

Public Service Staff  
Relations Act



Before the Public Service  
Staff Relations Board

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BETWEEN

**ROLLAND LAGACÉ**

Grievor

and

**TREASURY BOARD  
(Solicitor General - Correctional Service Canada)**

Employer

***Before:*** Guy Giguère, Board Member

***For the Grievor:*** Robert Morissette, Public Service Alliance of Canada

***For the Employer:*** Stéphane Arcelin, Counsel

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Heard in Montréal, Quebec  
on September 29, 1998.

## DECISION

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On March 20, 1996, Rolland Lagacé, a correctional officer CX-1 (also designated as AC-I) with Correctional Service Canada, working at Archambault Institution, filed the following grievance:

[Translation]

*I am filing this grievance because the employer is not making every reasonable effort to allocate overtime work on an equitable basis among the employees.*

*Ref: Clause 21.11 CX group*

The corrective action requested in his grievance was a statement to the effect that the employer was not respecting subclause 21.11(a) of the collective agreement between the Treasury Board and the Public Service Alliance of Canada (Codes: 601/89, 651/89). The subclause reads as follows:

*21.11 Assignment of Overtime Work*

*Subject to the operational requirements of the service, the Employer shall make every reasonable effort:*

- (a) to allocate overtime work on an equitable basis among readily available qualified employees;*

On May 7, 1996, Ferno Truchon, Unit Manager at Archambault Institution, denied the grievance at the first level of the grievance procedure for the following reasons:

[Translation]

*[...] it is my view that, from the standpoint of operations, it is more efficient to follow the current policies. These policies, set out in Standing Order 065-1, ensure an equitable distribution of overtime work.*

*[...]*

The grievance was also denied at the second level of the grievance procedure and in his letter, dated September 3, 1996, Jean-Claude Perron, Deputy Commissioner, Quebec Region, Correctional Service Canada, stated:

[Translation]

[...]

*The present use of availability lists for AC-Is and AC-IIs is in keeping with a longstanding agreement between the employer and your union and it allows for an equitable allocation of overtime among readily available qualified employees, while also being in accordance with your collective agreement. I would like to mention that a new overtime callback procedure could be introduced for AC-Is and AC-IIs provided it respects the collective agreement. If appropriate, I encourage you to discuss with the your union and with local management the possibility of considering a new procedure suitable to both parties.*

[...]

Lastly, on July 18, 1997, the grievance was denied at the final level of the grievance procedure by John Rama, Assistant Commissioner, Personnel and Training, Correctional Service Canada, in these terms:

[Translation]

[...]

*As for the assignment of overtime work between AC-I and AC-II, the local practice in place for several years respects both the principle of equity and service requirements.*

[...]

On August 29, 1997, the grievance was referred to adjudication. At the beginning of the hearing, the parties agreed that the burden of proof was on the grievor. The exclusion of the witnesses was requested and granted.

It should be noted that the testimony and exhibits refer to two classifications: CX and AC. Both designations apply to the same positions. Consequently, in this decision, CX-1 and AC-1, CX-2 and AC-2, and CX-3 and AC-3 are to be considered synonyms.

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Uncontested facts

Below is a summary of how overtime is allocated at Archambault Institution. Overall, these facts were not contested and came out of the testimony by Mr. Lagacé and Richard Sauvageau, CX-3, Supervisor of Correctional Operations at Archambault Institution.

The manner in which overtime is assigned at Archambault Institution is set out in "Standing Order - Overtime - Correctional Group", dated 92-11-12, which was filed as Exhibit G-4.

Reading the Standing Order reveals that an operational minimum must be maintained first before bringing persons in on overtime. Article 13 of the Standing Order reads:

[Translation]

13. *It is the responsibility of the Supervisor of Correctional Operations in charge of the operations office to authorize overtime in the institution. However, he must first ensure the operational minimum, if applicable, before bringing in persons on overtime.*

To illustrate this, Mr. Sauvageau used the example of a morning when he might be missing three CX-1s and two CX-2s. What he would do would be to take two of the CX-1 with sufficient experience, who had reported for their shift, and assigned them for the day as CX-2s, and then bring in five part-time officers who would fill the three CX-1 positions not covered and the positions of the two CX-1s who were used to replace the CX-2s: this would ensure the operational minimum before granting overtime.

