under the expired collective agreement, in Year 1, if a lawyer at the LA-2A group and level received a performance rating of "Outstanding" and that lawyer was earning $100 000.00, their salary would increase by the percentage increase amount set by the employer for the assessment point of "Outstanding" for that fiscal year. If that percentage increase amount was 10%, the lawyer who received a performance rating of "Outstanding", would get a $10 000.00 increase in their salary, and as such in the next fiscal year they would earn $110 000.00. If, however, that same lawyer received a performance rating of "Superior" and the employer set the percentage increase amount for the assessment point of "Superior" at 7%, that lawyer would get an increase in their salary of only $7000.00, and as such in the next fiscal year they would earn $107 000.00. Finally, if that same lawyer received a performance rating of "Satisfactory", he or she would not get any increase, and their salary would remain at $100 000.00.

[96] If we alter our example only slightly, again under the performance pay regime of the expired collective agreement, again using as our example a lawyer at the LA-2A group and level and earning $100 000.00 but it is in the following fiscal year, Year 2, and the employer sets the percentage increase amount at only 7% for "Outstanding", that lawyer would get a $7000.00 salary increase, and in the next fiscal year he or she would earn $107 000.00.

[97] Under the performance pay regime, any given lawyer's increase was tied not only to the performance rating they received, but the percentage increase assigned to that rating point by the employer. That pay increase could and would often vary year to year.

[98] Also under the expired collective agreement, if a lawyer was already earning the maximum salary for lawyers at their group and level and received a performance rating of "Outstanding", "Superior" or "Fully Satisfactory", he or she would not receive an increase in salary but would receive a cash equivalent amount as a "performance award". This is also set out in Part 2 of Appendix "B"; however, it is found under clause 5.0, which states that since the lawyer is already at the maximum of the salary

range, their salary would not increase and they would receive the percentage amount of their salary in cash. The awards were set as follows:

- Outstanding performance up to 10%
- Superior performance up to 7%
- Fully satisfactory performance up to 5%

[99] For example, again, if we take an LA-2A, earning the maximum salary amount under the expired collective agreement, which would have been (for outside of Toronto) $118 995.00, and during the performance assessment process that lawyer was assessed as a performance rating of "Outstanding", and the performance award percentage was 10%, he or she would not receive any increase in salary; it would remain at $118 995.00; however, they would receive a cash payment equal to 10% of their salary, which would be $11 899.50.

[100] I agree with the finding at paragraph 37 of *AJC v. TB*, wherein it states that a pay increment, as per the collective agreement, is a quasi-automatic progression that occurs at a set date, by a pre-set amount, and that in-range performance increases and performance awards outside that range are compensation to reward performance and not pay increments based on time of service. They are two difference and distinct schemes. In this regard, the current collective agreement has made a number of changes as it pertains to both salary increases and performance awards. They have shifted from the performance pay regime, based on an increase on performance assessment, to a lock step regime, which is a quasi-automatic progression at a set date at a pre-set amount. These changes, in no particular order, denote a significant change to that portion of the collective agreement as it relates to pay increases.

[101] First, the rating system used to rate the assessed performance of individual lawyers went from six (6) assessment points to four (4). The four new assessment points, as set out in Part 2 of Appendix "B" of the current collective agreement, in both clauses 4.0 and 5.0, are as follows:

- Exceeds
- Fully Meets

- Unsatisfactory
- Unable to Assess

[102] Second, on May 10, 2013, a lock step pay increase system became effective. On that day, each and every lawyer's salary was increased based on a series of adjustments ("the initial adjustments"), which were set out at Appendix "A", "Pay Notes", "Pay Range Structure", clauses 1 through 4. Once these initial adjustments were made, each and every lawyer's annual pay was represented by an annual rate of pay found on Line C of Appendix "A". It was at this point that each lawyers' annual rate of pay was converted to the lock step annual rate of pay range. To do this, each lawyers' annual rate of pay was taken from line C (of the appropriate group and level in which they belonged) and adjusted to the rate of pay on line "Y" of Appendix "A", under the heading of "Annual Rates of Pay", which was closest to but not less than the rate of pay at which the lawyer was being paid on line "C" of Appendix "A", "Annual Rates of Pay". For example, for a lawyer who was at the LA-2A group and level and was in a region other than Toronto, after the initial adjustments as set out on May 10, 2013 in Pay Notes were made, and found himself or herself at a salary of $125 000, they would then be converted to the salary of $125 785.

