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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

KENDALL BARBOUR, STAN GUTT, JAMES HANN, JOSH LEDREW, AND STEPHEN MCINNIS

Grievors

and

TREASURY BOARD (Department of Transport)

Employer

Indexed as
Barbour v. Treasury Board (Department of Transport)

In the matter of individual grievances referred to adjudication

Before: John G. Jaworski, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievors: Amanda Montague-Reinholdt, counsel

For the Employer: Pierre-Marc Champagne, counsel

Heard at St. John's, Newfoundland,
January 17 and 18, 2017.

REASONS FOR DECISION

I. Individual grievances referred to adjudication

1 At the relevant time, Kendall Barbour, Stan Gutt, James Hann, Josh Ledrew, and Stephen McInnis (collectively, "the grievors"), were all employed by the Treasury Board (TB) at Transport Canada (TC) as marine safety inspectors (MSIs) in the Marine Safety Division (MSD) in St. John's, Newfoundland. All were classified at the TI-07 group and level.

2 At the relevant time, the grievors were governed by a collective agreement dated October 18, 2013, and that expired on June 21, 2014, between the Public Service Alliance of Canada (PSAC) and TB for all employees of the Technical Services Group ("the collective agreement").

3 On either November 22 or 23, 2012, the grievors all individually filed identical grievances in which they stated as follows: "I grieve the failure of the employer to allocate overtime in a transparent and equitable manner contrary to Article 28 of the Technical Services collective agreement."

4 As relief, the grievors all stated as follows: "That I be offered overtime in a fair, transparent and equitable manner. That I be reimbursed for overtime wages lost. That I be made whole."

5 On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *PSLREBA*) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (PSLREB) to replace the former Public Service Labour Relations Board (PSLRB) as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to s. 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

6 By letter dated June 16, 2015, the grievors were all notified that their grievances had all been partially allowed at the final level of the grievance procedure; however,

the grievors were not satisfied with the responses, and they referred the grievances to adjudication under s. 209(1)(b) of the *PSLRA*.

7 On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the PSLREB and the titles of the *PSLREBA*, the *PSLRA*, and the *Public Service Labour Relations Regulations* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, the *Federal Public Sector Labour Relations Act* ("the *Act*"), and the *Federal Public Sector Labour Relations Regulations* ("the *Regulations*").

8 Mr. Hann testified on behalf of the grievors and Scott Kennedy on behalf of the employer. Much of the evidence was not in dispute.

II. Summary of the evidence

9 The Government of Canada's fiscal year is from April 1 of any given year to March 31 of the next year. This decision deals with the allocation of overtime during the course of three fiscal years: 2010-2011, 2011-2012, and 2012-2013. Anytime I refer to one of those three fiscal years, I am referring to the period between April 1 of the first year and March 31 of the next year.

10 At the time of the hearing, Mr. Hann was an MSI and had been for about 10 years. He and Mr. Ledrew hold the professional designation of master mariner, and Messrs. Barbour, Gutt, and McInnis all hold the professional designation of chief engineer.

11 At the time of the hearing, Mr. Kennedy was Atlantic Regional Director for Marine Safety and Security at TC. He started in that role in 2009. Like Messrs. Hann and Ledrew, he also is a master mariner.

12 Mr. Hann testified that the MSD in St. John's is composed of these three sections:

i. Compliance and Enforcement ("C&E") Services;

ii. Inspection Services; and

iii. Technical Services.

13 His evidence was that the work of the MSIs in C&E Services is largely examining and certifying seafaring personnel. In Inspection Services, it largely involves inspecting domestically registered ships. And in Technical Services, it largely involves reviewing technical aspects of Canadian-registered ships. That last group largely consists of naval architect technologists.

14 Mr. Hann stated that a person qualified as an MSI who is either a master mariner, chief engineer, or naval architect can carry out an inspection as long as he or she is an MSI. He also said that professional designations can largely dictate the type of inspection they do. A chief engineer has expertise in machinery, a master mariner has expertise in operational and not mechanical issues, and a naval architect generally carries out hull inspections.

15 Mr. Hann testified as follows:

- "master mariner" is a professional qualification that permits a person to be a master (captain) on any ship anywhere in the world; and
- "chief engineer" is a professional designation that allows a person to be a chief engineer on any ship anywhere in the world.

16 At the time the grievances were filed, all the grievors were working in C&E Services.

17 The evidence suggested that before the grievances were filed, more overtime opportunities existed in Inspection Services than in C&E Services because of the type of work Inspection Services carried out. The evidence also disclosed that before the time relevant to the grievances (before 2010), a rotation system of some type existed in which master mariners and chief engineers were rotated between C&E Services and Inspection Services. According to Mr. Hann, the naval architects were not part of the rotation. He further testified that the reason for the rotation was to allow the MSIs who were master mariners and chief engineers to have more access to the overtime that came with Inspection Services positions.

18 The evidence disclosed that the rotation stopped sometime before 2010. Thus, overtime opportunities decreased for those MSIs working in C&E Services. Mr. Hann introduced into evidence an undated memo to Mr. Kennedy that was signed by a number of MSIs in St. John's. While the exact date of the memo is unknown, Mr. Kennedy responded on April 23, 2010, referring to the memo, which he had received earlier that week. The undated memo stated as follows:

…

> *We, the undersigned feel that staff rotation should be reinstated between Inspection Services and Examination and Enforcement* [C & E Services] *as it has been in previous years.*
>
> *Rotation between these two sections has been in existence for about ten years and it has proven to be regarded as fair and equitable for those involved. Rotation promotes professional development for Marine Safety Inspectors (MSI) in their variety of roles. An examiner would become a better rounded MSI as they would be exposed to the work ordinarily carried out by those in Inspection Services. Likewise, an inspector would become more conversant with the examination and enforcement duties of an MSI.*
>
> *In addition to the variety of roles played by both sections there is also a considerable difference regarding the amount of overtime duties performed by the MSI of Inspection Services as opposed to MSI of Examination and Enforcement.*
>
> *We therefore ask that you kindly consider reinstating the rotation between these two sections.*

…

19 Mr. Kennedy's reply stated as follows:

…

> *Thank you for your letter, received in this office earlier this week.*
>
> *I recently met with your group in St. John's as well as other groups. I will complete my visits in May.*
>
> *I fully understand your perspective: rotation is an option to diversify your work experience in Transport Canada Marine Safety.*

> *I am pursuing all options to address the issues [sic] of overtime equitably [sic] in the office in St. John's. I will follow up with you shortly to discuss this further.*
>
> …

20 When asked in cross-examination about differences in the work description between chief engineers and naval architects, Mr. Hann stated that the work description was generic and that all MSIs were under it. The difference was the professional designations that the master mariners and chief engineers received from regulating boards. Mr. Hann stated that as a master mariner, he is licensed and certified to do things that a naval architect cannot do, but that there are no things that a naval architect can do that he cannot do.

