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Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

MARIO ROIREAU AND CONRAD GAMACHE

Grievors

and

TREASURY BOARD
(Solicitor General Canada - Correctional Service)

Employer



Before: Evelyne Henry, Member

For the Grievors: Céline Lalande, Union of Canadian Correctional Officers -
Syndicat des agents correctionnels du Canada - CSN

For the Employer: Karl Chemsî, Counsel

Heard at Sherbrooke, Quebec,
January 29 and 30, 2004;
Written arguments filed on February 26 and March 17 and 22, 2004

DECISION

[1] Mario Roireau and Conrad Gamache are correctional officers (CX) CX-02, working at Cowansville Institution. They are contesting the procedure for the assignment of overtime, claiming that it violates clause 21.10 of the collective agreement signed on April 2, 2001 between the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN) and Treasury Board, with respect to the Correctional Service group.

[2] The grievors claim that CX-02s working 12-hour shifts do not have access to an equitable share of overtime because of the employer's policy of offering overtime at the lowest cost.

[3] The employer objected to the adjudicator's jurisdiction to hear a grievance contesting the procedure for the assignment of overtime. I reserved decision on this objection.

[4] The grievors testified and called five other witnesses: Gilles Leclerc, Eric Marcotty, Paul Hinse, Marcel Larocque and Michel Martel.

[5] Mario Roireau has been employed with Correctional Service since October 1977 and has been a CX-02 since 1988. He has worked a schedule of 12-hour shifts (12-hour schedule) since April 2002. Previously, he worked a schedule of 8-hour shifts (8-hour schedule). There are 16 CX-02s on the 12-hour schedule and 56 on the 8-hour schedule.

[6] Mr. Roireau is available "practically" all of his days of rest and for four hours at the end of his workday. In April 2002, he was slightly less available during his days of rest. During the four hours after his shifts, Mr. Roireau is available sometimes but not always.

[7] Availability for overtime is recorded on a form entitled [translation] "CX-02 sign-up for overtime availability" (Exhibit P-1). The names of all CXs are listed in alphabetical order. There are three parts to the form: one to indicate the shift for which the CX is available, one for the signature and one to cancel availability.

[8] CXs indicate the shifts in which they are interested with a check mark: "M" for morning [matin], "J" for day [jour] and "S" for evening [soir]. If a CX changes his mind later on and no longer wants to be available, he initials the appropriate box in the

right-hand column. A form (Exhibit P-1) is filled out for each day of the month and the date is shown at the bottom left. The forms are kept in a folder containing all of the forms for the coming month. The forms are available one week to one and a half weeks before the coming month. Exhibit P-1 is an example of the forms for February 2004.

[9] There were similar sheets in April 2002. Mr. Roireau does not recall whether, at that time, the list of CXs covered all CXs or if there was a separate list for CX-01s and CX-02s. The folder containing the availability forms is kept on the counter where the CXs sign the attendance register.

[10] Mr. Roireau submitted the overtime summary dated March 31, 2002 (Exhibit P-2). This summary is printed from the computer entries used by Correctional Service to offer overtime to CXs.

[11] The first column contains the names of the CXs; the names of CXs who work a 12-hour schedule are highlighted and the names of CXs who work an 8-hour schedule are not highlighted. This list contains all of the CX-01s and CX-02s. March 31 is the last day of the overtime summary. On April 1, everyone starts over again at zero for a period of one year.

[12] The second column shows the total overtime accumulated. The third column shows the availability. The fourth column is blank and the next (T.5) is for time and a half. The sixth column (T.____) is for double time or time and three-quarters. The column labelled "HRE" [heure] is for the time at which the CX was called. The column "CX-05" is for the initials of the correctional supervisor who offers the overtime and the last column, "OK-Refus" [OK-Refused] is to indicate if the offer was accepted or refused.

[13] The availability recorded on Exhibit P-1 is transferred each day to Exhibit P-2 by a correctional supervisor. Using the work schedules, the correctional supervisor then determines the overtime rate that must be paid to each CX. After a shift and on the first day of rest, the overtime rate is time and a half. For the second and subsequent days of rest, it is double time. In the case of CXs working a 12-hour schedule, overtime is paid at time and three-quarters at all times.

[14] Form P2 is prepared for every shift, every day of the year. The correctional supervisor uses this form to establish his overtime call priority. He calls the CX who

has the least hours and who is paid at the lowest overtime rate. He calls all CXs at time and a half before all others, regardless of their accumulated overtime. Even if a CX paid at time and three-quarters has no accumulated overtime and another CX paid at time and a half has 100 hours of accumulated overtime, he will call the latter.

[15] Mr. Roireau introduced Exhibit P-3, which is the same form as P-2 but dated July 31, 2002. This summary applies to the CX-02s. The names highlighted are those of the CXs working a 12-hour schedule and, those not highlighted are CXs working an 8-hour schedule. Mr. Roireau obtained Exhibit P-3 by printing the daily form for July 31, 2002.

[16] Mr. Roireau pointed out that the employees whose names are highlighted generally have fewer overtime hours accumulated than the others do. He pointed out that J. Lamoureux, who works an 8-hour schedule, has 98.75 hours, while he, Mr. Roireau, has only 21.5 hours. Mr. Roireau had increased his availability. He explained the gap by the fact that Mr. Lamoureux, working an 8-hour schedule, was paid at time and a half and was always given priority over Mr. Roireau, who had to be paid at time and three-quarters.

[17] Under cross-examination, Mr. Roireau confirmed that Exhibit P-2 contains a summary of overtime prior to when the 12-hour schedule came into effect for the CX-02s. Mr. Roireau's grievance, dated May 31, 2002, requests that the procedure for assigning overtime be changed because, in his view, it discriminates against employees working a 12-hour schedule. Mr. Roireau stated that the priority given to CXs paid at time and a half over those paid at time and three-quarters is inequitable and contrary to clause 21.10 of the collective agreement.

[18] Mr. Roireau could not say how many hours he had in April 2002. He could not provide the number of hours for January 2003 because he does not have the documents with which to determine that information. Mr. Roireau could not say how many hours were accumulated at the time that the supervisor signed the grievance in June 2002 because he does not have the form for June 2002 in his possession today. Mr. Roireau may have access to the document for the period April 2003 to April 2004.

[19] Mr. Roireau denied being around the average with respect to overtime throughout the year. He indicated that none of the highlighted names are among the

employees with the greatest amount of accumulated overtime. Mr. Roireau denied that Exhibit P-3 places him around the average in terms of accumulated overtime.

[20] Mr. Roireau took between 20 and 25 days of holidays during 2002-2003. He took two weeks in the summer and two weeks in the winter. Mr. Roireau denied that his holidays affected his availability during the period when there is the most overtime. For three days of holidays, he must use four and a half days of annual leave so that, in the end, he is at about the same point as the CXs working 8-hour schedules. Mr. Roireau could not indicate availability during his holidays but he could for his days of rest. He took holidays as did all his fellow workers.

[21] During re-examination, Mr. Roireau specified that the names highlighted on Exhibit P-2 are those of CX-01s paid at time and three-quarters. Mr. Roireau took his holidays toward the end of July, beginning of August in 2002. He could not be more specific but this is normally the time that he takes his holidays. In summer 2002, Mr. Roireau did not travel; he therefore would normally have indicated his availability, but cannot say when.

[22] Mr. Roireau presented Exhibit P-4, which covers accumulated overtime as at March 31, 2003. This form covers the period from April 1, 2002 to March 31, 2003 for CX-02s. The highlighted names are those of the CXs working 12-hour schedules. Mr. Roireau's name is 13th from the bottom of the first page: he has a total of 82.75 hours. The next to last name on the second page is that of Marc Côté, a CX-02, working an 8-hour schedule: he has a total of 283.29 hours.

[23] According to Mr. Roireau, Mr. Ferland, whose name is highlighted, has a lot of overtime but he did not work a 12-hour schedule the entire year. He worked a great deal of overtime when he was working an 8-hour schedule.

[24] There are 16 CX-02s working the 12-hour schedule, or four per cell block. Volunteers are sought for each cell block and they are selected by seniority. A CX who volunteers must commit for a period of three months. If he does not like the arrangement, he can return to the 8-hour schedule. Mr. Roireau stayed on the 12-hour schedule: he stated that he likes his life style and having to travel three days rather than six. To his knowledge, only two CXs have left the 12-hour schedule because they did not work enough overtime.

[25] Gilles Leclerc has been working for Correctional Service for 12 years. He has been at Cowansville Institution for nine years as a CX-02; previously he was at Port-Cartier.

[26] Mr. Leclerc works the 8-hour schedule on the swing shift. He worked the 12-hour schedule from April to August 2002. He stated that he worked very little overtime during that period. Mr. Leclerc was available for all shifts, especially during his days of rest. Mr. Leclerc indicated his availability on a document similar to Exhibit P-1. His name appears on the second page of Exhibit P-3: he has a total of 45.50 hours accumulated as at July 31, 2002. Mr. Leclerc said initially that these were converted hours, that this total might represent two 12-hour shifts, since he could not see the period that he worked. Mr. Leclerc indicated that there was an agreement to convert hours worked into hours paid rather than indicate the total number of hours worked. Mr. Leclerc is uncertain whether Exhibit P-3 indicates converted hours or not. Mr. Leclerc left the 12-hour schedule on about August 16, 2002.

[27] On Exhibit P-4, Mr. Leclerc's name appears 8th from the top of the second page. He has a total of 177.52 hours. These are converted hours.

[28] Mr. Leclerc attributes the difference in the number of hours between July 2002 and March 2003 to the fact that he initially worked the 12-hour schedule and then switched to the 8-hour schedule: the overtime was offered to him on a priority basis rather than to his 16 fellow workers on the 12-hour shifts. He stated [translation]: "I could almost choose the time of my overtime". Mr. Leclerc believes that the accumulation of overtime increased, rising from about 40 hours to 177 hours.