[103] A third change was how each and every lawyer's annual rate of pay would increase. The post-May 10, 2013 process to obtain an annual rate of pay increase is set out in the current collective agreement at Appendix "A", "Pay Notes", "In-Range Pay Movement" and "Lock Step Pay Range for LA-DEV, LA-1, LA-2A and LA-2B", clauses (8) through (11). Quite simply put, these four clauses state that the previous process for annual rate of pay increases as governed by the performance pay regime ended on May 10, 2013, and after that date, all annual pay movement shall be in the new lock step system and that a lawyer shall move up to the next higher rate on the lock step pay range.

[104] The employer submitted that performance evaluation was not removed from the current collective agreement, to which I agree. However, the employer also submitted that although the parties have gone from a percentage based increase to a lock step increase, they are both performance based. On this, I disagree.

[105] As already set out in the expired collective agreement, a lawyer could only get an increase in their annual rate of pay if they received a performance rating of

"Outstanding", "Superior" or "Fully Satisfactory". If they received a performance rating of "Satisfactory", "Unsatisfactory" or "Unable to Assess", they received no increase. Clearly, in the expired collective agreement, a lawyer's pay increase was directly tied to their performance. The level of performance as assessed determined first whether they would get an increase, and as well, the amount of the increase. There was no set increase amount. Depending on what any given lawyer's salary was, the increase could be one of three percentages applied to that lawyers' existing salary, or nothing.

[106] The current collective agreement has changed all this. While it has not removed the performance assessment process, it has to a large extent divorced the performance assessment from the annual salary or pay increase. Indeed, both the expired and current collective agreements contained Pay Notes at the Appendices. Those pay notes are contained at Appendix A of both of the collective agreements. The significant change from the expired collective agreement to the current collective agreement is the reference to and inclusion in the current collective agreement of the clauses found at clause (5), and clauses (8) through (14) which were not found in the expired collective agreement. Clauses (8) through (14) of the current collective agreement all deal with the conversion to the lock step pay increase system and are denoted by the following three subheadings:

- In-Range Pay Movement — Clauses (8) and (9
- Lock Step Pay Range for LA-DEV, LA-1, LA-2A and LA-2B — Clauses (10) and (11)
- Pay Increment Administration for LA-DEV, LA-1, LA-2A and LA-2B — Clauses (12), (13) and (14)

[107] While I agree that the performance pay regime was not removed from the current collective agreement, I do not accept that it was because pay increases are tied to performance. Rather, it is clear that it is because during the duration of the current collective agreement, the conversion to lock step was taking place. The move to lock step was not to take place until May 10, 2013, after the current collective agreement was operational. Until that move took place, the previous pay increase system based on the performance pay regime, which was set out in detail in Appendix B of both the collective agreements, was in place. It should be noted that the expired collective agreement expired on May 9, 2011, and the current collective agreement was signed on March 12, 2013. There is a gap of close to two years, time within which pay issues had

to be accounted for. Additionally, post-May 10, 2013, lawyers who are at the maximum of the salary range for their group and level are, as they were prior to May 10, 2013, entitled to a "performance award." These clear facts necessitate the continued inclusion of Appendix "B" in the current collective agreement.

[108] I agree with the submission of the employer that the collective agreement only sets out restrictions on the power granted to the employer under the *FAA*. In addition, the employer also argued that where there is a direct monetary cost, it must be clearly and expressly granted in the agreement. I also agree with this. However, I find that the pay increment sections of Appendix "A" of the current collective agreement are clear and unambiguous.

[109] There is nothing confusing about the wording contained in the current collective agreement. At clauses (12) through (14) of Appendix A of the current collective agreement under the subheading of "Pay Increment Administration for LA-DEV, LA-1, LA-2A and LA-2B", it sets out how the new pay increment system for the lawyers will operate. Quite simply put, these three clauses state that effective May 10, 2013, if you would have been eligible for an increase under the old performance pay regime, you were now eligible for an increase under the new lock step regime, and that every 12 months, or every year, you are eligible for a pay increment (except for the lawyers on the LA-1 scale; their increases are every six months). In fact, clause (14) states that even those lawyers who were appointed prior to March 31, 2013, but were not employed for a sufficient amount of time prior to the end of the fiscal year (being March 31, 2013) to be assessed shall receive a pay increment.