Mr. Lagacé also testified that it had happened that he reported for his shift at Archambault and was told that he was replacing a CX-2 for the day. When this happens, he is appointed as an acting CX-2 for the day and paid at the regular CX-2 rate. His CX-1 position is filled by a part-time officer, if necessary, unless a CX-1 is available to replace him. Mr. Lagacé's cheque stubs for August 1998 (Exhibit E-3) were filed in evidence and, as an acting CX-2 for a period of eight hours, his additional gross income is \$7.28 per day.

Second, once the operational minimum is assured, overtime is allocated the Institution from two separate lists of available employees: one list for the CX-1s and the other for the CX-2s. These lists are valid for a period of only one month. Article 20(a), paragraph 1 of the Standing Order states:

[Translation]

20 (a) CX Personnel - Security and Unit Positions: officers of the group and at the level of the position to be filled at the time of need have priority.

[...]

[Underlining in original]

Third, the employee is called based on his place on the CX-1 or CX-2 list; priority goes to those employees with a lower hourly pay rate, that is, time and a half and then double time. Article 25 of the Standing Order reads:

[Translation]

25. Priority is given to employees at the lower pay rate and whose names appear first on the list, that is, for any callback to work because of a staff shortage, an employee at time and a half will be considered first and then employees at double time, all subject to the priorities by group.

[Underlining in original]

If the employee refuses because he is not available that day, or if there is no response to the callback, the refusal is not documented and he remains in the same order for the next overtime offer.

Lastly, after exhausting the CX-1 and CX-2 lists, as applicable, employees from another level can be called back.

Article 20(a), paragraphs 4 and 5 of the Standing Order specify the order of priority to be followed:

[Translation]

*Second, officers of the same group but of a lower level.*

*Third, officers of the same group but of a higher level.*

The evidence did not show that it was in fact necessary to use the list of the other levels but Mr. Sauvageau explained that, if there were no more people available on the CX-2 list, at time and a half or at double time, the CX-1 list would be used and, if there were no CX-1 employees available, the CX-3 list would be used.

To the knowledge of the witnesses, all Correctional Service institutions, except one, operate with two overtime lists. The only institution that does not operate in this manner is Leclerc Institution, where there is only one list for CX-1s and CX-2s and where overtime is allocated equally among them.

The Standing Order was the subject of consultation with the bargaining agent and was revised in 1992 at the latter's request. Under cross-examination, Mr. Lagacé admitted that, for 20 years, there has been "an agreement on the balancing of the schedules with the union", but, in his view, it needed to be adjusted to take into consideration part-time correctional officers. He testified that there had been a union vote on the use of two separate lists of employees available for overtime, but he questioned the legitimacy of that vote because there were not enough members present when the vote was taken. For his part, Mr. Sauvageau stated that, when management wants to introduce new administrative procedures, it always tries to reach agreement with the bargaining agent but if that is not possible, it is management that decides.

### The contested facts

Where the parties do not agree is on whether overtime is assigned equitably, through the use of the two separate lists for CX-1 and CX-2 employees. Below is a brief summary of the testimony on this point.

Mr. Lagacé testified that, at the time of his grievance, he worked in the Ste-Anne des Plaines block of Archambault Institution. He was available to work overtime on all shifts. He admitted that he considered the allocation of overtime within the AC-1 level equitably but the fact that there are two lists creates a problem. According to

Mr. Lagacé, all AC-1s are qualified to perform the duties of AC-2s and that is why they are regularly asked to fill in as AC-2s on an acting basis. However, an AC-1 cannot do overtime as an AC-2 because his name appears only on the AC-1 list.

The grievor filed in evidence a document entitled, "Overtime - Archambault Institution - April 1995 to March 1996" (Exhibit E-4). Mr. Lagacé testified that this table was prepared by the employer and is signed by the administrative secretary. According to this table, the total number of hours of overtime worked during that period by AC-1s was 7,644.75 hours and 9,457.25 hours by AC-2s. Since there were 71 AC-1 employees and 49 AC-2 employees in January 1996, this gives an average number of overtime hours of 107.67 hours per person for the AC-1s and 193 hours per person for the AC-2s for the period from April 1995 to March 1996. Mr. Lagacé calculated that if a single list had been used, each employee would have done an average of 142.51 overtime hours.

According to Mr. Lagacé, the appropriate corrective action would be to use a single list as is the practice at Leclerc Institution, or some other measure that would ensure an equal allocation of overtime. Under cross-examination, Mr. Lagacé admitted that there was another list of employees available to perform the duties of AC-2 employees on an acting basis for longer periods. However, he is not interested in placing his name on that list: "I am not interested in being moved [*sic*], but it has happened to me and when I refused, I was told it was an order".