[29] Mr. Leclerc did not like working the 12-hour schedule. After his father died, he wanted to change. He asked to return to the 8-hour schedule in late June or early July 2002. He had to find a replacement and to work about 19 hours to adjust the schedules. According to Mr. Leclerc, the 12-hour schedule is popular, except in cell block 9. Mr. Leclerc is the first CX-02 to return to the 8-hour schedule.

[30] Under cross-examination, Mr. Leclerc admitted that he did not stop working the 12-hour schedule because he was doing less overtime. He left because his father's death created upheaval in his life. In addition, when working the 12-hour schedule, Mr. Leclerc found himself in charge of the cell block. By working a 12-hour schedule,

he was at greater risk of "being assigned" to cell block 9 and he did not particularly like being the officer in charge of the cell blocks during the evening and night shifts.

[31] Mr. Leclerc worked statutory holidays between April 2002 and March 2003. The premiums for working a statutory holiday are the same regardless of the schedule and are not included in overtime.

[32] Eric Marcotty has worked for Correctional Service since July 2002. He began at Cowansville Institution as a CX-01 and became an acting CX-02 in October 2002. He has worked the 8-hour schedule from the start.

[33] Mr. Marcotty described how he indicates his availability for overtime. He did not take annual leave between October 2002 and March 2003. According to Exhibit P-4, Mr. Marcotty completed 261.01 hours of overtime between August 2002 and March 31, 2003. He was called regularly to work overtime after his shifts and during his days of rest. Mr. Marcotty was paid time and a half for his overtime hours.

[34] Mr. Marcotty cannot explain why he was offered overtime more often. He completed his probationary period in July 2004. He cannot say what proportion of overtime he accumulated as a CX-01 or CX-02 between August 2002 and March 2003.

[35] Paul Hinse has been at Cowansville Institution since September 2000. He began as a CX-01 and became an acting CX-02 on December 10, 2001.

[36] Mr. Hinse has worked a 12-hour schedule since August 26, 2002. As a CX-02, he worked an 8-hour schedule from December 10, 2001 to August 26, 2002. He replaced Gilles Leclerc on the 12-hour schedule.

[37] Mr. Hinse did not change his availability for overtime after he changed his schedule.

[38] Mr. Hinse indicated his name on Exhibit P-6, which is the overtime summary dated August 31, 2002. Mr. Hinse's name is highlighted on the second page, toward the bottom. He has a total of 86 hours of overtime worked.

[39] On Exhibit P-4, Mr. Hinse's name appears third on the second page: he has 151.88 hours. He believes that this total represents hours worked. Mr. Hinse says that the lists of converted hours appeared in 2003-2004.

[40] Mr. Hinse stated that the only explanation for the discrepancy between the accumulation of 86 hours in five months and 65 hours in seven months is the fact that his overtime became payable at time and three-quarters when he worked a 12-hour schedule while, before that, he was paid at time and a half when he worked the 8-hour schedule.

[41] Under cross-examination, Mr. Hinse stated that the hours that appear on Exhibit P-6 are hours worked. Mr. Hinse believes, but is not certain, that the maximum hours that an employee can work in a day may not exceed 16 hours.

[42] Marcel Larocque has worked at Cowansville Institution for 26 years. He has been a CX-02 since 1992.

[43] Mr. Larocque has worked the 12-hour schedule steadily from when it was introduced to the present. He is available for the three shifts of his days of rest, from the first to the last. He is always available, except on Monday evenings when he goes bowling if he is not working the night shift. CXs work from 7:00 a.m. to 7:00 p.m. on the day shift, and from 7:00 p.m. to 7:00 a.m. on the night shift.

[44] Prior to working a 12-hour schedule, Mr. Larocque was less available but had the opportunity to work 8 hours of overtime after his 8-hour shift, which is referred to as "working a double shift". By working a 12-hour schedule, he can do four hours of overtime after his shift. It is the maximum overtime he can do on a normal day of work.

[45] Mr. Larocque found his name on the second page of Exhibit P-3, third from the top, with 28.50 hours. He does not know if these are hours worked or converted as at July 31, 2002.

[46] On Exhibit P-4, Mr. Larocque found his name, highlighted, third from the bottom of the sheet: he has 90.63 hours. He stated that these were converted hours.

[47] Mr. Larocque stated that he has never been offered 12 hours of overtime. He has done four hours when correctional supervisors were "in a fix". He has also worked eight hours when on leave.

[48] Mr. Larocque knows Marc Côté, who is a CX-02 whose name appears last on Exhibit P-4. Mr. Côté has 283.29 hours of overtime and works an 8-hour schedule.

[49] Under cross-examination, Mr. Larocque reported that he worked overtime on statutory holidays and that these hours are not included in Exhibits P-2, P-4 and P-6. He worked five statutory holidays. Mr. Larocque indicated that overtime, shift premiums, etc. are paid by separate cheque, once a month. Regular pay is paid every two weeks. Mr. Larocque does not think that the assignment of overtime on statutory holidays is equitable, but he has not filed a grievance.

[50] Michel Martel has worked at Cowansville Institution since January 16, 1999. He began as a CX-01 and has been an acting CX-02 for about two years. He became an acting CX-02 while working the 8-hour schedule. He began working the 12-hour schedule when it was introduced in April 2002.

[51] Mr. Martel returned to the 8-hour schedule in April 2003. Between April 1, 2002 and March 31, 2003, Mr. Martel was available for overtime and indicated it on the sheets similar to Exhibit P-1. He entered his name as available 90% to 95% of the time, regardless of the shift.

[52] Mr. Martel is familiar with Exhibit P-3. His name appears second on the second page: he has 28.50 hours of overtime. On Exhibit P-4, his name is second last on the first page: he has 129.60 hours accumulated.

[53] Mr. Martel knows Jean Lamoureux whose name appears on the second page of Exhibit P-4. Mr. Lamoureux is an acting CX-02 like Mr. Martel: he has 277.55 hours accumulated on Exhibit P-4. He explained that Mr. Lamoureux has more overtime than he does because Mr. Lamoureux was paid time and a half, while he was paid time and three-quarters.

[54] Mr. Martel returned to an 8-hour schedule because he wanted to work more overtime and he was "worn out" from working nights. On the 8-hour schedule, it is quite rare for him to be called to work at night. Mr. Martel works in cell block 9. There are four CX-02s in cell block 9 who work a 12-hour schedule: the majority work the 8-hour schedule.

[55] Conrad Gamache has worked for Correctional Service since March 3, 1981. He has been at Cowansville Institution since August 1989. He arrived at Cowansville as a CX-COF-04 and became a CX-02 in 1991 when the classifications were converted.

[56] Mr. Gamache is paid every two weeks for an average of 37.5 hours per week. The gross amount of this cheque remains relatively the same. Every month he receives another cheque for shift premiums and overtime. This cheque also includes premiums for working a statutory holiday, kilometrage and meals. There is a special notation of "statutory holiday" when the premium is for work on a statutory holiday.

[57] Mr. Gamache worked the 12-hour schedule between April and December 2002; he replaced someone who had more seniority than he did, Marc Vaillancourt. When Mr. Vaillancourt returned from extended sick leave, he resumed his position and the 12-hour schedule. Mr. Gamache returned to his "8-hour swing schedule".

[58] When he worked a 12-hour schedule, Mr. Gamache worked every second weekend. Since returning to the 8-hour schedule, he has worked two weekends out of three. In April 2003, Mr. Gamache returned to the 12-hour schedule when the officer left again.

[59] Mr. Gamache indicated that he is always available for overtime. He signs up everywhere because he is available. Mr. Gamache is part of the emergency response team, which means that he has priority for "emergencies to go to the hospital". Mr. Roireau is not part of the emergency team.

[60] During the period between April 2002 and March 2003, there were several occasions where Mr. Gamache was involved in responses that required him to remain one hour, a half hour or three-quarters of an hour on overtime. Mr. Gamache has been part of the emergency response team since 1989. He resigned from the team in 2003.

[61] Mr. Gamache may be required to work overtime when acting as an escort. This overtime is difficult to predict but it is included on the forms such as Exhibit P-4. Overtime hours are recorded on Exhibit P-4 but not work on a statutory holiday.

[62] Exhibit P-2 shows the overtime worked during 2001-2002. Mr. Gamache performed the most hours with 229.25 hours. He filed a grievance with respect to the principle of equity even though he had a lot more hours; he stated that "it is not right".

[63] Between April 2002 and March 2003, Mr. Gamache's availability did not change. He signed everywhere, as before. According to Exhibit P-3, as at July 31, 2002, he had 58 hours accumulated. His name is the first highlighted name from the bottom of the second page. The hours on Exhibit P-3 are hours worked. According to Mr. Gamache,

hours started being recorded as converted hours in 2003. Mr. Gamache considers this practice discriminatory because the people paid at time and three-quarters will see their "numbers increase more quickly".

[64] Mr. Gamache filed his grievance on January 3, 2003 (Exhibit P-7). At that time, Mr. Gamache was working an 8-hour schedule. He introduced Exhibit P-8, which is the summary as at February 22, 2003. His name appears 10th from the bottom of the second page: he has 192.76 hours. He did some catch-up working the 8-hour schedule.

[65] Mr. Gamache's name is the second highlighted name on the second page of Exhibit P-4: he has 205.89 hours. Mr. Gamache went back on the 12-hour schedule in March 2003.

[66] Mr. Gamache wanted to submit a summary of overtime hours as at May 4, 2003 but the employer objected claiming that facts that occur after the filing of the grievance are not relevant. The period of April 2002 to March 2003 is already in evidence. I upheld the objection because the information is subsequent to the grievance and to the overtime period at issue.

[67] Mr. Gamache commented that, in its response to the grievance, the employer cites figures that did not correspond to the overtime worked. The employer refers to 222 hours although, according to Exhibit P-4, Mr. Gamache had 205.89 hours at the end of March 2003.

[68] Mr. Gamache knows Marc Côté, who has 283.29 hours, as indicated on Exhibit P-4. Mr. Côté is much less available than Mr. Gamache but he works as many hours because it is not a question of availability but of lower cost.