21 I was not provided a copy of MSI job description.

22 I was not provided any evidence about overtime for MSIs in Technical Services, including whether they worked overtime and what that overtime consisted of.

23 The evidence disclosed that at least some MSIs working in Inspection Services were naval architects.

A. <u>The collective agreement</u>

24 Article 2 of the collective agreement defines "overtime" as "… in the case of a full-time employee, authorized work in excess of the employee's scheduled hours of work …" or "… in the case of a part-time employee, authorized work in excess of seven decimal five (7.5) hours per day or thirty-seven decimal five (37.5) hours per week, but does not include time worked on a holiday …".

25 Article 18 of the collective agreement deals with the grievance procedure. Clause 18.15 states as follows:

> ***18.15*** *A grievor may present a grievance to the first level of the procedure in the manner prescribed in clause 18.08, not later than the twenty-fifth (25th) day after the date on which the grievor is notified or on which the grievor first becomes aware of the action or circumstances giving rise to the grievance. The Employer may present a policy grievance in the manner prescribed in clause 18.04 not later than the twenty-fifth (25th) day after the date on which the Employer is notified orally or in writing or on which the Employer first becomes aware of the action or circumstances*

giving rise to the policy grievance.

26 Article 28 of the collective agreement deals with overtime. Clauses 28.01 and 28.03 state as follows:

> ***28.01*** *Each fifteen (15) minute period of overtime shall be compensated for at the following rates:*
>
> *(a) time and one-half (1 1/2) except as provided for in paragraph 28.01(b);*
>
> *(b) double (2) time for each hour of overtime worked after fifteen (15) hours' work in any twenty-four (24) hour period or after seven decimal five (7.5) hours' work on the employee's first (1st) day of rest, and for all hours worked on the second (2nd) or subsequent day of rest. Second (2nd) or subsequent day of rest means the second (2nd) or subsequent day in an unbroken series of consecutive and contiguous calendar days of rest.*
>
> …
>
> ***28.03*** *Subject to the operational requirements of the service, the Employer shall make every reasonable effort:*
>
> *(a) to allocate overtime work on an equitable basis amongst readily available, qualified employees;*
>
> *and*
>
> *(b) to give employees who are required to work overtime adequate advance notice of the requirement.*

27 Article 34 of the collective agreement deals with travel time. Clauses 34.02 to 34.04 state as follows:

> ***34.02*** *When an employee is required to travel outside his or her headquarters area on government business, as these expressions are defined by the Employer, the time of departure and the means of such travel shall be determined by the Employer and the employee will be compensated for travel time in accordance with clauses 34.03 and 34.04. Travelling time shall include time necessarily spent at each stop-over enroute provided such stop-over is not longer than three (3) hours.*
>
> ***34.03*** *For the purposes of clauses 34.02 and 34.04, the travelling time for which an employee shall be compensated is as follows:*

(a) for travel by public transportation, the time between the scheduled time of departure and the time of arrival at a destination, including the normal travel time to the point of departure, as determined by the Employer;

(b) for travel by private means of transportation, the normal time as determined by the Employer, to proceed from the employee's place of residence or workplace, as applicable, direct to the employee's destination and, upon the employee's return, direct back to the employee's residence or workplace;

(c) in the event that an alternate time of departure and/or means of travel is requested by the employee, the Employer may authorize such alternate arrangements, in which case compensation for travelling time shall not exceed that which would have been payable under the Employer's original determination.

34.04 *If an employee is required to travel as set forth in clauses 34.02 and 34.03:*

(a) on a normal working day on which the employee travels but does not work, the employee shall receive his or her regular pay for the day.

(b) on a normal working day on which the employee travels and works, the employee shall be paid:

(i) his or her regular pay for the day for a combined period of travel and work not exceeding his or her regular scheduled working hours;

and

(ii) at the applicable overtime rate for additional travel time in excess of his or her regular scheduled hours of work and travel, with a maximum payment for such additional travel time not to exceed twelve (12) hours [sic] pay at the straight-time rate of pay;

(c) on a day of rest or on a designated paid holiday, the employee shall be paid at the applicable overtime rate for hours travelled to a maximum of twelve (12) hours [sic] pay at the straight-time rate of pay.

28 On June 16, 2015, the grievors all received a grievance reply, which was identical save and except for the value of the remedy. The relevant portions of the replies stated as follows:

…

> *The following is the final level reply to your grievance filed on November 23, 2012, in which you stated that overtime was not allocated in a transparent and equitable manner, contrary to Paragraph 28.03 a) of the Technical Services Collective Agreement. As corrective action, you have requested to be reimbursed for the overtime lost during fiscal years 2010-2011, 2011-2012, and from April to November 15, 2012.*
>
> …
>
> Redress period
>
> *Accepted principles in jurisprudence regarding distribution of overtime indicate that overtime should be measured over a reasonable period of time which is, generally speaking, a period of one (1) year. Therefore, I am of the opinion that for the corrective action requested, the period of consideration in this case is from April 1, 2012 to March 30, 2013. With respect to the older periods requested in your corrective action, the grievance is denied as it is untimely.*
>
> Qualified employees
>
> *As Compliance and Enforcement (C&E) Branch employee, you maintained that you were qualified to do the work of Inspection Services (IS) Branch except for Naval Architect work. According to the information received from management, C&E employees were normally qualified to do the work of IS, including Naval Architect work. Therefore, I have determined that you were eligible for overtime worked in IS, including Naval Architect and the calculations are reflective of this.*
>
> Readily available employees
>
> *It is acknowledged that the employer does not presently have data/information to determine if the C&E and IS employees were readily available for each overtime opportunity in the fiscal year 2012-2013. Also, there is insufficient data to ascertain whether there were other operational factors influencing management's decisions to offer overtime to specific individuals. Therefore, I have decided that all C&E and IS employees should be considered readily available for the overtime from April 1, 2012 to March 30, 2013 except for*

> *those who were absent for a long period of time and who had not worked any overtime, as the presumption is that they were not readily available.*
>
> …
>
> Conclusion
>
> *Considering the foregoing, the data in the attached table was analyzed to determine whether you missed overtime opportunities during the relevant period.*
>
> *It is important to note that equitable is not necessarily equal. However, overtime should be shared equitably in the sense that there would be no wide gaps between one employee and others over the period of one year, if the employees were qualified and readily available, and there were no operational factors to explain the variance.*
>
> …

29 The final two paragraphs set out the overtime each specific grievor had received compared to the amount of overtime received by the employee with the most overtime and then set out the amount of overtime compensation due each grievor that was applicable on the date the grievances were filed. The employer awarded each grievor compensation for fiscal year 2012-2013 in the form of additional overtime (at the rate of time-and-a-half or 1.5) to bring the total overtime for each grievor up to 169 hours for the year. The employer had determined that 169 hours was the average overtime per MSI working in C&E Services and Inspection Services for 2012-2013.