Mr. Lagacé also testified that he considered the AC-2 duties to be more complex than those of an AC-1 employee. When there is a crisis or an emergency, the AC-2 is placed in charge of the AC-1s, therefore he is superior. He also stated that he had done a limited amount of case management and that, in general, he did not fill out the forms.

Richard Sauvageau testified that, as Supervisor of Correctional Operations, he supervises 25 CX-1 and 15 CX-2 officers. He explained the existence of the two lists as follows: "We prioritize the quality of the work and the expertise by making two lists, because the work of the CX-1 and the CX 2 is not the same; part of the CX-2 work involves social reintegration and case management, which the CX-1 work does not." The CX-2 must also receive special training because they have to prepare monthly

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reports and have direct contact with inmates (caseload). The CX-2 employees are also involved, upon occasion, in parole hearings.

Mr. Sauvageau explained that one of the differences between the functions of the CX-1 and CX-2 is that the CX-1 is a "static security" position, more stationary than that of the CX-2, which is a dynamic security position. The CX-2 is called upon to recommend programs for inmates to the case management officer. There is also a hierarchical relationship between the CX-2 and the CX-1; in a crisis or a difficult situation, a CX-2 is expected to take charge. Exhibits G-1 and G-2, which are the CX-1 and CX-2 job descriptions, were filed in evidence in support.

Mr. Sauvageau testified concerning Exhibit G-3, which is a list of persons available to hold positions other than their own at Archambault Institution. He stated that the only names on this list were those of individuals interested in occupying an acting position as an AC-2. He added that, in the past, no employees had indicated any interest and it had been necessary to use the services of part-time employees.

Mr. Sauvageau also stated that it is important to have CX-2s in CX-2 positions; that is the priority so that they can perform all of the duties of the position. The CX-2 will continue to carry out his own work in his normal position and will be able to do the case management". In response to Mr. Arcelin's question concerning the effects on operations of having a single list, Mr. Sauvageau assured him that they would be negative. Using again the example of the five positions to filled, two CX-2 and three CX-1 positions, if there was a single list, CX-2s could be replacing CX-1s and CX-1s could be replacing CX-2s because of the order of priority. In the event of a crisis or a difficult situation, where the expertise of a CX-2 is essential, this would not be a beneficial arrangement.

To Mr. Morissette's questions concerning a situation where a CX-2 employee replaces another CX-2, the witness stated that, in such situations, the CX-2 would continue to look after his own caseload and would not manage the caseload of the person he was replacing; he could, however, do more than a CX-1. For example, if an inmate had a problem, the CX-2 would be able to help him because he has the necessary knowledge. He can also make reports in the activity log that he will pass on to the CX-2 he is replacing. He can do counselling, settle conflicts by meeting with the



inmates, meet with the parole officer directly, or discuss programs with the officer that he is replacing, when the latter returns.

### Arguments

#### For the grievor

Mr. Morissette began by stating that the grievance must be considered in light of clause 21.11(a) of the collective agreement.

The question is not to determine whether, at the time of a competition, a CX-1 could qualify as a CX-2 or whether, in the long term, he could qualify on an acting basis in such a position. The question is restricted to determining whether, for a period of four or eight hours, a CX-1 asked by the employer to perform the functions of a CX-2, or obliged to do so by the employer, is qualified to do so. The employer admitted that CX-1 employees are qualified to replace CX-2 employees for a few hours. The collective agreement indicates that the work must be allocated on an equitable basis among the qualified employees. Mr. Morissette also pointed out that the Standing Order, which was filed as Exhibit G-4, is not a negotiated document: consultations were held but, in the end, it was the employer who decided; it exercised its management right.

As shown by Exhibits E-1, E-4 and E-5, there is a pool of employees and there are a number of overtime hours available. There is an imbalance in the allocation of overtime between the CX-1 and CX-2 levels. In support of this claim, Mr. Morissette cited two of the Board's decisions, the first being *Jutras* (Board file 166-2-20534), which deals with the Standing Order revised in 1992 and the question of whether an employee is qualified to do overtime in a group other than his own. The second is *Leighton* (Board file 166-2-17211), which was decided by the then Deputy Chairperson, P. Chodos. Mr. Morissette cited in particular pages 11 and 12 of that decision:

*[...] The issue here is whether, in the exercise of that managerial prerogative, the employer has the right to refuse to assign that work to a higher classified employee who is governed by the PPI collective agreement, notwithstanding the requirement in paragraph 21.14(a) of that agreement to equitably allocate overtime work among "readily available, qualified employees".*