[69] Several CXs sign up for their days of rest but they need to sign up at time and a half to get called. There are many zeros beside names because some CXs do not want to work overtime. Refusals of overtime are not recorded.

[70] Under cross-examination, Mr. Gamache explained that the computer can only print documents for the current year.

[71] In Mr. Gamache's view, the documents submitted show the inequity. He is familiar with all of the documents because he worked as a clerk, that is, as the

assistant to the correctional supervisor in charge of the institution. In this capacity, he had access to all of the documents relating to overtime.

[72] Mr. Gamache tried to get the documents for 2002 from Jean Yves Cyr, who told him to go to the storeroom. The boxes were not there.

[73] Mr. Gamache does not have the numbers for April 2002. Nor does he have the numbers for January 2003. Mr. Gamache filed his grievance on January 3, 2003.

[74] Mr. Gamache filed a grievance because when he was paid double time for overtime he was passed over in terms of being offered overtime for people with more hours than he had. Mr. Gamache believes that the principle of equity was not respected.

[75] Mr. Gamache stated that when he worked the 12-hour schedule, he was the employee most available for overtime. He was more available at that time than Mr. Roireau.

[76] Mr. Gamache feels aggrieved by the fact that the employer offered overtime first to CXs paid at time and a half, even if they had more hours than he did. It is not the number of hours that is inequitable but the way in which the employer assigns the overtime. If clause 21.10 of the collective agreement was respected, Mr. Gamache would not feel aggrieved because he worked less overtime, provided that CXs working the 8-hour schedule and 12-hour schedule were offered overtime with the same frequency. He feels aggrieved in terms of both the principle and the money compared to his colleagues who are paid time and a half. Mr. Gamache feels there is bias in terms of hours and money. He feels unfairly treated because he does not have a choice as to when he works overtime. Mr. Gamache considers it discriminatory for the lists to show hours as converted hours. He is convinced that the lists of converted hours began in 2003. Mr. Gamache cannot explain the decimals on Exhibit P-8.

[77] Pierre Sansoucy is a correctional operations supervisor at Cowansville Institution. He has worked for Correctional Service for 31 years, 30 of them at Cowansville. He is in charge of an operational unit. When he works weekends, he is in charge of the institution. He is responsible for 21 employees.

[78] Mr. Sansoucy has administered and updated the work schedules for six years. In 1999, he was part of a committee that created and implemented a 12-hour schedule

for CXs with the assistance of the bargaining agent. This schedule was introduced in 2000 with the CX-01s only.

[79] Mr. Sansoucy presented Exhibit E-2 bundled, which includes:

E-2(a) The memorandum dated May 7, 1999 from the Deputy Warden, Claude Guérin to Gordon Hamilton at Headquarters;

E-2(b) The memorandum dated March 14, 2002 from the Deputy Warden of Cowansville Institution to the CX-02s at Cowansville;

E-2(c) The memorandum dated February 11, 2003 to the Warden of Cowansville Institution, signed by the Deputy Warden, Claude Guérin and Jean Yves Cyr from UCCO-SACC-CSN;

E-2(d) The six-page variable work schedule of February 14, 2003;

E-2(e) A document entitled [translation] "Use of Replacements".

[80] Mr. Sansoucy explained that, in about 1998, some of the unionized CXs made requests at the regional and national levels to have work schedules that would give them a better quality of life.

[81] Correctional Service's management at the national level commissioned the private company, TA Associés, to develop a variety of schedules, regardless of hours, for shifts of 8, 9, 10 or 12 hours. Institutions were then asked to volunteer. Cowansville and Drummondville were selected from the 10 that were prepared to be part of a pilot project.

[82] Representatives from the private company and senior management came to explain the philosophy of shift schedules, how they worked and what they would provide. The new schedules had to meet three criteria: (1) enable employees to spend more time at home to have a better quality of life; (2) not cost more than the existing schedule; and (3) meet all operational requirements.

[83] A committee was set up for Cowansville Institution. The eight members of the committee were: Mr. Sansoucy, correctional supervisor; Marc Tremblay, unit manager; Jacques Grenier, President of the union local; Mario Roireau, CX-02; Conrad Gamache,

CX-02; Johnny Diotte, CX-01; Marc Healy, CX-01; Yvan Paradis, CX-01; and Danielle Verrette, CX-01.

[84] After discussions, the committee selected the 12-hour schedule for the CX-01s. If after a one-year trial period the shift schedule proved successful, it would be offered to the CX-02s with the same criteria.

[85] For the most part, the 12-hour schedule was hammered out by the CX-01, who did most of the work. Others verified whether the schedule was flexible enough to meet the cost and operational requirements criteria. Consensus was reached after two or three months. The next step was to set the terms and conditions and common tools in order to implement it while respecting the collective agreement, specifically with respect to how leave would be taken, holidays, bereavement or family leave and overtime. Once agreement was reached with the bargaining agent, the package was presented to management of the institution and the regional administration for approval.

[86] Approval was given and the 12-hour schedule started in April 2000 for the CX-01s. Once the schedule was fully operational, the union local and the CX-02s asked for the same arrangement. Because of differences in the duties of CX-01s, who handle static security, and the CX-02s, who handle dynamic security, the 12-hour schedule could only be implemented on a more limited basis.

[87] A committee, including Noël Ray and Aldo Ray as the CX-02s, prepared a 12-hour schedule for a limited group of CX-02s. The CX-02 pilot project began in April 2002 after the same approval process as for the CX-01s. The document in Exhibit E-2(b) describes this process. It was sent to the president of the union local at the time but Mr. Sansoucy does not remember his name. It was also sent to the coordinator of Correctional Operations, unit managers and correctional supervisors.

[88] Document E-2(c) is the one issued in February 2003 for the 2003-2004 schedule. Each year, it is necessary to review what worked and what did not. The Deputy Warden, Claude Guérin and the President of the UCCO-SACC-CSN local, Jean Yves Cyr indicated the steps that needed to be taken. The terms and conditions approved are described in document E-2(d). That document sets out the number of CXs, their work schedules, the procedures for granting holidays, leave, statutory holidays, overtime and training. It was signed on behalf of the Deputy Warden and by the President of the

UCCO-SACC-CSN local, Jean Yves Cyr. There were no changes made to the terms and conditions in 2003 compared to the previous year.

[89] Mr. Sansoucy stated that, prior to the 12-hour schedule, overtime was paid only at time and a half or double time. The procedure in place for many years was to call the CXs paid a time and a half first and then those paid at double time. The purpose of this procedure was simply to manage public funds prudently: to provide the best service at the least cost while respecting the collective agreement and being equitable.

[90] The overtime rate for CXs working the 12-hour schedule was already in the collective agreement (time and three-quarters). The same philosophy of call priority was applied and the procedure of calling CXs paid at time and a half before those paid at time and three-quarters, and the latter before those paid at double time, was implemented at the very beginning of the pilot project for implementing the 12-hour schedule.

[91] Mr. Sansoucy explained that all CXs sign up on a universal availability list, like Exhibit P-1, every day of the week during a given month. They can do so each day when they arrive at work, or for the week, or even the month. On the right side of the form, CXs can indicate if they are no longer available.

[92] The correctional supervisor takes down the form for the day when it is completed and uses Exhibit P-2 to offer overtime. He checks the roll call, the work schedule and the CXs who signed Exhibit P-1 to ensure that they are not on another shift at the same time. He determines whether the CXs have to be paid time and a half, time and three-quarters or double time. A form like Exhibit P-2 is issued for each shift. The manager does his work on paper and then enters the final version on the computer when he is finished. When the employer is finished and has filled his overtime need, he converts the number of hours into straight time.

[93] The union local asked that the total number of overtime hours be converted into straight time based on the hours paid. This request was made over a year ago and converted hours have been used on the forms like Exhibit P-2 since then.

[94] The correctional supervisor (CX-05) enters his initials on the form (Exhibit P-2). There are 10 CX-05s. The CX-05 records the time at which the call was made, "OK" if the overtime is accepted or "refused" if it was refused. Exhibit P-2 is updated for each

shift. The only exception is when CXs are travelling for training or escort duty. The form is completed when they return.

[95] The form (Exhibit P-2) contains all types of overtime except premiums for working a statutory holiday. Work on a statutory holiday is handled separately. A CX on a 12-hour schedule, who does not work on a statutory holiday, is paid for eight hours; this means there is a four-hour deficit. These four hours are accumulated and when the total reaches 12 hours, measures are taken for the CX to give them back.

[96] Overtime is offered based on the availability of CXs, taking into account the number of hours of overtime accumulated and the applicable rate of pay. The supervisor calls the CX paid at time and a half who has the least number of hours accumulated and goes down the list. He then moves on to the CXs paid at time and three-quarters, beginning with the one with the least hours and going down the list, ending finally with the CXs paid at double time. If the first CX paid at time and a half who is available is the one with the most overtime, he will be offered the overtime.

[97] Normally, the overtime call is made around 5:30 a.m. for the day shift, around noon for the evening shift and at dinner time for the night shift. There may be exceptions when there are emergencies, such as an injured inmate, a fight between inmates, the need to escort an inmate or at other times of tension, which result in some CXs on duty being kept on at the end of the shift regardless of the list.

[98] When the availability list is used, a CX may call in around 10:00 a.m. to find out if overtime is going to be offered. The CX knows who is first on the list. If he is first, he will tell the supervisor to book him and that he will call back later to confirm. This happens often. CXs can check the list in the supervisors' office and they do so.

[99] According to Mr. Sansoucy, over the course of a year, all of the CXs are offered overtime equitably. Over the period of a year, things balance out because there are peak periods, such as June, July and August, and during the Christmas and Easter holidays. Mr. Sansoucy has in the past had to order CXs to remain on overtime because the availability list was exhausted. Such an order is given to the CX with the least seniority.