30 The evidence indicated that over the years, different types of inspections were carried out that could lead to more overtime opportunities. Two particular types of inspections, Occupational Health and Safety (OHS) and Port State Control, required the MSIs to have specialized training, which would result in them being either designated (OHS) or certified under an international understanding (Port State Control).

31 Both Mr. Hann and Mr. Kennedy talked in generalities about the types of work and the overtime generated by each type. There were no specifics as to the total amount of overtime generated by specific types of work over the years at issue, save and except that more overtime was generated due to ship inspections, which those working in Inspection Services carried out.

32 The employer entered into evidence two tables that set out all the overtime of all the MSIs in both C&E Services and Inspection Services for all three fiscal years in question. The first table covered all three fiscal years in total; however, it left out Mr. McInnis's overtime. The second table covered all three fiscal years, except that it ended on November 26, 2012; however, it included Mr. McInnis's overtime. In addition, both tables disclosed the value of the total overtime as converted (the value of the overtime once the 1.5 or double-time (2.0) multiplier was applied).

33 Having had the benefit of both tables, the following is a chart showing for each year at issue the total overtime hours for employees in C&E Services and Inspection Services respectively, and the total of both:

Fiscal year	Inspection Services	C&E Services	Total
2010-2011	1277.25	566.25	1843.50
2011-2012	1469.25	710.75	2180.00
2012-2013	1352.75	716.25	2069.00

34 The following chart shows for each year at issue the total overtime hours with the equivalent in converted hours:

Fiscal year	Total overtime hours	Total converted hours
2010-2011	1843.50	2984.38
2011-2012	2180.00	3490.38
2012-2013	2069.00	3361.00

35 A simple calculation of dividing the total converted hours by the total overtime hours discloses that the multiplier used was more than 1.5. In 2010-2011, it was 1.62; in 2011-2012, it was 1.60; and in 2012-2013, it was 1.62. This establishes that overtime hours were not all paid at 1.5 and that some were paid at 2.0.

36 The evidence disclosed the following:

- in 2010-2011, there appeared to be 3 MSIs in C&E Services eligible for overtime — Messrs. Barbour, Gutt, and Hann;

- in 2010-2011, there appeared to be 10 MSIs in Inspection Services eligible for overtime, although of the 10, 1 (Mr. A) accounted for only 2.5 hours, another (Mr. B) for 14.50 hours, and a third (Mr. C) for 18 hours;

- in 2011-2012, there appeared to be 5 MSIs in C&E Services eligible for overtime, of which 4 were Messrs. Barbour, Gutt, Hann, and McInnis; the fifth did not grieve and had received 158.25 hours of overtime;

- Mr. McInnis had no overtime in 2010-2011; however, during the course of 2011-2012, he worked 38.75 hours of overtime;

- in 2011-2012, there appeared to be 10 MSIs in Inspection Services eligible for overtime, although of the 10, Mr. A accounted for only 13 hours, Mr. B for 8 hours, and Mr. C for 6 hours;

- in 2012-2013, 6 MSIs in C&E Services appeared eligible for overtime, including all 5 grievors and a sixth employee, who did not grieve and who had received 136.25 hours of overtime;

- Mr. McInnis left C&E Services during the course of the 2012-2013 fiscal year; however, he had received 39.5 hours of overtime; and

- in 2012-2013, there appeared to be 10 MSIs in Inspection Services eligible for overtime, although of them, Mr. B and Mr. C received no overtime as did another employee, Mr. D, who in 2010-2011 and 2011-2012 had received overtime.

37 It was not clear from the evidence if in 2012-2013, Messrs. B, C, and D, who worked in Inspection Services in earlier years, were still working in that section or if they merely did not receive any overtime.

38 The evidence also disclosed that some of the work required the MSIs to travel, which was paid at the overtime rate. While the evidence disclosed some of the totals associated for travel time related to the overtime, the way the evidence was presented did not disclose if the information was all the travel time associated with overtime. The evidence disclosed showed the following amounts of time associated with travel and overtime for C&E Services and Inspection Services:

Fiscal year	Inspection Services	C&E Services
2010-2011	195.17	45.00
2011-2012	292.75	70.75
2012-2013	87.88	20.75

39 Mr. Hann testified that one of the MSIs in Inspection Services (other than Messrs. A, B, C, or D) took on less overtime because that MSI had a young child and was not available as much as the others. The MSI in question did not testify. In 2012-2013, that MSI was 1 of only 4 MSIs out of 13 in C&E Services and Inspection Services who received in excess of 200 overtime hours.

III. Summary of the arguments

A. For the grievors

1. The timeliness objection

40 The employer partially granted the grievances for 2012-2013. It did not grant them for 2010-2011 and 2011-2012. The grievors' position is that the employer breached clause 28.03 of the collective agreement in 2010-2011 and 2011-2012.

41 Article 18 of the collective agreement deals with the grievance procedure, and clause 18.05 provides that a grievance may be presented at the first level of the grievance procedure no later than the 25th day after the date on which the grievor is notified or first becomes aware of the action or circumstances giving rise to the grievance.

42 The grievors first became aware of the distribution of overtime to the MSIs in C&E Services and Inspection Services on November 16, 2012. They all filed their grievances on either November 22 or 23, 2012.

43 Mr. Hann testified that the grievors regularly asked their manager about the amount of overtime available and how much was being allocated to the MSIs in Inspection Services. He said that the MSIs in C&E Services were never told the amount of overtime available; nor were they told how much was being allocated to Inspection Services. Their manager told them that he did not know and that he was getting no co-operation from the other managers. The employer called Mr. Kennedy as

a witness, who testified that no one asked him these questions; this is consistent with Mr. Hann's evidence.

