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566-02-8860 to 8866

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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

JEROME KEEN AND SHAWN ROBERTSON

Grievors

and

PUBLIC SERVICE ALLIANCE OF CANADA

Bargaining Agent

and

TREASURY BOARD (Department of Fisheries and Oceans)

Employer

Indexed as

Keen v. Treasury Board (Department of Fisheries and Oceans)

In the matter of individual grievances and a policy grievance referred to adjudication

Before: James Knopp, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Bargaining Agent: Kim Patenaude, counsel

For the Employer: Amita Chandra, counsel

Heard at Ottawa, Ontario,

June 17 to 19, 2019.

I. Introduction and background

[1] The sea lamprey is a nasty piece of work. It is an invasive species and is a parasitic fish native to the northern and western Atlantic ocean. However, since the 1830s it has made its way via the Welland Canal to all five Great Lakes. It latches onto the side of a fish and feeds on the host's blood and body fluids until the host expires, frequently from infection. The sea lamprey has a voracious appetite. Left unchecked, sea lampreys can devastate recreational and commercial fishing resources.

[2] The Great Lakes Fisheries Commission coordinates sea lamprey control in the Great Lakes. The work is jointly carried out by the United States Fish and Wildlife Service and by the Department of Fisheries and Oceans (DFO).

[3] Field biologists set up traps and barriers in the many tributaries that feed into the Great Lakes to prevent the lampreys from moving upstream. Special chemicals called lampricides are administered, which target lamprey larvae but are harmless to other aquatic creatures. Once the treatment has been implemented, field biologists and technicians must remain on site for at least 24 hours to ensure its safe and effective application.

[4] Jerome Keen and Shawn Robertson ("the grievors") are field biologists. To be precise, they are aquatic science technicians, and their positions are classified EG-04. They are with the Engineering and Scientific Support unit in the DFO's Sea Lamprey Control Centre. Due to the nature of their employment mandate, their working conditions are rather unique.

[5] Their schedule in the winter months is from 9 to 5, Monday to Friday, with weekends off. Those months are spent planning and preparing for the field season, which typically spans approximately April 1 to October 31. Effectiveness in the field depends on careful planning. Using meteorological and research data as well as data from previous years' fieldwork, a plan is developed, which will see several crews sent to different locations in New York State, Michigan, and Ontario, as necessary, to control the sea lamprey infestation.

[6] A brief mention of some of the informal names of the crews will provide some indication of the diversity of the work they perform. Treatment, Barriers, Adult

Assessment, Larval Assessment, and Environmental Assessment crews all operate at different places and times throughout the field season.

[7] Factors influencing crew deployment include weather conditions (especially temperature, since the lampricide is less effective at temperatures of less than 5 degrees Celsius), facility of access to treatment sites, current flow, and geographical distance from Sault Ste. Marie (which is the headquarters for these operations). Two days of travel (one way) are usually needed to reach the furthest field sites, located in upstate New York.

[8] It is readily apparent that as much as one would like to draft a precise and comprehensive schedule covering the entire field season, conditions can change in the blink of an eye, and flexibility is necessary. A draft schedule is drawn up in late February or early March for review by both management and employees. Concerns are usually minor, and the necessary changes are reviewed, consented to by both sides, and implemented before the final plan is put forward in March.

[9] For the crews, the winter schedule of Monday to Friday, 9 to 5, turns upside down when fieldwork commences in April. As many as 19 or 20 consecutive workdays are scheduled to allow for travel, setup, construction or maintenance, and perhaps treatment and monitoring. This is followed by as many as 8 to 10 days of rest, depending upon the circumstances. Unpredictable weather frequently varies the durations. The periods are often extended, for example, to complete a work session in a remote location so as to avoid having to return there later. Flexibility is an important characteristic of working in the field.

[10] The demands of this unique working environment are reflected in an appendix to the collective agreement. At issue at the hearing was the interpretation Appendix I of the collective agreement between the Treasury Board and the Public Service Alliance of Canada for the Technical Services group that expired on June 21, 2014 ("the collective agreement") as it relates to compensation for employees working in the field during field season.

[11] These grievances are about overtime, as per the agreed statement of facts which follows.