[100] According to Mr. Sansoucy, the advantage of the 12-hour schedule over the 8-hour schedule is one of improved social life and the possibility of longer vacations if

the time selected for holidays coincides with the longer periods of days of rest. The 12-hour schedule provides for periods of rest of nine consecutive days, twice in 48 weeks, as well as two rest periods of six consecutive days during the year.

[101] Holiday time is taken in blocks of seven days. The CXs sign up for the days they want in these blocks. They can choose two blocks and then must wait until everyone has made their choices before selecting more. If they take only two days in one block and two in another, they still have to wait for everyone else to make their selections in order to take the rest of their holidays.

[102] The other benefit of the 12-hour schedule is that CXs save on transportation; they spend on average 82 more days per year at home.

[103] Throughout the 15 years that Mr. Sansoucy has been a supervisor, the policy of offering overtime to CXs paid at time and a half before those paid at double time has always been in effect. In his view, this policy is equitable over the long term because the offer of overtime ends up balancing out.

[104] Mr. Sansoucy wanted to submit in evidence the overtime pay list. The grievors objected because he was not the one who prepared it or who asked for it and he has no personal knowledge of it. I upheld the objection.

[105] According to Mr. Sansoucy, Mr. Roireau and Mr. Gamache are around the average of the CXs who worked overtime if the availability of CXs every day is considered. The average includes all CXs who have accumulated hours.

[106] CXs who work the 12-hour schedule do so from personal choice and on the basis of seniority. They can leave this shift schedule but there are adjustments that have to be made and they must complete the current schedule. Replacements are easy to find; there are volunteers waiting to work on this schedule. Schedules are selected once a year using one list per unit. There are two employees per unit working on the 12-hour schedule. Requests are filled based on seniority. In general, the pilot project ran well for the first period from April 2002 to 2003.

[107] Under cross-examination, Mr. Sansoucy stated that he is the correctional supervisor for cell block 9. He works as the correctional supervisor in charge of operations one weekend per month and when he has to replace absent supervisors. There are six supervisors responsible for the institution, who must cover 24 hours a

day, seven days a week. Mr. Sansoucy held the position of the supervisor in charge of the institution for nine years. The supervisors in charge have rotating shift schedules, they take turns. As the unit supervisor, Mr. Sansoucy works the day shift. He has not had to be on a rotating schedule for two years. Between April 1, 2002 and March 31, 2003, Mr. Sansoucy did not have to work any weekends, but did have to take charge of the institution 15 times between Monday and Friday. The responsibilities are the same during the day shift; he had to assign overtime, etc. There is more activity during the week and more comings and goings during the day.

[108] Even when working in the unit, Mr. Sansoucy can be called to replace the correctional supervisor and must prepare sheets similar to Exhibits P-2, P-4, P-6 and P-8. The supervisor in charge who normally does this work may be called to meetings, on a tour of detention facilities, in meetings with "the bosses" or with financial management, or have obligations that require him to leave his office. At these times, Mr. Sansoucy must replace him.

[109] Mr. Sansoucy explained that the correctional supervisor has an assistant at the CX-02 level. This is a position assigned on a rotating basis to the CX-02s working 12-hour shifts.

[110] Mr. Sansoucy confirmed that the pilot project of the 12-hour schedule for CX-01s took place when the Public Service Alliance of Canada (PSAC) was the bargaining agent. It was the institution's employees who "hammered out" a schedule with management. They had the "blessing" of the PSAC.

[111] Matsqui Institution was the first to have a 12-hour schedule and to set the criteria for the implementation of pilot projects. Some institutions do not have a 12-hour schedule.

[112] Mr. Sansoucy is aware that Mr. Cyr is the president of the UCCO-SACC-CSN local at the institution. He is not aware that Sylvain Martel is the President of the UCCO-SACC-CSN at another level.

[113] Mr. Sansoucy stated that he had to offer overtime to CXs paid at double time during the summers of 2002 and 2003. He did not do so often. He takes his holidays in August. He could not give the exact dates. Mr. Sansoucy does not remember when he took charge of the institution; it happens frequently in the summer when there are not

enough replacements to cover holidays. The supervisors on duty do it on a rotating basis.

[114] The correctional supervisors consult with each other and Mr. Sansoucy checks the roll call and overtime lists daily; it is an "automatic reaction". There are only 10 supervisors and they know each other well; they have been there between 25 and 28 years, except for the last two. They talk about overtime as much as the employees that they supervise. They all meet once every two months when the schedules have to be redone.

[115] According to Mr. Sansoucy, the hours shown on Exhibit P-4 are converted hours. Those on Exhibit P-3 are not converted because there are zeros and fives. [Translation] "The transition between the two occurred at some point." Exhibit P-8 is also converted hours. The same is true of Exhibit P-6, because there are decimals that end in threes and sixes. Converted hours began with Exhibit P-6 dated August 31, 2002.

[116] Mr. Sansoucy stated that Exhibit P-4 indicates the results at the end of the year but does not include the overtime for statutory holidays. When Mr. Sansoucy talks about average overtime, he is talking about an average calculated from the pay documents from the Finance Section, which includes all overtime paid to CXs.

[117] At the end of the hearing, I granted the parties' request to present their arguments in writing.

Grievors' argument

[118] The grievors filed their written arguments on February 26, 2004. They read as follows:

[Translation]

As agreed at the hearings of January 29 to 30, 2004 in the above-mentioned matters, we hereby submit the arguments for Correctional Officers Roireau and Gamache.

Employer's preliminary objection

The employer objected to your jurisdiction to hear the grievances of Mr. Roireau and Mr. Gamache on the grounds that these grievances are challenging an employer policy.

In this regard, we believe that the employer is mistaken about the grounds for the grievances, "my employer is not respecting clause 21.10 of the collective agreement", with a factual matter, "the current overtime procedure is discriminatory".

The objection is manifestly incorrect. An employee may always object to any policy or practice of the employer to the extent that the employer uses said policy or procedure to disregard its obligations under the collective agreement. If this were not possible, it would mean that an employer could adopt a policy to avoid any collective agreement obligation.

In support of its objection, the employer cites Armand (166-2-19560) in which the adjudicator determined that he does not have jurisdiction to interpret the employer's policy on the assignment of overtime because that policy was not part of the collective agreement.

In Armand, the employees believed that the employer's policy was incorporated in the collective agreement. They were asking that it be applied, that is, that there be equitable daily assignment of overtime.

In our case, the issue is not to have the overtime policy of Cowansville Institution applied, but rather is an objection to that policy because it does not comply with the provisions of clause 21.10 of the collective agreement.

It is certainly within your jurisdiction to determine whether the employer's practice respects the provisions on the assignment of overtime set out in clause 21.10.

Arguments concerning the grievances

Uncontested facts:

- 1. Prior to April 1, 2002, the 72 level 2 correctional officers (hereafter CX2s) worked eight hours per day, rotating between day and night shifts. They worked an average of 37.5 hours per week.*
- 2. Since April 1, 2002, 16 CX2s have worked a variable schedule. They work 12 hours per day and rotate between the day shift (6:50 a.m. to 7:20 p.m.) and the night shift (7:00 p.m. to 7:00 a.m.). They work an average of 37.5 hours per week. The other 56 CX2s continue to work 8-hour per day schedules according to the terms and conditions mentioned above.*
- 3. Mario Roireau is a CX2 who has worked at Cowansville Institution on a 12-hour per day schedule from April 1, 2002 to the present.*

4. *Conrad Gamache is a CX2 who worked at Cowansville Institution on a 12-hour per day schedule from April 1, 2002 to mid-December 2002. From mid-December 2002 to March 24, 2003 he worked an 8-hour per day schedule.*
5. *Management at Cowansville Institution established a policy for the assignment of overtime.*
6. *According to that policy, accumulated overtime is counted on an annual basis between April 1 and March 31 of the following year.*
7. *CX2s, regardless of their daily work schedule (8 hours or 12 hours) are invited to indicate their availability for overtime for each day and for each shift on the form, [translation] "CX-2 sign-up for overtime availability", submitted as Exhibit P-1.*
8. *Overtime worked by CX2s is recorded for each shift and copied onto the forms [translation] "OVERTIME CX-02s" in the "TOT" column. This column reverts back to zero on April 1 of each year.*
9. *For each shift, a correctional supervisor establishes a list of CX2s available for overtime in the order in which overtime will be offered on the forms "OVERTIME CX-02s" submitted as P-2, P-3, P-4, P-6, P-8.*
10. *From April 1, 2002 to July 31, 2002, overtime was recorded on these forms based on the number of hours worked. From August 1, 2002 to March 31, 2003, hours were recorded based on the pay rate applied. For example, for eight hours at time and a half, 12 hours were recorded; for eight hours at time and three-quarters, 14 hours were recorded. Documents filed as P-3 and P-6.*
11. *Overtime to be worked is offered to employees shown as available on the form "CX-2 sign-up for overtime availability" (P-1) as follows:*
 - (a) *to employees paid at time and a half (1 1/2), who have the least number of accumulated hours (Form OVERTIME CX-02s in TOT column) until that category is exhausted;*
 - (b) *to employees paid at time and three-quarters (1 3/4), who have the least number of accumulated hours (Form OVERTIME CX-02s in TOT column) until that category is exhausted;*

(c) to employees paid at double time (2), who have the least number of accumulated hours. (Form OVERTIME CX-02s in TOT column)

12. The collective agreement provides in clauses 21.12 and 21.14 that, for CX2s working 8-hour shifts, overtime will be paid for each completed 15 minute period at time and a half (1 1/2).
13. However, these same CX2s will be paid at double time (2) for hours worked on a second or subsequent consecutive day of rest, after eight hours of overtime in a calendar day, in excess of eight consecutive hours of overtime in any contiguous period of overtime, or in the case of an emergency when an employee is required to work more than 24 consecutive hours, according to clauses 21.13 and 21.14.
14. For CX2s working 12-hour schedules, the collective agreement provides in clause 34-5 that overtime worked over and above the normal schedule or on days of rest will be paid at time and three-quarters (1 3/4).

The question at issue

Does the method used by the employer to assign overtime violate clause 21.10 of the collective agreement?