44 The employer will submit that the grievors should have done more, gone over their manager's head to Mr. Kennedy, filed an access to information and privacy (ATIP) request, or engaged their bargaining agent. This position is not supported by the jurisprudence. They had no obligation to take such steps or to go further than they did.

45 The grievors submitted that their situation should be contrasted with that of an employee receiving an improper amount of pay. The employee, having received a paycheque and pay stub (or details of the pay) would possess the knowledge required to file a grievance immediately. The same cannot be said about overtime allocation. First, it is done over the course of a fiscal year, and second, unless the employer provides employees with accurate information, they will never know. The grievors acted diligently and timely under clause 18.15 of the collective agreement.

46 The grievors submitted that it was incumbent on the employer to monitor the allocation of overtime and to provide accurate and timely information to them. The employer did not; as such, it would not be fair to not compensate them for their loss due to the employer's failure to conduct itself as set out in the collective agreement and the jurisprudence.

47 *Macri v. Treasury Board (Indian and Northern Affairs Canada)*, PSSRB File No. 166-02-15319 (19871016), [1987] C.P.S.S.R.B. No. 295 (QL), addresses how the triggering event is identified for the time frame within which a grievor must file his or her grievance. *Campbell v. Treasury Board (Correctional Service of Canada)*, 2016 PSLREB 42 at para. 61, presents an analysis of the decision in *Canada (National Film Board) v. Coallier*, [1983] F.C.J. No. 813 (C.A.)(QL).

48 The grievors submitted that the employer's lack of transparency and its allegation to them that it was working diligently delayed the information from reaching them until November of 2012.

49 *Algonquin College of Applied Arts and Technology v. Ontario Public Service Employees Union, Local 415* 2014 CanLII 67088 and 2015 CanLII 9194 ("*Algonquin*"), addressed a situation in which a union did not pay a bill for union

release time, which the employer was aware the union had to pay for. The employer was supposed to bill the union for that time and did not do so particularly timely. It billed the union for seven semesters at one time, which resulted in billing for a six-figure amount. Before the bill was sent, the union had advised the employer that it would not pay it and indeed, once it was invoiced, it refused to pay the bill. The employer grieved that action.

50 The union took the position that the grievance was untimely because the employer was outside the 20-day period in which it could grieve because it ought to have known that the invoice was not going to be paid. The arbitrator held that there was no refusal to pay until the invoice was issued and the union refused to pay it; the refusal was the trigger.

51 *Algonquin* also stands for the proposition that damages are not limited to the period within which a grievance could have been filed in relation to the triggering event. The total amount owed under the invoices could have been claimed once it was known.

52 The grievors' position is that nothing prevents the Board from addressing any damages for 2010-2011 and 2011-2012.

2. <u>The merits of the grievance</u>

53 The issues are straightforward; did the employer meet its obligation under the collective agreement with respect to overtime? If not, what remedies should be granted?

54 Article 28 of the collective agreement governs overtime, and clause 28.03(a) provides that subject to operational requirements, the employer shall make every reasonable effort to allocate overtime work on an equitable basis among readily available qualified employees.

55 The grievors referred me to *Attorney General of Canada v. Bucholtz*, 2011 FC 1259 at para. 52, which sets out as follows the three general principles to use to assess whether an allocation of overtime was equitable:

i. equitability must be measured over a reasonable period;

ii. equitability is assessed by comparing the hours allocated to the grievor to the hours of similarly situated employees over that period; and

iii. once the overtime hours of the grievor and the other employees are compared, the adjudicator must determine if any factors can explain a discrepancy between their hours, such as differing availability or leave, etc.

56 In *McManaman v. The Attorney General of Canada*, 2015 FCA 136, the Federal Court of Appeal affirmed the reasoning in *Bucholtz*. At paragraphs 7 and 8, it addressed the question of equitability with respect to the meaning of "similarly situated" employees.

57 In *Lemoire v. Treasury Board (Correctional Service of Canada)*, 2016 PSLREB 45 at paras. 58 and 59, the PSLREB addressed the issue of what a reasonable period should be; in this case, it was stated that a fiscal year is the reasonable period over which the equitability should be measured.

58 In *Weeks v. Treasury Board (Correctional Service of Canada)*, 2010 PSLRB 132 at para. 53, the adjudicator stated that absent an agreement with the local union as to the process to use to allocate overtime, the employer is free to use whatever method it wishes, as long as it results in an equitable distribution of overtime among readily available and qualified employees. It also states that when the hours of allocated overtime are examined, if a large gap appears in the amounts of overtime allocated, then that itself is evidence of inequitable distribution.

59 *Baldasaro v. Treasury Board (Correctional Service of Canada)*, 2012 PSLRB 54 at para. 52, notes that there is a positive duty on the employer to monitor overtime, which is essential to ensure equitability. Discrepancies in overtime arise only via reviews and audits. They cannot be corrected if they are not known. At paragraphs 54 through 56, the adjudicator finds that while overtime may be both mandatory and voluntary, if there is to be a distinction in allocating overtime using mandatory versus voluntary as the distinguishing factor, then that should be set out in the collective agreement. By not putting all overtime into the pot of potential time, the employer creates a systemic bias in its distribution.

60 When the principles set out in the case law are applied, similarly situated employees must be considered over the course of a fiscal year in terms of their overtime allocation. In this case, the grievors should be compared to the other employees in C&E Services who held either chief engineer or master mariner positions.

61 The reason for excluding naval architects (who also were MSIs in Inspection Services) from that comparison is that they were never part of the rotation. And MSIs in Inspection Services who were naval architects as opposed to chief engineers or master mariners did not work significant amounts of overtime.

62 In addition, at least two MSIs in Inspection Services were master mariners, and the evidence disclosed that one of them had a very young child and that the other left partway through the fiscal year. A third MSI, also a master mariner, had a significantly lower amount of overtime, which Mr. Hann could not explain.

63 It can be inferred that those MSIs who had significantly low amounts of overtime had not made themselves available for it.

64 At the final level of the grievance procedure, the employer partially allowed the grievors' grievances for the 2012-2013 fiscal year and compensated them by paying them the difference between the amount of overtime they had worked and the average amount of overtime per employee. That average amount was determined by taking the total amount of overtime distributed among all employees in C&E Services and Inspection Services and dividing it by the number of employees in those two groups. The result was an average of 169 hours of overtime. The difference in hours was then paid at an overtime rate of 1.5.