II. Agreed statement of facts

[12] At the opening of the hearing, the parties jointly submitted an agreed statement of facts (ASF) with 15 tabs containing copies of the documents it refers to.

[13] The ASF reads in part as follows:

> **AGREED STATEMENT OF FACT**
>
> 1. These grievances all relate to employees of the Engineering and Scientific Support Bargaining Unit in the Sea Lamprey Control Centre ("SLCC") of the Department of Fisheries and Oceans ("DFO"). The Public Service Alliance of Canada ("PSAC") is the certified bargaining agent for this unit within the Treasury Board's Technical Services Group.
>
> 2. Engineering and Scientific Support employees in the SLCC are Aquatic Science Technicians who are required to perform work away from their headquarters during the "field season"
>
> 3. The field season is typically from April 1 to October 31.
>
> 4. On May 9, 1973, a first Memorandum of Agreement ("MOA") between the employer and PSAC was negotiated to waive certain clauses of the collective agreement as they pertain to scheduling and travel for employees of the Engineering and Scientific Support Bargaining Unit in the SLCC.
>
> 5. A second MOA was signed on July 29, 1975. The language in this MOA was consistently renewed by the parties in collective bargaining and included in the collective agreement as Appendix "L" until March 26, 1999.
>
> 6. ln 1999, further to discussions at the local level between management and the union, an agreement was reached to table proposed revisions to the MOA for consideration in collective bargaining.
>
> 7. A new collective agreement was signed by the parties on March 30, 2000. This collective agreement included an amended MOA which became Appendix "I".
>
> 8. The MOA was again modified in 2013.
>
> **PAST APPLICATION OF THE MOA**
>
> 9. Prior to the changes negotiated in March 2000, employees working in the field and subject to Appendix "L" would work a number of consecutive calendar days, accumulating their days of rest to be taken at the end of their field work. For example, they would work nineteen (19) consecutive days, ending on a Friday. They would then get the next six (6) days off, which include their regular Saturday and Sunday as well as four (4) days of rest accumulated during their field work. They were paid Weekend

Premiums in accordance with article 27.02 of the CA for the four (4) weekend days they worked while they were in the field.

10. During the 2000 field season, following the change in the MOA, employees working in the field would earn overtime for work performed on a Saturday at a rate of 1.5 and on Sunday at a rate of 2.0. They would then book compensatory time off at their regular rate. The remaining OT earned while in the field could be cashed out or used as leave. For example, an employee working the same schedule as above – nineteen (19) consecutive days, ending on a Friday would have Saturday and Sunday off as regular days of rest and book Monday to Thursday off (30 hours) with the compensatory leave earned during their field period. They would have 22.5 hours of compensatory leave remaining to be paid out or taken as additional compensatory leave.

11. ln fairness to Great Lakes Fisheries Commission ("GLFC") employees working for SLCC on contract, SLCC management advised that GLFC employees would be compensated in a similar fashion to DFO employees for weekend hours worked during the field status..

12. On February 16, 2011, Dr. Michelle Wheatley, Regional Director, Science, Central & Arctic Region, Fisheries and Oceans Canada, Freshwater institute advised employees in the Engineering and Scientific Support Group at the SLCC that the employer would be implementing a clarification of Appendix "I". She advised that as of the 2011 field season, employees subject to Appendix "I" would be viewed as shift workers for the duration of the field season. She advised that the employees would be entitled to shift premiums under article 27.01 and 27.02 but they would not be entitled to overtime compensation for normal hours of work on Saturdays and/or Sundays if they are considered work days as part of their regular shift schedule.

13. During the 2011 field season, approximately 95 grievances were filed by 18 separate grievors with respect to the implementation of this clarification.

14. Bath parties agreed to refer a limited number of grievances to adjudication. The grievances and the employer's responses are attached as follows:

15. On September 30, 2015, PSAC filed a policy grievance alleging a violation of Articles 25.10 and 28.01(b) of the Technical Services collective agreement.

ISSUES

16. The parties disagree on the interpretation of Appendix "I" as it relates to the issue of compensation for employees working in the field during field season.

[*Sic* throughout]

III. Grievances before the Board

[14] The issues grieved by Mr. Keen and Mr. Robertson are representative of the concerns of a number of grievors. The grievances of Mr. Keen and Mr. Robertson, as well as a policy grievance arising out of the interpretation of the same collective agreement appendix, were brought forward as test cases.