[110] The wording found at clauses (10) and (11) of Appendix A of the current collective agreement under the subheading of "Lock Step Pay Range for LA-DEV, LA-1, LA-2A, and LA-2B" state that effective May 10, 2013, pay increments for lawyers at the LA-DEV, LA-1, LA-2A and LA-2B levels will be to the next higher rate on the applicable lock step pay range that comes into effect on May 10, 2013. Clause (11) then places the only restriction on that move to the next higher rate by stating that a lawyer whose performance is assessed as "Unsatisfactory" is not eligible for a pay increment. Simply put, once the conversion to lock step has taken place, effective May 10, 2013, all lawyers are entitled to their pay increment, on an annual basis, to the next higher rate in the lock step pay range unless they have received an "Unsatisfactory" performance assessment. Under the current collective agreement, there are four performance

ratings, "Exceeds", "Fully Meets" and "Unsatisfactory" and "Unable to Assess." If the employer wanted to restrict the lock step pay progression, they certainly could have by being more explicit. They did not; only one restriction was agreed to and set out, being "Unsatisfactory".

[111] If there was any uncertainty, this is removed by looking to Article 3.0 of Part 2 of Appendix B, under the subheading of "Performance Pay Administration", which states that in-range pay increases that took effect on April 12, 2012 were governed by the performance pay regime, whilst after that point, in-range pay increases would be in accordance with the lock step salary ranges. In addition, in the lock step regime, there is no difference in the amount of the pay increases a lawyer would receive based on the performance assessment. The only restriction was if a lawyer was assessed as "Unsatisfactory". So, if two lawyers at the same group and level and at the same point on the lock step pay grid are assessed in the performance process, and one receives "Exceeds" and one receives "Fully Meets", they both move forward in the lock step regime to the same point. If the employer had wished there to be a difference, clause (11) of Appendix A under the subheading of "Lock Step Pay Range for LA-DEV, LA-1, LA-2A, and LA-2B" would have said so. It did not.

[112] Appendix B deals exclusively with performance pay and performance awards, which prior to May 10, 2013, was both the way lawyers' pay progressed upwards through the salary range and how lawyers who had reached the maximum of the salary range were compensated. After May 10, 2013, the performance pay regime did not disappear completely. It was still operational for those lawyers who had reached the maximum of the salary range for their group and level, as they would still receive a performance award based on their performance assessment, if they received an "Exceeds" or "Fully Meets" rating on their performance appraisal.

[113] The employer argued that clause 8 of Appendix B places a restriction on those persons who were on maternity leave or paternal leave and were unable to be assessed and therefore on their performance assessment received a rating of "Unable to Assess". I agree that this was the case prior to May 10, 2013; however, after the conversion to the lock step regime, this clause has no bearing on the increase of salary based on lock step.

[114] *Canada (National Film Board) v. Coallier* [1983] F.C.J. No. 813 (FCA) ("*Coallier*"), dealt with an appeal of an adjudicator's decision regarding a grievance involving

salary. The court held that when the collective agreement provides a time limit within which a grievor can file a grievance, the time limit begins to run when the grievor learned of the facts upon which his grievance was based.

[115] Article 24.12 of the collective agreement permits a lawyer to present a grievance at the first level of the grievance procedure no later than the twenty-fifth (25th) day after the earlier of the day on which the lawyer received notification and the day on which the lawyer had knowledge of the alleged violation or misrepresentation or any occurrence or matter affecting the lawyer's terms and condition of employment.

[116] By applying the reasoning from *Coallier* to the facts of this policy grievance, any member of the bargaining unit, who was on maternity leave or paternal leave from the day being 25 days prior to October 10, 2013(the date the grievance was filed), and continuing after that date, who did not receive their lock step increase, only by virtue of the fact that they received an "Unable to Assess" performance rating, shall be provided any lock step payment they should have received and any subsequent lock step increase.

[117] For all of the above reasons, I make the following order:

(The Order appears on the next page)

VI. Order

[118] Extrinsic evidence shall not be allowed and therefore has not been considered.

[119] The grievance is allowed.

[120] Any lawyer who was on maternity leave or paternal leave from the day being 25 days prior to October 10, 2013, and continuing after that date, who did not receive their lock step increase, only by virtue of the fact that they received an "Unable to Assess" performance rating, shall be provided any lock step payment they should have received and any subsequent lock step increase.

[121] Any lawyer who is entitled to a payment of arrears shall also be entitled to be paid interest on any sums due, from the date they are due.

[122] Interest shall be calculated at the rate of interest as set out in the tables for pre-judgement and post-judgment interest as set out in the *Federal Courts Act* and shall be compounded annually up to and including the day on which the payment is made.

[123] I shall remain seized of this matter to address any issues of remedy.

September 28, 2015.

John G. Jaworski,
adjudicator