65 According to Mr. Kennedy, it is not practical to offer overtime opportunities equally to everyone; it depended on the circumstances. An example given was if a particular MSI is inspecting a particular vessel, it would not make sense to stop that MSI from working at the end of the workday with work still to be done and offer the balance of the work to another MSI at the overtime rate. While this is accurate, the evidence disclosed that the majority of the overtime available was for ship inspections. No operational reason was offered why this work, which would often entail overtime, could not be assigned to members of C&E Services.

66 The grievors submitted that the MSIs who were part of C&E Services

and Inspection Services and who did not have a significant amount of overtime during the course of the fiscal year should be eliminated from the calculation of the average amount of overtime. Then, the average amount of overtime each grievor should have been offered would increase.

3. Overtime rate

67 The grievors also submitted that the rate of pay the employer used to pay them, 1.5, was incorrect; it should have been 1.62. This is based on the fact that the total overtime amounts were not all earned at 1.5; some were earned at 2.0. An analysis of the total hours of overtime at straight time compared to the total converted hours demonstrates that a percentage of the total overtime was at 2.0. As such, the appropriate calculated rate would be at 1.62 and not 1.5.

B. For the employer

1. The timeliness objection

68 By 2010, the grievors knew that the rotation system had ended. They were concerned that they would not receive the overtime opportunities that Inspection Services received. They knew that they would not receive the same overtime opportunities as far back as 2010. They should have been proactive and sought out the information.

69 The grievors were not satisfied with the lack of information provided by management; they could have complained to their bargaining agent or filed a grievance but did not. They could have filed an ATIP request; they did not.

70 The employer referred me to *Campbell*; *Manuel v. Treasury Board (Department of Transport)*, 2012 PSLRB 9, *Lamy v. Treasury Board (Department of Public Works and Government Services)*, 2008 PSLRB 23, *Watson v. Treasury Board (Department of National Defence)*, 2012 PSLRB 105, and *Williams v. Treasury Board (Correctional Service of Canada)*, 2008 PSLRB 28.

2. The merits of the grievance

71 The burden of proof was on the grievors, which *Bucholtz* did not alter. While the employer is required to compile information, the grievors had six to seven years to present their case. Suggesting that the evidence is clear and uncontradicted would not be true.

72 The employer accepts that the test set out in *Bucholtz* is clear; while it accepts that the time frame for comparison is the fiscal year, it submitted that the grievors have not satisfied the second criterion in *Bucholtz*, identifying similarly situated employees. They asked to infer or assume a number of things, which is insufficient.

73 Who is similarly situated? Overtime is available and needs to and can be done by an MSI. Largely, it does not matter if that MSI holds the professional designation of a chief engineer, master mariner, or naval architect, save and except for very specific work that requires a different designation, which the evidence disclosed was very rare.

74 The employer submitted that Mr. Hann's evidence must be viewed carefully. He was in C&E Services, and largely, the work involved in that job did not require him to work overtime. The evidence disclosed that the bulk of overtime came from inspecting vessels, which normally was associated with Inspection Services.

75 Mr. Hann testified that MSIs in C&E Services wanted to work in Inspection Services because those working there received more overtime. This is not about overtime but about work assignment.

76 Things changed in 2010 when a system ended of rotating employees through the two groups. It was assumed that ending the rotation would never allow the MSIs in C&E Services to catch up. The grievors complained about that change. When they did, a plan was formulated.

77 The grievors stated that they discussed overtime with the employer or its representative from 2010 forward; however, they never approached their bargaining agent, spoke with Mr. Kennedy, or filed a grievance.

78 When the bargaining agent asked the employer to produce the overtime, it did, of all employees in both C&E Services and Inspection Services over the fiscal years of 2010-2011, 2011-2012, and 2012-2013. To determine if the overtime was allocated equitably, the test in *Bucholtz* must be used, but the grievors say it should not and that some of those individuals must be removed. They cherry-picked who should be in the group of similarly situated individuals, which is not how it works.

79 The Federal Court did not provide a precise recipe for determining how to find out if a discrepancy exists. First, the grievors have to identify who is similarly situated, and then, it must be determined if a difference in treatment exists.

80 The bargaining agent asked to set aside some of the MSIs as not being similarly situated. That should not happen because all of them were qualified for MSI work. However, there are a couple of exceptions, but there is no detail as to who was certified to do that work and how much overtime it amounted to.

81 Certain work done within the MSD requires specific qualifications, so only certain employees could do it. The employees' qualifications are not available as information.

82 There is no data on the breakdown of the type of work the overtime was for.

83 The grievors also want to exclude the naval architects, who are the MSIs working in Technical Services. They should be part of the process because since they are MSIs, they were also qualified to do the work done in C&E Services and Inspections Services, and they would have been eligible for the overtime.

84 A Port State Control inspection was identified as a specialty type of inspection. It would have had an impact on the work of three of the five grievors.

85 The grievors asked to infer that certain MSIs were just not available, based on the amount of overtime they worked.

86 The employer referred me to *Dewit v. Canada Revenue Agency*, 2016 PSLREB 40, for the proposition that if an employer uses a generic job description for a particular class of employees, those employees are all qualified to do the work in the job description, and as such, they are all similarly situated employees.

87 The grievors wanted the Technical Services MSIs taken out of the equation because it brought an element of conjecture to the process. It was not up to the employer to explain as it did not have the burden of proof. The grievors were required to show why certain MSIs should be included in the distribution of overtime and why others should not. It was insufficient to merely infer that information. Records are kept, which could have been used to prove their case. Even if the MSIs in

Technical Services worked a fixed 8:00 a.m. to 4:00 p.m. shift, it did not mean that they were not qualified for the overtime that the MSIs in C&E Services and Inspection Services were working.

88 The grievors suggested that a particular MSI in Inspection Services was not interested in overtime because of childcare issues; yet in 2011-2012, that MSI worked almost the same amount of overtime as Mr. Gutt did.

89 When cross-examining Mr. Kennedy, the grievors asked him to compare the person with the lowest overtime (2.5 hours) to the person with the highest (365 hours), which is not the way to address the question of equitable overtime. *Bucholtz* stands for the proposition that apples are to be compared with apples and oranges with oranges. Two different persons at opposite ends of the spectrum cannot be compared. In this respect, the employer also referred me to *McManaman*.