[15] The text of the appendix at issue in the hearing changes slightly under each collective agreement. The earlier versions referred to this appendix as "Appendix L" and the later versions referred to it as "Appendix I".

A. Mr. Keen's grievances

[16] Mr. Keen filed four grievances. They have file numbers 566-02-8860, 8861, 8862, and 8863, respectively. Each is about a denial of a payment of overtime in 2011, for the following Saturdays or Sundays:

1. file 8860: April 16 and 30 and July 23 and 24;
2. file 8861: May 1, 28, and 29;
3. file 8862: June 4, 5, 25 and 26; and
4. file 8863: July 23 and 24.

[17] Mr. Keen did not testify. The parties agreed that Mr. Robertson's testimony addressed the same issues that Mr. Keen raised in his grievances.

B. Mr. Robertson's grievances

[18] Mr. Robertson filed three grievances. They have file numbers 566-02-8864, 8865, and 8866. Each grievance is about a denial of a payment of overtime in 2011, for the following days:

1. file 8864: Wednesday, May 11, as seven days' notice was not provided in advance of a schedule change;
2. file 8865: Sunday, May 1, and Saturday and Sunday, May 28 and 29; and
3. file 8866: Saturday and Sunday, April 16 and 17, and Saturday, April 30.

C. The policy grievance

[19] On September 30, 2015, the Public Service Alliance of Canada filed a policy grievance, which has file number 569-02-199, alleging that "[t]he Department of Fisheries and Oceans has violated the Technical Services collective agreement (expiry June 21, 2014) by failing to correctly apply Articles 25.10 and 28.01(b)." The corrective action requested was threefold, as follows:

> 1. *That the Board declares that the employer has breached the collective agreement;*
> 2. *That the Board order the employer to correctly apply the collective agreement; and,*
> 3. *Any and all other remedies that are fair and reasonable in the circumstances.*

[20] Clause 25.10 of the collective agreement pertains to "Notice of Change of Schedule for Shift Workers". It reads as follows:

> ***25.10 Notice of Change of Schedule for Shift Workers***
>
> *If an employee is given less than seven (7) days' advance notice of a change in his or her shift schedule, the employee will receive a premium rate of time and one half (1 1/2) for work performed on the first shift changed. Subsequent shifts worked on the new schedule shall be paid for at straight time. Such employee shall retain his or her previously scheduled days of rest next following the change or if worked, such days of rest shall be compensated in accordance with the overtime provisions of this collective agreement.*

[21] Clause 28.01 pertains to overtime and reads as follows:

> ***ARTICLE 28***
>
> ***OVERTIME***
>
> ***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.*

[22] On July 11, 2016, Carl Trottier, Associate Assistant Deputy Minister, Compensation and Labour Relations, responded to this grievance as follows, in part:

…

> *Upon careful review of all the relevant information, I find no reason to intervene with respect to the interpretation of clause 25.10 (Notice of Change of Schedule for Shift Workers). It is the position of the employer that slightly modifying the hours of work on a specific day or making a slight temporary change do not constitute a change in the work schedule as intended in clause 25.10.*
>
> *As for the application of article 28 (Overtime), I find that the employer has erred in its previous interpretation of paragraph 28.01(b). More specifically, it was an error to interpret "any twenty-four (24) hour period" to mean a "day" which is defined as "a twenty-four (24) hour period commencing at 00:01 hour."*
>
> *Upon further review, a double (2) time overtime entitlement for an employee not working under the provisions of Appendix I or paragraph 25.14(h) of the collective agreement ought to be calculated on the basis of the overtime worked after fifteen (15) hours' [sic] within the twenty-four (24) hour period commencing when the employee began his/her shift within that same twenty-four (24) hour period.*
>
> *In light of the above, and to the extent described herein, the grievance is partially allowed. With regards to the corrective measures requested, a revised interpretation regarding the application of paragraph 28.01(b) will be issued.*

…

[23] It was agreed at the outset that the evidence introduced at the hearing would pertain to both the policy grievance and the seven individual grievances.