Clause 21.10 states:

"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,
- (b) to allocate overtime work to employees at the same group and level as the position to be filled, i.e.: CX-1 to CX-1, CX-2 to CX-2, etc.;

and

(c) to give employees who are required to work overtime adequate advance notice of this requirement."

Based on the evidence presented, since April 1, 2002, the employer has respected its obligations in that overtime is assigned to employees at the same group, with only CX2s allowed to indicate their availability for overtime for the work of that group. Overtime is assigned among the employees at this group and level. (Exhibits P-3, P-4, P-6, P-8)

The procedure used to identify readily available qualified employees, by indicating availability to work overtime on days and shifts (Exhibit P-1) is reasonable and, in our opinion, in compliance with the collective agreement.

However, the assignment of overtime is not done equitably.

Management of Cowansville Institution established a procedure that does not respect the collective agreement by assigning overtime based on the hourly rate paid to the employee.

In effect, the overtime assignment method applied at that institution ensures that overtime is always offered first to CX2s who indicated their availability and who work the 8-hour schedule.

It is only when there are no CX2s available who work the 8-hour schedule that overtime is offered to CX2s who work the 12-hour schedule because of the hourly rate (1 3/4) paid for overtime.

The testimony of the various CXs shows that this situation significantly disadvantages CX2s working the 12-hour schedule.

Marcel Larocque, CX2, who has worked the 12-hour schedule since April 2002, accumulated a total of 90.63 hours by March 31, 2003 (P-4), despite being very available, except for Monday evenings. He believes that he needs to be very available because on a 12-hour schedule, they are rarely called for overtime.

Michel Martel, CX2, worked the 12-hour schedule for the whole of the period from April 1, 2002 to March 31, 2003 and accumulated a total of 129.60 hours for the year, despite being very available. For the following fiscal year, he asked to return to the 8-hour schedule in order to be able to do more overtime.

Gilles Leclerc, CX2, worked the 12-hour schedule from April 1, 2002 to August 26, 2002 and exchanged his schedule with Paul Hinse, acting CX2, who was working the 8-hour schedule. Paul Hinse then worked the 12-hour schedule from August 26, 2002 to March 31, 2003.

Mr. Leclerc accumulated a total of 45.50 hours by July 31, 2002 (12-hour schedule (P-3)).

He accumulated a total of 177.52 hours by March 31, 2003 (return to 8-hour schedule on August 26, 2002 (P-4)). Note that most of the overtime was worked on the 8-hour schedule.

As for Paul Hinse, he accumulated a total of 86.00 hours by August 31, 2003 (8-hour schedule until August 26, 2002). He accumulated a total of 151.88 hours by March 31, 2003. Here again, most of the overtime was done on the 8-hour schedule given the change in the method of counting hours in August 2002.

One of the complainants, Mr. Roireau worked the 12-hour schedule from April 1, 2002 to March 31, 2003, was available for overtime all the time, for all shifts, and accumulated a total of 21.50 hours by July 31, 2002 (P-3), 63.50 by August 31, 2002 (P-6) and 82.75 by March 31, 2003 (P-8).

You will note that a large proportion of the overtime worked by Mr. Roireau was worked during the summer, that is, in August 2002, a peak period for recourse to overtime according to the testimony of Mr. Sansoucy, correctional supervisor at Cowansville Institution. It is therefore less surprising in this context that the employer used Mr. Roireau's services, even though it had to pay him at the 1 3/4 rate for his hours.

If we compare Mr. Roireau's situation to that of Eric Marcotti, one of the witnesses, we can see the scope of the inequitable allocation of overtime. Mr. Marcotti joined Cowansville Institution on July 10, 2002 as a level 1 correctional officer (hereafter CX1) on the 8-hour schedule. He began working overtime in August 2002. Since the beginning of October 2002, he has worked as an acting CX2 on the 8-hour schedule. He never worked the 12-hour schedule as either a CX1 or CX2. Mr. Marcotti was available for overtime work most of the time, on days of rest and after his shifts, except for night shifts. His total as of March 31, 2003 was 261.01 hours (P-4).

Mr. Roireau has a total of 82.75 compared to Mr. Marcotti's 261.01, a difference of 178.26 hours between them. Mr. Marcotti's total is twice as high as Mr. Roireau's is. Similarly, CX2s Lamoureux (277.55), Ouellet (277.88), Roy (281.29) and Côté (283.29) all had results higher than Mr. Marcotti.

While we do not know how many hours paid at double time were worked by Messrs. Marcotti, Lamoureux, Ouellet, Roy and Côté, the fact remains that, given that CXs paid overtime at double time are called last, there is a very large gap between their totals and that of Mr. Roireau.

The second complainant, Conrad Gamache, CX2, worked the 12-hour schedule from April 1, 2002 to mid-December, 2002. Mr. Gamache made himself very available for overtime, being accustomed to being available all the time. He

accumulated a total of 86.00 hours by August 31, 2002 (P-6). You will note that there is very little difference with the total accumulated by Michel Martel as of the same date and with the same availability. However, the gap between these two CX2s at the end of the year (Mr. Martel 129.60, Gamache 205.89) is explained by the fact that Mr. Gamache worked the 8-hour schedule from mid-December to the end of March. Because of his considerable availability for overtime, he was always called before Mr. Martel because the latter always had to be paid at the 1 3/4 rate.

You will also note from Exhibit P-4 that none of the CX2s on the second page of the document with a total of over 145 hours worked the 12-hour schedule the entire year. Mr. Hinse started the 12-hour schedule on August 26, 2002, Mr. Gamache left the 12-hour schedule in mid-December 2002 and then came back to it at the end of March 2003, and Mr. Ferland started the 12-hour schedule in March 2003.

In its evidence, the employer stressed the benefits of the 12-hour schedule that allows employees to complete their 37.5 hours in fewer days than other employees. This schedule is definitely appreciated by the CXs who work it. However, you will note that these CX2s work the same number of hours as their fellow workers and that this schedule has a number of disadvantages, notably that of having to work at night.

You must not decide the grievance on the basis of the benefits or disadvantages of the 12-hour schedule compared to the 8-hour schedule, but rather on whether the assignment of overtime among CX2s is equitable since the collective agreement does not provide for the assignment of overtime based on work schedule or the rate of pay for those hours.

The question of equitable assignment of overtime under clause 21.10 has been the subject of many decisions of the Public Service Staff Relations Board.

First, Strurt-Smith and Treasury Board (CSC), PSSRB 166-02-15137.

In this case, the employer believed that an equitable system of overtime allocation allowed it to give priority to employees who should be paid at time and a half (1 1/2) rather than double time (2) because the employer must take into account operational requirements when allocating overtime. The employee objected to the fact that he was refused hours because he had to be paid double time to do the work. The employer's interpretation was rejected in this case because Adjudicator Galipeault felt that operational requirements

were related to the nature of the work required and not the associated cost. Given the difference between the number of hours of overtime worked by the two employees available to work them, the adjudicator allowed the grievance.

Foisy and Treasury Board (Transport Canada), PSSRB 166-2-17174 and 17175.

In this case, there are facts similar to ours and the wording of the collective agreement on assignment of overtime is identical to ours except for the allocation being separated between the different levels of CXs.

There were two work teams, one that worked a 12-hour schedule and the other an 8-hour schedule. The team on the 12-hour schedule received more leave than the team on the 8-hour schedule. One day, the employer allocated overtime to an employee who had worked more total hours of overtime than others because of the rate that had to be paid to that person (1 1/2) compared to the double time (2) that had to be paid to employees who had accumulated fewer hours.

Mr. Cantin states as follows at page 6:

"Turning to the merits of the case, I believe that it is not reasonable, when the time comes to determine whether overtime work has been allocated equitably, to consider the situation only as it existed on one very specific day. It may well be that, during a given fiscal year, the initial offer of overtime may be to the detriment of some employees. This situation may continue for several weeks if no further opportunities to work overtime arise."

At page 7, the adjudicator states as follows:

"I conclude, as did the then Chief Adjudicator Edward B. Jolliffe, Q.C., in *Sumanik, supra*, that the word "equitable" does not have the same meaning as the word "equally" (page 16 of the decision). However, nearly six months after the collective agreement took place, employee Gauthier had worked approximately three times as much overtime as the grievors. This clearly indicates an inequitable allocation of overtime, contrary to the provisions of the collective agreement. This is my conclusion." [Emphasis added]

Evans and Treasury Board (SGC-CSC), PSSRB 166-02-17195.

Identical clause of the collective agreement except for the allocation of hours within it: CX1 to CX1, CX2 to CX2. Identical allocation procedure (sign up for availability,

cumulative hours, and employer's preference for time and a half (1 1/2).

Adjudicator Chodos states as follows:

"The issue here is clearly whether Mr. Evans had been fairly treated in respect of the allocation of overtime assignments, contrary to paragraph 21.11(a) of the relevant collective agreement. Even a cursory reading of that provision indicates that the right to a share in overtime assignments is not an absolute one. That right is qualified *inter alia* by the terms "subject to operational requirements" and more importantly for the purposes of this grievance, by the proviso that "the employer shall make every reasonable effort..." (underlining added) in equitably allocating overtime.

I accept the argument that questions of cost-effectiveness are not subsumed by the term "operational requirements". However, having said that, it is also true that the considerations of cost do not per se constitute a violation of the principle of equitable allocation of overtime. Indeed, then Chief Adjudicator Jolliffe in the Sumanik decision (supra) stated at page 16 [...] that "Overtime, however, should be shared equitably in the sense that over a 28 day cycle there should be no wide gaps between one employee and others. Over a period of one year the result should be "approximately" equal (I draw your attention to the word "approximately"). This can be achieved if the employer amends its directive of March, 1970, to make clear that double-time is to be minimized, but always subject to the requirements of the collective agreement and particularly the requirement that the allocation of overtime shifts is to be on an equitable basis."