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*In my view, by refusing to allocate this overtime work to the grievor, the employer is in violation of this provision. As counsel for the grievor pointed out, paragraph 21.14 contains no restriction on the type of employee in the bargaining unit who is entitled to be considered for overtime, other than that the employee be readily available and qualified. Considerations such as classification and cost are simply not incorporated into this provision and consequently do not further qualify the requirement on management to equitably assign overtime. [...]*

Mr. Morissette concluded by stating that the employer had made reasonable efforts to allocate overtime equitably but, at the end of a reasonable period, which must be determined by the Board, this allocation must be equitable for all employees, which is not the case in this instance. Exhibit E-5 covers a 12-month period. The period could have been shorter, such as three months, but the principle remains. The list may not be the only solution, as there may be another way to ensure equitable allocation. Further, an employee's failure to respond to an offer of overtime should be treated as a refusal and documented as such, otherwise persons who are absent or who refuse would constantly be placed back at the beginning of list, as is presently the case.

#### For the employer

Mr. Arcelin began by stating that the burden of proof was on the grievor, who did not discharge it. Producing a list of available volunteers, like Exhibit E-2, and a table of overtime hours, like Exhibits E-4 and E-5, does not prove that there was an inequitable allocation of overtime. Accordingly, in his decision in *Halabecki* (Board file 166-2-28423), the then Board member Potter, stated as follows at page 8:

*There was evidence to show the annual amount of overtime worked by all PI-04 employees over the past four years (Exhibit E-6) as well as overtime worked by all PI-01, PI-03 and PI-04 employees in 1997 (Exhibit E-7). However, in this unique situation, the fact that in any one particular year an employee at the PI-04 level has lower levels of overtime than other PI-04 employees is not, in and of itself, justification for drawing a conclusion that subclause 21.14(a) has been violated. I agree with Mr. Lindey that no absolute conclusion can be drawn from these listings as they do not contain the number of times overtime was worked following the placement of one's name on the volunteer list. Both sides agreed some grain elevators were busier than others, and the*

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*overtime recorded in these two exhibits could simply be a product of a very busy grain elevator, with the "in-house" employee performing the overtime.*

More specifically, Exhibit E-2 is a list of all AC-1 and AC-2 employees. Employees are called to see if they are available; if there is no response, the employer moves to the next person. All employees are included on the list. It is a working document. The employer does not challenge the overtime numbers that appear in Exhibit E-5, but the information is not complete and therefore the evidence that Mr. Morissette has presented is incomplete.

Overtime is allocated equitably among the qualified employees. Mr. Lagacé even testified concerning an agreement between the employer and the bargaining agent on the existence of two lists that has existed for 20 years.

Mr. Lagacé's reasoning is not valid. On the one hand, he does not put his name on the list of employees interested in holding acting CX-2 positions because he does not like to be moved around. On the other hand, he would like to do overtime in a CX-2 position.

Subclause 21.11(a) of the collective agreement (Exhibit G-5) talks of "qualified" and "available" employees and, as seen in Exhibits G-1 and G-2, the job description is quite different for CX-1 and CX-2 positions. The fact that an employee is assigned to a CX-2 position for a day does not mean that he is qualified to perform all of a CX-2's duties. It is clear that when CX-1 hold CX-2 positions on an acting basis for a day, they carry out some of the CX-2 tasks. Mr. Arcelin agrees with Mr. Morissette on this point but, in his view, it is only the "static security" tasks of the CX-2 position. However, when a CX-2 replaces on overtime another CX-2, the employer expects him to perform more than just the "static security" tasks.

Lastly, if there were only one list, management's hands would be tied and it would have less flexibility in handling its priorities.

### Reasons

By his grievance, Mr. Lagacé claims that the system established by the employer to allocate overtime among employees does not respect the terms of the collective agreement.

To respond to that claim, I must determine first whether a CX-1 employee is qualified, within the meaning of subclause 21.11(a) of the collective agreement, to replace a CX-2 employee on an overtime basis. Indeed, this is the key element of the argument of Mr. Lagacé's representative.

The evidence is to the effect that, on a regular basis, CX-1 employees replace CX-2 employees on an acting basis in order to ensure an operational minimum. Before calling employees to work overtime, the Supervisor of Correctional Operations selects, from among the CX-1s present, those that he considers sufficiently experienced to replace the absent CX-2s on an acting basis. Thus, Mr. Lagacé frequently finds himself among the CX-1s chosen. When he replaces a CX-2 on an acting basis, he does not perform all of a CX-2 employee's duties, but he can do some of them. This would indicate that Mr. Lagacé is qualified to replace CX-2s for a short period of time. Is it necessary, as the employer claims, to distinguish between an acting replacement and an overtime replacement?