IV. Summary of the evidence

[24] Mr. Robertson testified to the working conditions in the field and to how weekend work was compensated before and after they were designated as shift workers. His testimony largely mirrored the circumstances spelled out in the ASF.

[25] Apparently, throughout the 1998 and 1999 field seasons, there was a growing degree of discontent among the aquatic science technicians because they were being compensated differently than were other federal government employees, who were

members of the Professional Institute of the Public Service of Canada (PIPSC) and who worked alongside them but under the terms of a different collective agreement.

[26] Mr. Robertson testified to how the PIPSC employees would work several consecutive days, followed by consecutive days of rest. When the workdays included a Saturday and Sunday, they were paid overtime for Saturday and Sunday. The grievors would carry out their fieldwork alongside them on Saturdays and Sundays but were not paid overtime on those days. Discussions took place at the local level in 1998 and 1999 between management and representatives of the aquatic science technicians about this discrepancy.

[27] A memo was introduced into evidence entitled, "Summary of Discussion of Meeting on May 21, 1999 Between Employees and Union Representatives of the Engineering and Scientific Support (EG) and the General Labour and Trades (GL) Bargaining Units and Management Team of the Sea Lamprey Control Centre" ("the memo"). It reads in part as follows:

…

> *Whereas in the past a work schedule program included a specified number of consecutive calendar days of work (normally not to exceed 20 consecutive days) in the field followed by a specified number of days of rest (up to 8 days of rest would be a maximum) with weekend work not compensated for, at overtime rates, the representatives of the bargaining units and the management team have proposed the following changes:*
>
> *1. A work schedule shall not exceed a combination of twenty (20) consecutive days of work and eight (8) days of rest.*
>
> *2. Work on Saturday will be compensated at one and one half times the hourly rate for all hours worked (excluding meal break). There will be a minimum of eight (8) hours of work for members of the GL group and seven and one half (7 ½) hours for members of the EG group.*
>
> *3. Work on Sunday will be compensated at one and one half the hourly rate of pay for all hours worked (excluding meal break). There will be a minimum of eight (8) hours of work for members of the GL group and seven and one half (7 ½) hours for members of the EG group.*
>
> *4. No Shift or Weekend premiums will apply.*
>
> *5. Upon return from a specified period of field work, members of the General Labour and Trades and Engineering and*

*Scientific Support Bargaining Units will be entitled to consecutive days of rest equivalent to the number of weekend days worked.**

6. The balance of time earned for weekend work shall be deemed overtime with compensation as per appropriate contract article on Overtime Compensation.

…

** The consecutive days of rest are to be taken during the normal work week.*

…

[28] The discussions resulted in an email dated September 26, 2000, to the employees affected by the changes from Larry Schleen, Acting Division Manager. The email reads in part as follows:

As most folks know, there has been a change in the compensation given to full-time DFO employees for weekends worked in the field, due to revised MOA's in their new contracts. Both EG and GL groups are now entitled to overtime compensation for Saturdays and Sundays. In essence, Egs [sic] and GLs are paid at 1.5 times for each hour worked on Saturday and 2 times for each hour worked on Sunday. The clause stipulates that one day be taken off for each weekend day worked immediately following each stipulated field period, with the remaining overtime (.5 day for each Saturday and 1 day for each Sunday) to be paid in cash or taken as time off at a later date.

…

[29] Mr. Robertson testified to the continuation of this practice for over a decade.

[30] Paul Sullivan benefitted from this practice while he worked in the field under the same conditions as Mr. Robertson. Then, in 2004, Mr. Sullivan was promoted to the managerial ranks, and his work situation changed. Over the course of the next several years, he monitored the costs of this practice and summarized them from time to time for analysis and consideration by upper management.

[31] Mr. Sullivan testified that to his knowledge, the Treasury Board was not aware of this practice until he brought it to its attention, at which time discussions began in earnest about changing it.

[32] Dr. Michelle Wheatley is the Regional Director, Science, Central and Arctic Region, DFO. She did not testify, but according to Mr. Sullivan, she was involved in reviewing the proposed changes to Appendix I as far as weekend work during field season was concerned.