I would suggest that matters such as the equitable assignment of overtime cannot be properly assessed by taking a "snap-shot" of one relatively brief period of time. This becomes particularly apparent when examining the facts of this grievance. Undoubtedly, as of the week of December 4, 1986 there was a discrepancy in overtime assignments between the grievor and Mr. Boudreau. It is equally apparent that this discrepancy was considerably narrowed, if not virtually eliminated, by the end of the quarter. In my view, the approximate balancing of overtime assignments over a period of three months, as is the case here, is consistent with the language and intent of the collective agreement. Accordingly I must find that the employer had made a reasonable effort to equitably allocate overtime assignments in respect of the grievor.

Had it been demonstrated that the employer, in adhering to a policy of not assigning overtime to employees who would as a consequence be working on their second day of rest, had thereby created real discrepancies in the allocation of overtime, I would have no hesitation in finding that the employer has thereby violated the collective agreement. However the evidence in this case does not support such a conclusion."
[Emphasis added]

In the instant case, the evidence clearly shows the discrepancy between the CX2s who work the compressed 12-hour schedule and the CX2s who work the 8-hour schedules. This gap is due to the employer's practice of allocating overtime on a preferential basis, according to the hourly rate to be paid for the hours worked, to the group at time and a half (1 1/2) before the group at time and three-quarters (1 3/4), with the group at double time (2) last.

A string of PSSRB decisions confirm that the assignment of overtime must be assessed over an extended period.

In some of these decisions, the assignment of overtime is considered equitable based on the average of the overtime assigned to all employees.

In its responses at the second level of Mr. Roireau's and Mr. Gamache's grievances, the employer relied on this average to justify the allocation of overtime that it considers equitable.

We submit that this method should not be used in our case for the following reasons. The CX2 groups working the 8-hour schedule and those working the 12-hour schedule do not have the same access to the assignment of overtime at the base rate. The base rate for the 8-hour schedule is 1 1/2, that of the 12-hour schedule is 1 3/4. In effect, it is as though the employer confined the CX2s working on the 12-hour schedule to the same category as the CX2s paid double time. Furthermore, you must consider that the CX2s working a schedule of 12 hours a day can indicate greater availability for overtime because they benefit from an average of 80 more days of rest than CX2s working the 8-hour schedule.

However, through these averages, we can obviously see the inequitable allocation of overtime among CX2s because of the method used by the employer. The inequity is evident even without taking into account the availability of the CXs and the fact that some of them changed work schedules.

From Exhibit P-3, the total accumulated hours as at July 31, 2002 are:

For CX2s on the 12-hour schedule, a total of 358 divided among 15 CX2s, which gives an average of 23.86.

For CX2s on the 8-hour schedule, a total of 2,396.35 divided among 48 CX2, which gives an average of 49.92.

This gives a total average for the two groups of 43.71 and shows that the CX2s on the 12-hour schedule are definitely losing out compared to those working the 8-hour schedule.

From Exhibit P-6, the total accumulated hours as at August 31, 2002 are:

For the CX2s on the 12-hour schedule, a total of 559.54 divided among 15 CX2s, which gives an average of 37.3.

For the CX2s on the 8-hour schedule, a total of 3,088.1 divided among 50 CX2s, which gives an average of 61.76.

Beginning in August 2002, it becomes difficult to establish an average from these figures because the hours are converted based on the rate paid. However, we can see that the gap between the average of the groups continues to be quite substantial.

From Exhibit P-4, the result as at March 31, 2003, we get:

For the CX2s on the 12-hour schedule, a total of 1,436.33 hours, divided among 17 CX2s, which gives an average of 86.10.

For the CX2s on the 8-hour schedule, a total of 7,303.87, divided among 54 CX2s, which gives an average of 135.25.

Here again, the hours are converted and there is nevertheless a very substantial discrepancy between the two groups. 86.10 represents 49.2 in actual hours paid at time and three-quarters and 135.25 represents 90.16 in actual hours paid at time and a half. Even acknowledging that some of the hours on the 12-hour schedule were paid at double time and that we do not have that data, we can still state with certainty, and conservatively, that at the end of the fiscal year, there is a difference of over 30% in the assignment of overtime between the two CX2 groups that work on different schedules.

For our part, we believe that this discrepancy between employees who work overtime on the 12-hour schedule and those who do so on the 8-hour schedule is large enough to say that the allocation of overtime among CX2s is not equitable and that clause 21.10 of the collective agreement was violated. Consequently, the grievances should be allowed.

[...]

[sic for entire quotation]

Employer's argument

[119] On March 17, 2004, the employer submitted the following written arguments:

[Translation]

(I) Preliminary comments

1. *At the beginning of the hearing, the employer raised a preliminary objection to the jurisdiction of an adjudicator from the Public Service Staff Relations Board to hear this matter. Reading the grievances, it is obvious that the employees are questioning the procedure for the assignment of overtime, which is not in any way part of the collective agreement. The employer would like to refer to the written objection dated November 17, 2003 sent to the Board.*
2. *However, the employer agreed that this objection should not be decided until after the union's evidence was heard.*

(II) Question at issue

3. *The employer submits that the only question at issue is the following: were the grievors, Conrad Gamache and Mario Roireau, treated equitably in the assignment of overtime during the period from April 2002 to March 2003?*
4. *The burden of proof rests with the employees to show that they were treated inequitably.*

(III) Arguments

The overtime allocation procedure

Background

5. *Pierre Sansoucy testified for the employer on the following facts. In 1998, some union members indicated to the employer their interest in having a work schedule that would allow a better quality of life. The employer, at the national level, mandated a private company to explore options for a new schedule that would meet this interest and would respect three criteria: (1) the new schedule would allow employees to spend more time at home; (2) it would not incur additional costs; (3) it would*

respect the operational requirements of Correctional Service.

6. Cowansville Institution was one of the institutions affected by this new pilot project and, to ensure adequate evaluation of the project, a committee of eight people was established in May 1999. This committee consisted of two managers and six unionized employees at the CX-01 and CX-02 levels. **(Exhibit E2, Document A)**
7. The grievors were part of this committee and participated on it.
8. After discussions and consultations, the members of the committee selected a twelve (12) hour schedule, which would apply to a majority of the CX-01s. If the pilot project was successful, it would be extended to the CX-2s.
9. The pilot project was in fact successful and was applied to a limited number of CX-02s in April 2002. It was determined that 16 CX-02 positions could operate on a twelve (12) hour schedule. These positions were easily filled and there is a waiting list to move onto this schedule. The positions were assigned by seniority.

Terms and conditions

10. In order to manage this new schedule, the employer and the union developed and signed terms and conditions regarding the number of employees, the schedules, holidays, statutory leave, overtime, training, shift premiums, etc. **(Exhibit E2, Documents C, D and E)**
11. In terms of overtime, employees on the twelve (12) hour schedule were paid time and three-quarters (1 3/4). Thus, the priority for overtime calling is made in the following order **(Exhibit E2, Document D)**:
 - Available employees on the eight (8) hour schedule, paid at time and a half (1 1/2);
 - Available employees on the twelve (12) hour schedule, paid at time and three-quarters (1 3/4);
 - Available employees, paid at double time.
12. This procedure was renewed and signed by Claude Guérin, Deputy Warden and Jean Yves Cyr, representative of the UCCO-SACC union in February 2003. **(Exhibit E2, Document C)**
13. It is precisely this procedure to which the grievors, Mario Roireau and Conrad Gamache, are objecting,

claiming that it contravenes the collective agreement because it does not respect the principle of equity in the allocation of overtime. We refer to the written arguments of Ms. Lalande and the question at issue that she suggests to the Board.

OT allocation procedure and the collective agreement

14. Contrary to the claims of the grievors, the "method" used to allocate overtime is not the determining factor when it comes to evaluating whether overtime is allocated equitably.
15. The employer submits that the collective agreement definitely does not cover the method, the policy or the procedure that should be used to try to allocate overtime equitably. Thus, regardless of the method used, it is the factual result, calculated over a reasonably extended period, which determines whether an employee is negatively affected compared to his colleagues. The simple fact that employees paid at time and a half (1 1/2) are called on a priority basis before those paid at time and three-quarters (1 3/4) is not relevant and is far from proof that overtime is not assigned equitably.
16. In Archer (Board file No. 166-2-13812 to 13817), the employer had established a procedure whereby employees available and paid at the normal rate increased by half or multiplied by two were offered overtime. However, employees paid at double time and a half the normal hourly rate were called only under exceptional circumstances. As is the case with Mr. Roireau and Mr. Gamache, the employees alleged that this procedure contravened the principle of equity. Their grievance was dismissed and the Federal Court of Appeal (Archer v. Canada, [1984] F.C.J. No. 352 (Q.L.), A-1195-83), reviewing the matter, noted as follows:

"Without expressing any view as to whether or not Article 15.03 of the collective agreement here in issue applies only to involuntary overtime as held by the Adjudicator, we are all of the view that the policy applied in this case was not in conflict with that article."

[Emphasis added]

17. Along to the same lines, in Zelisko (Board file No. 166-2-31346), the employer had adopted a policy on how certain escort duties, which could give rise to overtime, were offered to employees. The adjudicator emphasized the following principle:

"In reference to an amendment to the "Regional Escort Policy", as an adjudicator I have no jurisdiction under the PSSRA to amend an employer policy. With regard to the second point requested in the corrective action, again I have no jurisdiction to order the employer to offer escorts on a "rotational basis". The method in which the employer determines how escorts are advanced is within its own scope. However, I can determine if the employer, in the assignment of escorts, has made a reasonable effort to offer overtime to readily qualified officers on an equitable basis for the period of time in issue."

[Emphasis added]

Consideration of pay rates when allocating overtime

18. *The fact that the employer takes into account pay rates when it offers overtime to employees is legitimate and not incompatible with the principles of the collective agreement. In this regard, the adjudicator in Evans (Board file No. 166-2-17195) offers the following opinion:*

"I accept the argument that questions of cost-effectiveness are not subsumed by the term "operational requirements". However, having said that, it is also true that the considerations of cost do not per se constitute a violation of the principle of equitable allocation of overtime."