90 With respect to the submission that the grievances include travel time, the employer submitted that travel time is under another article of the collective agreement (article 34) and that that subject would need to be handled in a different grievance. The grievors did not grieve a breach of article 34. Travel time is not overtime.

91 There is no information to link the travel time to the overtime. The grievors asked to assume that travel had occurred.

3. Overtime rate

92 There is no clear information on the overtime rate.

93 The employer paid the applicable rate.

94 The grievance is about overtime that was not distributed equitably. There is no way of knowing whether that overtime, if it was not properly distributed, would have been paid at 1.5 or 2.0.

4. Non-payment to Mr. McInnis

95 If Mr. McInnis was not paid, the employer is content that the Board remain seized to deal with that issue.

C. The grievors' reply

96 With respect to the timeliness issue, the grievors were concerned and made inquiries; their manager put them off.

97 There is no evidence that the grievors knew that their overtime was accurate until they received the amounts disclosing what had been assigned and filed their grievances.

98 The implication with the employees who did not work more overtime is that they did not state that they were available.

99 The employer stated that apples must be compared to apples and oranges to oranges, but no one in Technical Services came forward to work or to ask for overtime; therefore, no one from there can be part of the equation.

IV. Reasons

A. The timeliness objection

100 At the final level of the grievance procedure, the employer partially allowed all the grievances, for April 1, 2012, to March 31, 2013. It denied all the grievances in respect of the claims for 2010-2011 and 2011-2012. It took the position that the portion of the grievances relating to those years was untimely.

101 The employer's position, as set out in its final reply to each grievance, was the following: "Accepted principles in jurisprudence regarding distribution of overtime indicate that overtime should be measured over a reasonable period of time which is, generally speaking, a period of one (1) year." I agree with this principle.

102 The evidence disclosed that between 2000 and 2010, the employer had in place a rotation system that appeared to address issues of overtime distribution by rotating MSIs through Inspection Services, which enabled MSIs in C&E Services to share in overtime opportunities, not necessarily on an annual basis but in a manner that appeared to keep all parties happy and that seemed to preclude the need to file grievances.

103 The evidence disclosed that at some point before the start of fiscal year 2010-2011, a determination was made that the rotation system would stop. Mr. Hann testified that he was never told why that happened. He said that a number of MSIs in the MSD in St. John's signed an undated letter to Mr. Kennedy about their concerns, which according to his response, would have been written sometime in mid-April of 2010. In his April 23, 2010, response, he stated as follows: "I am pursuing all options to address the issues of overtime equitably [*sic*] in the office in St. John's. I will follow

up with you shortly to discuss this further."

104 On May 6, 2010, Mr. Kennedy apparently emailed ("the May 6 email") all MSIs in the MSD in St. John's. He stated that overtime earnings were to be reported within each group and that the group managers (according to Mr. Hann, it meant all of C&E Services, Inspection Services, and Technical Services) were to meet weekly to discuss workload issues and potential opportunities for overtime so that it could be equitably shared. The email said that all overtime was to be pre-approved.

105 Mr. Hann stated that upon receiving the May 6 email, he expected an equitable distribution of overtime. However, he also stated that although he knew how much overtime was being distributed in C&E Services, he and his fellow MSIs there had no idea how much overtime was being distributed in Inspection Services. He said that it was a regular topic of conversation at C&E Services section meetings. He said that their manager would tell them that he did not know the overtime numbers for Inspection Services and that he had no way of knowing them. Mr. Hann stated that their manager told them it was a matter of privacy.

106 Mr. Hann testified that only at a C&E Services section meeting on January 9, 2012, was it disclosed to those in the C&E Services that one of the MSIs told that group that an MSI in Inspection Services had disclosed to him an exorbitant amount of overtime that he had worked. Mr. Hann said that they asked their manager if he could help them and that his response was that he was attempting to obtain cooperation from the manager of Inspection Services but that none was forthcoming.

107 The evidence disclosed that the grievors' attempts to determine the overtime distribution picture from management yielded no answers. Only when a request was made to Mr. Kennedy through a PSAC representative on October 31, 2012, did the overtime numbers come to the grievors' attention, on or about November 16, 2012.

108 The document that the employer gave to the PSAC representative, which was subsequently given to the grievors on November 16, 2012, contained the overtime distribution for fiscal years 2010-2011, 2011-2012, and 2012-2013 (until November of 2012) broken down by section (C&E Services, Inspection Services, and Technical Services).

109 Section 68(1) of the *Regulations* sets out that the deadline to file a grievance is as follows:

> ***68 (1)*** *… no later than 35 days after the earlier of the day on which the grievor received notification and the day on which the grievor had knowledge of the alleged violation or misinterpretation or any occurrence or matter affecting the grievor's terms and conditions of employment.*

110 It is clear that the grievors attempted, albeit to no avail, to secure from their manager the amount of overtime being distributed to MSIs in the MSD's sections in St. John's. They did not know that distribution, despite their repeated requests for information from the employer, until November 16, 2012. They filed their grievances on November 23, 2012.

111 The employer stated that the grievances, save and except for the grievance related to 2012-2013, were out of time. I disagree.

112 The employer submitted that the burden of proof was on the grievors and that while it had to compile the information, they had six to seven years to present their case. This is not true. The evidence presented indicated that the information with respect to overtime hours, whether the total overtime available and offered (whether overall, to individuals, or by section), was in the employer's hands. The grievors asked for it, and it was not given to them.

113 The employer had the information and should have provided it to the grievors. It could not come before the Board and hide behind a timeliness argument when its failure to act caused the delay.

114 If the employer is responsible for compiling information and does not provide it to grievors when they ask for it, how is it possible for them to comply with the time frames in the *Regulations*? They cannot because they do not know that overtime was not distributed equitably. The jurisprudence dictates that good faith in labour relations should be assumed. While the grievors might have had suspicions and concerns, until the employer produced for them the overtime hours that had been distributed, they did not know whether they were being treated fairly.

115 When Mr. Kennedy testified, he stated that he had reviewed the situation starting in the spring of 2010 to address some MSIs' concerns about the potential

distribution of overtime, given that the employer had ended the rotation system. He indicated that he was taking steps to provide opportunities to increase overtime.

116 The employer cannot shield itself behind its willful blindness, inaction, or misfeasance. The evidence clearly disclosed that the grievors asked for information because of their concerns. Only the employer could have provided it.