[33] Dr. Wheatley sent the following email on February 16, 2011, advising of the changes. The email reads in part as follows:

…

> *SLCU [Sea Lamprey Control Unit] employees working during the field season have work schedules that resemble shift schedules, as they are variable and rotational in nature. In order to better reflect this operational reality, effective immediately, SLCU employees covered by Appendix I will be viewed as shift workers for the duration of the field season. Shift workers are entitled to shift premium pay and weekend premium pay, as per Article 27.01 and 27.02. Shift workers are not entitled to overtime compensation for their normal hours of work on Saturdays and/or Sundays if these days are considered work days as part of their regular shift schedule.*

…

[34] With respect to the grievance in file 8864, Mr. Robertson testified to a change in the schedule that took place while he was in the field. The number of consecutive work days was reduced, and his team had to return to Sault Ste. Marie instead of remaining in the field for the scheduled number of workdays. Less than seven days' notice was provided.

[35] The circumstances surrounding Mr. Robertson's grievance were not covered in testimony, but they are provided in a letter dated August 9, 2011, which Mr. Sullivan wrote to Mr. Robertson. It reads in part as follows:

…

> *As you are aware, while in the field season you operate under Appendix I in the Technical Services Collective Agreement. You were originally scheduled to work in the field from April 26, 2011 to May 13, 2011. Due to weather conditions, you were notified on May 4, 2011 that you would be returning to Sault Ste. Marie headquarters on May 5, 2011. You were also notified that your days of rest and lieu days would no longer be scheduled for May*

> *14–19, 2011 and would be changed to May 7–10, 2011. Therefore you were required to report to work on May 11, 2011.*

…

V. Summary of the arguments with respect to the grievance in file 566-02-8864 and the first aspect of the policy grievance

[36] The grievors drew a distinction between the daily schedule and the work schedule program. Appendix I speaks only to lengthening the schedule, as follows:

…

> … *Should local management decide that operational requirements require an extension of the twenty (20) calendar days of work [up to a maximum of seven (7) calendar days] in order to preclude another trip to the area, the appropriate number of additional days shall be worked and the days of rest and compensatory leave extended as required.*

…

[37] Nothing in Appendix I provides for shortening the schedule, only lengthening it. Therefore, argued counsel for the grievors, Mr. Robertson should have been entitled to seven days' notice of the change or to the appropriate compensation should that notice not be provided.

[38] The employer argued that there is no distinction between the daily schedule and the work schedule program as far as schedule changes are concerned, but in any case, the provisions of Appendix I apply when workers are in the field. The purpose of Appendix I is to allow management to make optimal use of time in the field. If, due to a variety of reasons, the schedule needs to be changed, Appendix I allows management to make the change without being required to give seven days' notice. To do otherwise would be fiscally irresponsible.

A. Decision and reasons

[39] Article 25 of the collective agreement, under which the grievors were operating in May 2011, deals with hours of work. Clause 25.08 deals specifically with advance notice, as follows:

> ***25.08*** *If an employee is given less than seven (7) days' advance notice of a change in his or her shift schedule, the employee will*

> *receive a premium rate of time and one-half (1 1/2) for work performed on the first shift changed.…*

[40] I agree with the employer. When it comes to changing the shift schedule, there is no difference between a daily schedule and the work schedule program. True, Appendix I contemplates lengthening the schedule, not shortening it, but I find that this makes no difference. A change is a change.

[41] This distinction is a moot point, however, because of Appendix I. The first sentence of Appendix I makes it very clear that article 25 simply does not apply when working away from the Sault Ste. Marie headquarters, in the field. Mr. Robertson's grievance in file 566-02-8864 is denied on that basis.

[42] Therefore, I also find that the employer properly interpreted clause 25.10 of the collective agreement. The first aspect of the policy grievance is denied.

VI. Summary of the parties' arguments with respect to the remaining grievances and the second aspect of the policy grievance

[43] These grievances all pertain to the practice of claiming overtime at time and one-half for working a Saturday and at double time for working a Sunday while in the field.

A. The grievors' arguments

[44] The grievors put forward three arguments in favour of upholding these grievances. First, the collective agreement language in Appendix I favours the grievors in that the text of later versions refers to compensatory leave, which is normally accumulated by accruing overtime hours for work done on Saturdays and Sundays during the field season when in the field. The language in subsequent versions of the collective agreement is consistent with the proposals discussed in 1999 and 2000, when compensating work performed on Saturdays and Sundays during the field season, when in the field, was being considered.