[Emphasis added]

19. *Even more eloquent, Lay (Board file No. 166-2-14889) refers to this point in Archer and the adjudicator states clearly the principle that the equitable allocation of overtime is not necessarily denied when the employer takes into account rates of pay. On the contrary, it is entitled to do so:*

"I would also note the decision of Adjudicator Pyle in the case of *Archer (supra)*, and the decision of the Federal Court of Appeal, which found that the employer does not violate Article 15.03 when it considers premium rates in the assignment of overtime work opportunities.

If the employer is entitled to consider premium rates when assigning overtime, two conclusions must follow. First, it must follow that the second part of the requested remedy, to the effect that the employer be required to offer supervisory overtime regardless of their premium rate, cannot be granted. The employer is entitled to pass over employees with

high premium rates and offer overtime opportunities to those with lower premium rates regardless of the amount of accumulated overtime such employees have worked up to that point in the cycle.

The second conclusion, following in part from the first, is that under certain circumstances an employee cannot assert a right to a particular overtime opportunity. Equitability cannot be determined on a day-by-day basis but only over an extended period of time."

[Emphasis added]

20. Thus, the employer argues that, while it gives priority to employees paid at time and a half, this procedure is not in any way incompatible with or a violation of the collective agreement if, in the end, over a period of a year for example, the allocation of overtime is balanced and equitable.

Equitable assignment of overtime

The principles

21. Before analysing the evidence, it is essential to emphasize the acknowledged principle that equity in the assignment of overtime does not mean equality in that allocation. It is virtually impossible for an employer such as Correctional Service to be able to give the same amount of overtime to all employees. First of all, this is not required by the collective agreement and second, the assignment of overtime involves consideration of a plethora of factors that depend as much on operational requirements as on the employees themselves. These factors are, for example, the availability indicated by employees on the form, their effective availability when they receive the call, the flexibility of the various schedules, the time of year, the unforeseeability of certain events, etc.
22. The decision that best illustrates this concept of equity is Sumanik (Board file No. 166-2-395). Several decisions have subsequently been inspired by the words of Chief Adjudicator Jolliffe who stated:

[...]"With respect to the corrective action requested, I cannot accept the contention of the aggrieved employee that overtime should be shared "equally". 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 the others.

Over a period of one year the results should be approximately equal, and I stress the word "approximately".

23. Thus, not only does reality create a situation where there would always be a discrepancy between employees, but, even more so, it is necessary to compare what is comparable. In other words, it would be illogical to compare an employee with very few overtime hours because he did not want to do any or he was not available, with an employee who is always available when he is called.
24. The employer therefore submits that employees Mario Roireau and Conrad Gamache cannot merely claim that the overtime assignment procedure violates the collective agreement because it gives priority to certain employees based on the rate of pay for these hours. Furthermore, it is not enough to provide a set of numbers for comparison purposes without taking into account all of the relevant factors that may explain why certain employees have worked much more overtime than others. Let us take a look at the evidence presented by the grievors.

The evidence

25. The bargaining agent called seven witnesses including the two grievors. The purpose of these witnesses was essentially to try to show that employees were called less often to work overtime when they were on the twelve (12) hour schedule.
26. It is important at this point to show that all of the evidence presented by the union concerning the comparison between employees relies on a single document, submitted in several versions according to the date on which it was printed (**Exhibits P2, P3, P4, P6 and P8**). This document provides the list of employees and the number of hours of overtime assigned. It represents a tool used by the employer to keep track of the calls made to employees and the priority that should be given when there is a need to assign overtime. However, this document does not provide any information on the various factors mentioned earlier and which determine whether there might necessarily be discrepancies among employees. In fact, this document does not show the frequency of availability of each employee. It does not show whether the employees, while indicating their availability, were unable to respond to the call and did not report to work or inversely. Nor does this document take into account the overtime worked on a statutory holiday. It does not show if the overtime is worked at

double time or not. In short, this document is a tool, nothing more, that enables the employer to manage one aspect of the assignment of overtime. The only complementary evidence provided by the union is the oral testimony of certain correctional officers who, in supporting the grievors, gave the impression that they were not satisfied with the twelve (12) hour schedule because there were fewer opportunities for overtime. Let us review their testimony.

Gilles Leclerc

27. Mr. Leclerc testified, among others, that he did not want to remain on the twelve (12) hour schedule because he worked less overtime. However, as he was questioned, he finally admitted that he left the twelve (12) hour schedule because of the death of his father and because the principle behind this schedule no longer suited him in the circumstances. Moreover, Mr. Leclerc admitted that there are virtually no employees who changed schedules as he did to return to the eight (8) hour schedule.

Michel Martel

28. Mr. Martel also claims that he left the twelve (12) hour schedule to be able to work more overtime. He subsequently added that another reason was that he was "burned out" working nights and he preferred the eight (8) hour schedule that allowed him to work more during the day. Moreover, his testimony about his availability to work overtime was very vague. He ended up stating that he signed up regularly, [translation] "but not every day, when it fitted my schedule".

Eric Marcotti

29. Mr. Marcotti claims that he worked a lot of overtime mainly because he was always on the eight (8) hour schedule. Far from justifying this conclusion, he subsequently added that he is almost always available except nights. Furthermore, he did not take holidays during the time he was an acting CX-02. His testimony is simply further proof that it is the specific circumstances of each individual that, over an extended period of time, explain why one employee has many more hours than his colleagues do.

Paul Hinse

30. Through mathematical acrobatics, the union tries to show through this witness that the majority of hours worked up to August 31, 2003 were done on the eight (8) hour schedule and that by March 31, 2003,

given the change in accounting method (hours paid rather than hours worked), the total is 151.88. But what is the probative value of this argument? The employer submits that it shows nothing except that the total hours worked, based on the document referred to, is around the average for employees at the end of a one-year period.

Marcel Larocque

31. Throughout his testimony, Mr. Larocque vehemently complained about the twelve (12) hour schedule. He also insisted that he was not paid if he did not work on a statutory holiday and that he was paid for only eight (8) hours if he worked a statutory holiday. All of his incorrect statements about how statutory holidays work significantly undermine his credibility. In fact, employees are paid twelve (12) hours of overtime when they work a statutory holiday, in addition to their normal pay. Furthermore, he had to admit that despite all his complaints, he never filed a grievance and is unable to explain such action.

Mario Roireau and Conrad Gamache (grievors)

32. The testimony of the two grievors made it clear that they were dissatisfied with procedure for the assignment of overtime that gave priority to employees on the eight (8) hour schedule paid time and a half (1 1/2). However, their testimony did not show that they had been personally aggrieved by the assignment procedure once the period of a year and their availability, among other things, were taken into account.

33. First of all, we must point out that Mr. Gamache is one of the employees who worked the most overtime during 2002-2003, regardless of the type of schedule. We need only refer to his testimony - where he is described as the "Overtime Champion" by his representative - and to the documents that he himself filed in evidence (**Exhibits P2, P3, P4, P6, P8**). When cross-examined on the reasons why he feels aggrieved, Mr. Gamache stated that he filed the grievance mainly as a matter of principle and to get equity for his colleagues. When questioned about the prejudice that the procedure caused him personally, he was unable to answer and merely claimed that he would have been called even more often and he would have earned even more money.

34. On Mr. Gamache's admissions alone the grievances should be dismissed. Sections 91 and 92 of the Public Service Staff Relations Act are clear that a grievance covers situations in which the employee feels personally aggrieved. It is not a question of filing a grievance on his

own behalf for alleged prejudice that other employees might have suffered.

91. (1) Where any employee feels aggrieved (a) by the interpretation or application, in respect of the employee, of (i) a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment, or

[...]

92. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to (a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,

and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication [...]

35. *As for Mario Roireau, he testified that he was always available prior to April 2002 except on days of rest. However, around April 2002 (beginning of the relevant period), he was slightly less available and entered his name for days of rest only. In other words, Mr. Roireau concedes that at the time that he filed the grievance, he was less available to work overtime. Moreover, during his testimony, Mr. Roireau had no idea of the amount of overtime he had worked for any of the months of the year in question. Nor did he know how many hours his colleagues had worked. In short, he does not have any data that allows him to compare himself to other employees. Lastly, Mr. Roireau took holidays that enabled him, given the special twelve (12) hour schedule, to be away a total of 20 consecutive days during July and August 2002. That also reduced his availability for overtime.*

36. *The employer submits that, on its face alone, the evidence presented by Mr. Roireau and Mr. Gamache is very weak and lacking in substance. The grievors clearly filed a grievance contesting the principle of the overtime assignment procedure without being able to discharge the burden to prove that this procedure was applied inequitably to them.*

(IV) Conclusion

37. *As was pointed out earlier, the employer respectfully submits that the role of a Board adjudicator is not to*

judge any procedure or policy applied by the employer, especially when it is not part of the collective agreement. In this regard, the employer maintains it preliminary objection.

38. *The role of a Board adjudicator, on the other hand, is to verify, based on the evidence presented, whether clause 21.10 of the collective agreement was violated and the grievors treated inequitably over the period of a year. We respectfully submit that the grievors have not discharged their burden of proof on this point.*

39. *For all these reasons, the employer respectfully requests that the grievances be dismissed.*

[sic for entire quotation]

Grievors' reply

[120] The grievors replied as follows on March 22, 2004:

[Translation]

We hereby provide our reply to the arguments presented by Karl Chemsy in his letter of March 17, 2003 regarding the above-mentioned grievance files.

First, the employer submits that the union participated in the establishment of the new schedule and that the schedule met the conditions set out in Exhibit E-2. It is correct that employees participated in the establishment of the 12-hour schedule, but the only evidence that you have concerning the participation of the union is that there were local consultations on the matter. Mr. Cyr's signature on Exhibit E-2(c) shows his approval of the procedure established in April 2003, a period not relevant to our grievance.