Adjudicator R. Young in *Johnston* (Board files 166-2-17488 and 17490) states, to the contrary, that no such distinction should be made:

*In the case where employees, such as the grievors, are asked to go into a particular unit to help out on a day-to-day basis because of staff shortages or over abundance of work-load, it is difficult to understand why they are considered no longer capable of being of assistance simply because the work to be done is to take place outside regular office hours. If an employee is capable or "qualified" enough to be called upon in the daytime, surely he/she is equally capable or "qualified" to be asked to do the same duties in the evening.*

Further, the employer admits that, at Leclerc Institution, there is no such distinction and that a single list is used for the CX-1s and CX-2s. This means that, at that institution, the employer considers that CX-1 employees are qualified to replace CX-2 employees on an overtime basis.

According to article 20(a), paragraphs 4 and 5 of the Standing Order, after exhausting the list of available CX-2s, the list of available CX-1s will be used and then, if there is still inadequate personnel available to work overtime, the CX-3 list will be used. In the Standing Order, the employer implicitly admits that CX-1 employees are qualified to replace CX-2 employees on an overtime basis.

I therefore consider Mr. Morissette's argument that CX-1s are qualified to replace CX-2s on an overtime basis to be without foundation. But, having determined that the CX-1s are qualified, I must now determine whether the system established to allocate overtime, using separate lists for CX-1s and CX-2s, is equitable.

The words of Chief Adjudicator E.B. Jolliffe in *Sumanik* (Board file 166-2-395) (page 18) provide guidance in this area:

*What may be equitable is not necessarily equal. Overtime, however, should be shared equitably in the sense that over a 28-day cycle there would be no wide gaps between one employee and others. Over a period of one year the results should be approximately equal [...]*

At first glance, Exhibit E-4, which is a table of overtime worked at Archambault Institution from April 1995 to March 1996, shows that there was an inequitable allocation of overtime. It shows that, over a period of one year, 49 CX-2 employees worked 9,457.25 hours of overtime compared to 7,644.75 hours for 71 CX-1 employees. Counsel for the employer did not contest these numbers, but argued that this evidence is incomplete. However, Mr. Lagacé's grievance deals with the validity of the system established to allocate overtime. For the reasons given below, it is my view that the evidence is complete because it shows that the system of using separate lists does not allocate overtime equitably among all employees in the CX group. It is therefore not necessary in this instance to examine the number of times that CX-1s, CX-2s and Mr. Lagacé did overtime because their names were on the list of available volunteers.

Article 20(a), paragraph 1 of the Standing Order, in fact, gives priority for overtime to officers in the group and at the level of the position to be filled at the time of need. In other words, if a CX-2 needs to be replaced on an overtime basis, the CX-2 list is used first. However, subclause 21.11(a) of the collective agreement contains no restrictions, other than that the employee must be qualified and available. This clause does not specify that the employee must be at the same level as the position in which he may work the overtime. Based on an analysis of adjudication case law, in particular Board decisions in *Bretzel* (Board files 166-2-10385 to 10387), *Conrad* (Board file 166-2-13056) and *Leighton (supra)*, I conclude that the level of an

employee's position, CX-1, CX-2 or CX-3, should not be a factor in the employer's obligation to allocate overtime equitably.

Accordingly, I allow Mr. Lagacé's grievance: since CX-1 employees are qualified to work overtime in CX-2 positions, I find that the employer, through its system of separate CX-1 and CX-2 lists, is not respecting the terms of subclause 21.11(a) of the collective agreement.

I would therefore encourage the parties to get together to discuss new ways to allocate overtime. I interpret as being to this end the September 3, 1996 letter from Jean-Claude Perron to Mr. Lagacé, inviting him, if appropriate, to discuss a new procedure with his bargaining agent and local management.

This could be an opportunity to examine more closely the procedure at Leclerc Institution, which uses only one list. While it was not argued, the parties may also wish to analyse the scope of the expression, "Subject to the operational requirements of the service", used in clause 21.11(a) of the collective agreement in its context. It is praiseworthy that, in the past, the bargaining agent and the employer have managed to agree on the allocation of overtime. I do not, by my decision, wish to cast any shadow over this climate of good relations and I hope that they will be able to find new grounds for agreement.

**Guy Giguère,  
Board Member.**

OTTAWA, February 22, 1999.

Certified true translation

Serge Lareau