117 For these reasons, the employer's timeliness objection is dismissed.

B. The merits of the grievances

118 For the reasons that follow, the grievances are dismissed.

119 Clause 28.03 of the collective agreement states that subject to the operational requirements of the service, the employer shall make every reasonable effort to allocate overtime work on an equitable basis among readily available, qualified employees.

120 The Federal Court in *Bucholtz* sets out the framework for grievances such as these as follows:

i. equitability must be measured over a reasonable period;

ii. equitability is assessed by comparing the hours allocated to the grievor to the hours of similarly situated employees over that period; and

iii. once the overtime hours of the grievor and the other employees are compared, the adjudicator must determine if any factors can explain a discrepancy between their hours, such as differing availability or leave, etc.

C. Overtime to be measured over a reasonable period

121 Both the employer and the grievors submitted that the appropriate period over which to measure and compare overtime is a fiscal year. I agree.

1. Comparing overtime hours of similarly situated employees

122 In effect, this criterion has two parts, the first being a determination of similarly situated employees and the second being a comparison of overtime hours.

However, they are not mutually exclusive concepts; the reasoning behind the amount of overtime hours each individual employee might have received may have some determination in whether or not the employees are similarly situated.

123 The evidence disclosed that all the grievors were MSIs and that MSIs were made up of master mariners, chief engineers, and naval architects. In addition, it disclosed that all MSIs were qualified to do the work in either C&E Services or Inspection Services. That said, based on any number of factors, not all MSIs will be similarly situated.

124 Early in his testimony, Mr. Hann talked about the rotation between C&E Services and Inspection Services. He stated that it was done to help the MSIs who were master mariners and chief engineers access the overtime that was more abundant in Inspection Services. He then stated a curious thing, namely, that the naval architects were not part of the rotation. Later, in his cross-examination, Mr. Kennedy identified four MSIs in Inspection Services who were naval architects. Perhaps Mr. Hann meant to state MSIs in Technical Services, but he did not.

125 In addition to C&E Services and Inspection Services was a third section, Technical Services, which the evidence disclosed was composed largely of naval architects, who were also MSIs, and who therefore would have been qualified for overtime work. The evidence of both Messrs. Hann and Kennedy was that any MSI could carry out MSI work, including the majority of the inspections carried out in the three different sections. The naval architect distinction was not a qualifying criterion of working in C&E Services or Inspection Services.

126 I find as a fact that the evidence disclosed does not satisfy the second criterion set out in *Bucholtz*. While there is some evidence about the MSIs and their work in C&E Services and Inspection Services, I agree with the employer's submission that it ignores those MSIs who worked (largely as naval architects) in Technical Services. The evidence suggests that there were naval architects (therefore MSIs) in Technical Services.
If so, did they work overtime? If so, how much? How many MSIs were in Technical Services? This information is relevant to determining similarly situated employees, which is the second *Bucholtz* criterion. Without that information, I have an incomplete picture of the true state of affairs; I have only a partial picture of what the group

of similarly situated employees would be, and only among those in C&E Services and Inspection Services.

127 The burden of proof in grievances alleging a breach of a collective agreement falls to the party that alleges the breach; it this case, it is the grievors. As I am unable to determine what comprises the group of similarly situated employees, the grievances must fail on this point.

128 Despite my finding that the grievances must fail for want of evidence of whether the MSIs in Technical Services were or could be similarly situated employees, the evidence I was provided, which was about MSIs who worked in either C&E Services and Inspection Services, did not meet the burden of proof with respect to "similarly situated" as between those two groups. Relevant information is missing.

129 A simple review of the evidence presented disclosed the following with respect to C&E Services and Inspections Services:

- in 2010-2011 there was a total of 1843.50 hours of overtime, of which 566.25 hours, or just under 31%, was worked by MSIs in C&E Services, while 1277.25 hours, or almost 69%, was done by MSIs in Inspection Services;

- in 2011-2012 there was a total of 2180 hours of overtime, of which 710.75 hours, or just over 33%, was worked by MSIs in C&E Services, while 1469.25 hours, or almost 67%, was worked by MSIs in Inspection Services; and

- in 2012-2013 there was a total of 2069 hours of overtime, of which 716.25 hours, or just over 34%, was worked by MSIs in C&E Services, while 1352.75 hours, or almost 66%, was worked by MSIs in Inspection Services.

130 At first glance, the evidence seems to suggest that as a whole, the MSIs in Inspection Services received more than twice the overtime as the MSIs in C&E Services did; however, the evidence also disclosed that there appears to have always been more MSIs in Inspection Services than in C&E Services.

131 The evidence seems to indicate that in 2010-2011, there were 3 MSIs in

C&E Services, while there were 10 in Inspection Services. Of the 1277.25 hours of overtime available to the 10 MSIs in Inspection Services, 3 of them accounted for only 35 hours (2.5, 14.5, and 18 hours, respectively). As this is such a small amount of a total, I agree with the grievors' submission that it is highly likely that for reasons unbeknownst to us, these MSIs either were not available for overtime or did not want it. Of the remaining 7 MSIs in Inspection Services, 3 received 75, 84.25, and 78.75 hours of overtime, respectively. While these amounts are smaller, they are not as insignificant as those who received only 2.5, 14.5, and 18 hours. As such, I am not prepared to remove them from the assessment of the total of overtime hours.

132 In 2011-2012, there appeared to have been 5 MSIs in C&E Services and still 10 in Inspection Services.

133 The evidence of Mr. Hann was that all the grievors were readily available to work overtime. While he might have made this blanket statement, it clearly is not accurate. In this respect, I need go no further than the little evidence that the hearing was provided with respect to Messrs. Ledrew and McInnis, neither of whom testified.

134 The documentary evidence disclosed that Mr. Ledrew received no overtime hours in 2010-2011 or 2011-2012, which leads me to believe that he did not join C&E Services until 2012-2013.

135 The documentary evidence also disclosed that Mr. McInnis received no overtime hours in 2010-2011. In 2011-2012, he received only 38.75 hours out of 710.75 total hours of overtime carried out by MSIs in C&E Services, and in 2012-2013, he received only 39.50 hours out of a total of 716.25 hours of overtime carried out by MSIs there. This leads me to believe that he joined C&E Services sometime in 2011-2012, although I was not provided with the date. In addition, the evidence disclosed that Mr. McInnis left C&E Services sometime in 2012-2013; again, I was not provided with a date.