Furthermore, even if there was real agreement with the union on all of the conditions for introduction of the 12-hour schedule, which we formally deny, a local union representative cannot, on his own, approve amendments to the collective agreement. Only the signatories of the collective agreement can amend it, namely, Treasury Board and the national executive of the UCCO-SACC-CSN. We refer you to clause 51 of the collective agreement and page 95 for the signatory parties.

The employer's representative challenges some of the comments made by the level two correctional officers in their testimony. For example, Mr. Larocque's comments regarding compensation for statutory holidays have little relevance to our matter. The fact that CX2s are paid for part or all of the

work day when they have to work a statutory holiday is not relevant because, at Cowansville Institution, work on statutory holidays is not counted in the assignment of overtime. Moreover, the comments of the employer's representative concerning the reasons why some CX2s left the 12-hour schedule to return to the 8-hour schedule are also not relevant.

The evidence clearly shows that there was and continues to be inequity in the assignment of overtime among CX2s because of the priority given by the employer to CX2s available with the least number of hours to their credit who must be paid at time and a half.

The principles established by PSSRB decisions on the equitable assignment of overtime seem clear. The employer can take costs into account when allocating overtime provided that, over a relatively extended period, hours are allocated equitably.

For our part, we believe that when it becomes more difficult for a group of employees to be assigned overtime because of the compensation paid, as in this case, the base rate of 1 1/2 for 8 hours and 1 3/4 for 12 hours, clause 21.10 of the collective agreement will be violated because, in these circumstances, the large gap in the number of hours allocated to the two groups does not allow for an equitable allocation of overtime.

Thus, the adjudicator's comments in Sumanik acquire their full meaning. Overtime does not have to be allocated equally but, over a reference period, there must not be a substantial discrepancy between the number of hours worked by each employee. The total should be relatively equal.

As a result, in our case, if the employer realizes that a group of CX2s is penalized by the allocation of overtime to the detriment of another group during the reference period, it must readjust the imbalance and allow a more equitable allocation of overtime among the CX2s.

The decisions cited by the employer, Archer and Lay, deal with the wording of another collective agreement in which the employer was required to keep overtime to a minimum. This provision is not present in the collective agreement covering correctional officers. In our view, these decisions are not incompatible with our position.

In Zelisko, cited by the employer, the issue concerned whether overtime worked for escort duty outside the institution had to be assigned to the employees who filed the grievance and not necessarily by an equitable allocation of overtime to employees in general.

At the end, the employer submits to you that Mr. Gamache's grievance should be dismissed because he is unable to give the reasons why he is aggrieved. Mr. Gamache is definitely very available to work overtime and he often fills in for the employer who needs his services. However, it is incorrect to claim that he was not personally aggrieved: the employer's violation of the collective agreement indirectly aggrieves him for the period that he worked the 12-hour schedule.

As for Mr. Roireau, the employer's representative surely misunderstood his testimony since Mr. Roireau testified that it was when the 12-hour schedule was introduced that he extended his availability to work overtime because it became very difficult to obtain overtime. Furthermore, you should not give much weight to the employer's argument that Mr. Roireau was able to take holidays because the vast majority of employees take holidays that reduce their availability to work overtime and this fact has little impact on the assignment of overtime annually.

[...]

Reasons for decision

[121] The question at issue is the application of clause 21.10 of the collective agreement. Does the employer's policy, which seeks to have overtime worked at the lowest cost, result in an inequitable assignment of overtime?

[122] Clause 21.10 reads as follows

21.10 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,*
- (b) to allocate overtime work to employees at the same group and level as the position to be filled, i.e.: CX-1 to CX-1, CX-2 to CX-2, etc.,*

and

- (c) to given employees who are required to work overtime adequate advance notice of this requirement.*

[123] With respect to the question of jurisdiction, I find the employer's objection surprising. It is clear that the subject of the grievance is the assignment of overtime

and clause 21.10. Although the failure to violate the collective agreement may lead to the dismissal of the grievance, it does not mean it cannot be adjudicated.

[124] The burden to prove the inequity of the assignment of overtime falls on the grievors. They have not discharged that burden.

[125] At first glance, when one looks at the documents summarizing the overtime, Exhibits P-2, P-3, P-4, P-6 and P-8, it may seem that correctional officers who work the 12-hour schedule are more often found at the beginning of the list and that CXs with the most overtime accumulated are mostly at the end of the list and work the 8-hour schedule. It takes more than merely looking at the list to conclude that there is an inequitable allocation of overtime; it is necessary to look at all of the criteria that influence the list.

[126] The parties agree that the period to consider when examining the assignment of overtime is the fiscal year. Exhibit P-4, which is the summary of overtime in ascending order as at March 31, 2003, is therefore the most relevant. Unfortunately, Exhibit P-4 only provides information on the final order in converted hours. I accept as probable that the presence of decimals ending in 3, 1 and 6 is an indication that the hours worked have been converted into hours paid. The witnesses unanimously agree that the summaries on Exhibits P-2 and P-3 were in hours worked. On Exhibit P-6, dated August 31, 2002, there is already a wider variety of decimals. I conclude that converted hours began to appear in August 2002 and that in March 2003, the conversion was complete.

[127] Since overtime is assigned primarily on a voluntary basis, a key factor is the availability of the CXs. The parties agreed on a system for indicating availability. Exhibit P-1 is an example of that system. It is only when no one is available that the employer will order a CX with the least seniority to work overtime that no one wants.

[128] The evidence presented to me shows the importance of the availability criterion. The grievors do not challenge this criterion. Indeed, Mr. Gamache relies on this criterion to justify his grievance, although he is among the overtime "champions". Mr. Gamache testified that, given his availability, it is appropriate for him to have more hours than Mr. Roireau does. It is his opinion that he should have more hours than the CX-02s who work the 8-hour schedule and who have more hours than Mr. Gamache does.

[129] Other than the testimony of the grievors and Messrs. Leclerc, Marcotty, Larocque, Hinse and Martel, there is no evidence of the availability of the CX-02s for overtime.

[130] The testimony on availability is vague and impossible to verify independently. This evidence is coloured by considerable subjectivity, which make it somewhat unreliable.

[131] Based on Mr. Gamache's testimony, it appears fair that Mr. Roireau has less accumulated overtime than he does. Mr. Roireau did not show me in a clear and precise way that he was more or as available as the five CXs who have the most overtime accumulated on Exhibit P-4. Mr. Roireau did not provide concrete evidence of the dates on which he should allegedly have been offered overtime in order to show that someone else with more hours was offered overtime in his place and that that situation affected his place on the final summary list.

[132] Mr. Gamache, who is 18th on Exhibit P-4 with 205.89 hours, although he was first on Exhibit P-2 with 229.25 hours, also did not show me concretely that the CXs who moved ahead of him were less available than he was.

[133] In addition, Eric Marcotty testified that he did not know why he was offered overtime more often. Mr. Marcotty completed his probationary period in July 2004; he therefore had very little seniority and did not take any annual leave during 2002-2003. The evidence established that, when there are no more volunteers, overtime is assigned according to the inverse order of seniority. Does the "forced" or involuntary allocation of overtime on the basis of seniority constitute evidence of inequitable allocation of overtime? That might be the case, possibly in another context, but not in the context of Cowansville Institution where the majority of overtime is allocated on a voluntary basis and where the grievors are complaining of not having more overtime hours. This factor may explain discrepancies but it is not inequitable.

[134] Another testimony was quite interesting and the grievors, in trying to prove that CXs left the 12-hour schedule because of the overtime issue, provided me with evidence that, in at least one case, the 8-hour schedule did not benefit Mr. Leclerc. If we look at the numbers, we see from Exhibit P-3 that Mr. Leclerc, who had been working the 12-hour schedule since April at that point, had accumulated 45.5 unconverted hours. If these hours are converted on the basis of time and

three-quarters, we get 79.625 converted hours. Thus, during one-third of the year, Mr. Leclerc accumulated 79.625 converted hours. According to Exhibit P-4, Mr. Leclerc had accumulated a total of 177.52 hours by the end of the year. He therefore accumulated 97.895 converted hours during the remaining two-thirds of the year. If we consider that Mr. Leclerc left the 12-hour schedule on August 18, 2002, we can conclude that his change in shifts affected his total overtime hours. If we divide into thirds of the year the hours worked after July, Mr. Leclerc obtained 48.95 converted hours in each third of the year that he worked on the 8-hour schedule. This case proves that working the 12-hour schedule and being paid time and three-quarters for overtime does not automatically lead to being offered fewer hours of overtime than being paid time and a half, as is the case on the 8-hour schedule.

[135] The testimony of Messrs Larocque, Martel and Hinse is not precise enough to convince me that lower cost is the only factor that can explain the differences appearing on the overtime summary documents, even though they appear to be convincing. Equitable assignment does not mean uniform assignment of overtime. There can be differences in the number of hours accumulated if these differences are the result of factors that are fair and accepted by the parties.

[136] The grievors' burden of proof goes beyond showing that employees are convinced that the assignment of overtime is inequitable. There must be concrete evidence demonstrating that, after an analysis of all factors that may explain a discrepancy in the number of hours accumulated, the only factor remaining is inequity. However, that is not the situation in this case. Although the grievors' argument may seem convincing at first glance, it does not stand up to an examination of the evidence. We do not know how the factors of availability, forced assignment of overtime or qualifications came into play. Mr. Gamache testified that he was a member of the emergency response team, a factor that leads him to perform certain functions that may result in overtime that could not be allocated to all other CX-02s.

[137] Finally, I cannot overlook the fact that the 12-hour schedule is staffed on a volunteer basis by CXs who choose it because it brings them other benefits, such as the opportunity to spend more days away from work. I would need tangible evidence of availability for overtime for me to accept as given that CXs on the 12-hour schedule are as available as those on the 8-hour schedule. In the cases before me, I was not presented with that evidence.

[138] In conclusion, I find that the grievors did not satisfy me that the assignment of overtime at Cowansville Institution was inequitable. The grievances of Mario Roireau and Conrad Gamache are therefore dismissed.

Evelyn Henry
Member

OTTAWA, July 8, 2004.