136 As I have no idea when Mr. McInnis joined or left C&E Services, I have no way of knowing whether the overtime he received in those years of 38.75 and 39.5 hours respectively was reasonable.

137 Based on the limited evidence the hearing was provided with respect to Messrs. Ledrew and McInnis, I cannot accept that all the grievors were always ready,

willing, and able to work overtime.

138 In addition, without more specific and exact information about the type of overtime and when and where it was available, I cannot accept a blanket suggestion that all the grievors were always available. I have no idea of whether any of them was on any type of leave or for how long or when due to any other reason, they might or might not have been able to take on overtime.

139 Limited evidence was put forward about an MSI in Inspection Services who it was suggested was not available for overtime because of a young child. This is far from the evidence required on a balance of probabilities to satisfy the test as to whether an employee is similarly situated. The employer maintains leave records, which easily could have been requested and if not produced, then an order of production could have been requested. They could have shed light on the true state of affairs with respect to availability. Conjecture is not evidence.

140 If I accept the grievors' argument that certain Inspection Services MSIs should be removed from the equation on the distribution of overtime, I am left to ponder why Mr. McInnis should not be removed as well, given that the argument put forward was that the low amounts of overtime worked by certain employees should be taken to mean that they were not available for it. Mr. McInnis's overtime, while it was not as low as some of the Inspection Services MSIs that I identified (who had worked only a few hours) was significantly less than his colleagues in C&E Services. This anomaly could have been explained; however, it was not.

141 If I average the overtime by employee in each of fiscal years 2010-2011, 2011-2012, and 2012-2013, and eliminate the outliers, Messrs. A, B, and C, who worked almost no overtime (in 2010-2011 and 2011-2012), and Mr. McInnis, the following is the average overtime per MSI in Inspection Services, C&E Services, and both:

Fiscal year	Inspection Services	C&E Services	Both
2010-2011	177.46	188.75	180.85
2011-2012	206.03	168	192.20
2012-2013	193.25	135.35	169.12

142 In 2010-2011, the average number of overtime hours worked by MSIs was 180.85. In that year, Mr. Barbour worked 170.75 hours, Mr. Gutt worked 161 hours, and Mr. Hann worked 234.50 hours.

143 While Messrs. Barbour and Gutt were under the average, Mr. Hann was above it by 53.6 hours. He had 63.75 more overtime hours than Mr. Barbour and 73.5 more than Mr. Gutt. This internal C&E Services difference could have been explained; it was not.

144 In 2011-2012, the average number of overtime hours worked by MSIs was 192.20. In that year, Mr. Barbour worked 193.75 hours, Mr. Gutt worked 139.50 hours, and Mr. Hann worked 180.50 hours.

145 While Mr. Barbour was just over the average and Mr. Hann just under the average by 11.7 hours, Mr. Gutt was below the average by almost 53 hours. In addition, within C&E Services, the difference between Messrs. Barbour and Gutt was 54.25 hours and Messrs. Hann and Gutt was 41 hours. I am sure that there is an explanation for this; however, it was not provided to the hearing.

146 The discrepancies in the amounts of overtime worked within C&E Services alone in 2010-2011 and 2011-2012 were large enough to indicate either that overtime in that section was not being equally distributed or that Mr. Gutt, who received only 161 and 139.5 hours of overtime in each of those years respectively, was not similarly situated with Messrs. Barbour and Hann. Mr. Gutt could have testified; he did not.

147 In 2012-2013, the average number of overtime hours worked by MSIs was 169.12. In that year, Mr. Barbour worked 154.50 hours, Mr. Gutt worked 145.50 hours, Mr. Hann worked 131 hours, and Mr. Ledrew worked 109.50 hours. However, as part of the grievance procedure, the employer determined that the grievors had not been given overtime opportunities fairly. As such, at the final level of the grievance procedure, it allowed their grievances by paying each one additional hours at the overtime rate of 1.5, to bring them all up to the average overtime hours of MSIs in C&E Services, which the employer had calculated to be 169 hours.

2. <u>Other factors to explain a discrepancy in overtime hours</u>

148 The allocation of overtime on an equitable basis does not mean that

everyone receives the exact same amount of overtime. The following describes some employees:

- they have a greater ability to work overtime than others do;
- they want to work more overtime;
- they make themselves always available for overtime;
- they are prepared to work some overtime but not as much as others;
- they may not want to work any overtime; and
- they may work overtime only as required.

149 In addition, depending on the employee and when the opportunities to work overtime occur, some employees may by default have more opportunities.

150 I heard virtually no evidence about the grievors and their availability save and except that Mr. Hann stated that they were all ready, willing, and able to work overtime. However, based on the limited evidence I had, it may or may not be true. And given this lack of evidence, it was clear that they had issues that required explaining.

151 As I am not prepared to allow the grievances for the reasons I have just set out, the issues related to the appropriate overtime rate to apply and whether travel time should be included are moot.

D. Mr. Ledrew and Mr. McInnis

152 There is no evidence that either of Messrs. Ledrew or McInnis worked as an MSI in C&E Services (or either of the other two groups) in 2010-2011. Without such evidence, their grievances for that year cannot be sustained.

153 For the fiscal year 2011-2012, again, there is no evidence that Mr. Ledrew worked as an MSI in C&E Services (or either of the other two groups). Without such evidence, his grievance for that year cannot be sustained.

154 With respect to Mr. McInnis, in the fiscal year 2011-2012, the evidence disclosed that he worked 38.75 hours of overtime. As set out earlier, I heard no

evidence about when he commenced working as an MSI in C&E Services (or either of the other two groups). Without such evidence, I have no idea of whether the 38.75 hours is reasonable. The same is true for 2012-2013, for which the only evidence I have is that he received 39.50 hours of overtime and that he left C&E Services during the course of that year. Depending on when he left, it could determine whether the 39.50 hours of overtime was reasonable and fairly distributed.

155 For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

156 The employer's objection based on timeliness for the time frame related to fiscal years 2010-2011 and 2011-2012 is dismissed.

157 The grievance in file 566-02-11383 is dismissed.

158 The grievance in file 566-02-11384 is dismissed.

159 The grievance in file 566-02-11385 is dismissed.

160 The grievance in file 566-02-11386 is dismissed.

161 The grievance in file 566-02-11387 is dismissed.

October 12, 2018.

John G. Jaworski,
a panel of the Federal Public Sector
Labour Relations and Employment Board