[45] The grievors argued that prior agreements can be used when interpreting the reasons for a language change. In the versions that predate the practice of paying overtime for weekend work, the words "compensatory leave" do not appear. The presence of these words in versions of the collective agreement that followed the advent of paying overtime for working Saturdays and Sundays during the field season

is indicative of the intention to compensate employees in this manner, even if the wording is not explicit.

[46] The second argument advanced by the grievors, should the language of Appendix I be found to be ambiguous, involves management's past practice. By February 16, 2011, when the grievors were formally considered fieldworkers and therefore not entitled to overtime compensation for their normal hours of work on Saturdays and Sundays when in the field, management had been compensating weekend work that way since September 26, 2000, a period of over 10 years.

[47] The grievors referred me to the case of *Canada (Attorney General) v. Lamothe*, 2008 FC 411, for the articulation of the doctrine of past practice. At paragraph 40, the Federal Court stated as follows:

> *[40] The doctrine dealing with the issue of past practice that can contradict specific clauses of a collective agreement holds that certain stringent requirements must be met. The evidence must show a practice over several years, and must meet the following requirements:*
>
> *(a) be repeated over several years;*
>
> *(b) be accepted by all of the parties involved; and*
>
> *(c) not be ambiguous or disputed.*

[48] The grievors argued that the evidence of both Mr. Robertson and Mr. Sullivan satisfies those requirements.

[49] Evidence of past practice may be admitted to establish estoppel, which is the third argument the grievors advanced. They referred once again to *Lamothe* for the definition of estoppel, as follows at paragraph 42:

> *[42] The doctrine of estoppel (prévision or fin de non recevoir) comes to us from English common law; it is described as follows:*
>
> *The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance has been made by him…*
>
> Combe v. Combe, [1951] 2 K.B. 215 *(Denning L.J.)*

[50] The next paragraph of *Lamothe* goes on to add that "[e]vidence of past practice may be admitted to establish estoppel in the context of collective agreements governing labour relations (Brown and Beatty p.72)."

[51] The grievors argued that the four elements of estoppel have been met. By way of Mr. Schleen's September 26, 2000, email, management made a clear and unequivocal representation about paying overtime for weekends. The grievors clearly intended to rely on that representation. They indeed did rely on it, for over 10 years, and they suffered an obvious detriment when it ceased to be paid.

[52] The grievors concluded that given the weight of these arguments and the evidence, these grievances should be allowed.

B. The employer's arguments

[53] The employer agreed that the issue is the interpretation of Appendix I, but it submitted there is no ambiguity in its wording. The mere presence of the words "compensatory leave" does not automatically imply the authorization of overtime to be paid for working scheduled Saturdays and Sundays. In fact, Appendix I makes no explicit reference to this practice, and on February 16, 2011, a memo was issued clarifying the terms of Appendix I so as to put an end to its incorrect application. Fieldwork is in fact shift work, argued the employer, and there is no entitlement to compensation by way of overtime for work performed on scheduled workdays simply because those days happen to be either a Saturday or a Sunday.

[54] The employer first argued that the decision to properly apply the provisions of Appendix I falls within the legitimate scope of management rights. Counsel referred to the part of the Federal Court's decision in *Hodgson v. Canada (Attorney General)*, 2006 FC 428 at para. 26, which refers to s. 11(2) of the *Financial Administration Act* (R.S.C., 1985, c. F-11) in part as follows:

…

> *(2) Subject to the provisions of any enactment respecting the powers and functions of a separate employer but notwithstanding any other provision contained in any enactment, the Treasury Board may, in the exercise of its responsibilities in relation to personnel management including its responsibilities in relation to*

> *employer and employee relations in the public service, and without limiting the generality of sections 7 to 10,*
>
> *(a) determine the requirements of the public service with respect to human resources and provide for the allocation and effective utilization of human resources within the public service;*
>
> […]
>
> *(d) determine and regulate the pay to which persons employed in the public service are entitled for services rendered, the hours of work and leave of those persons and any matters related thereto* ….
>
> …

[55] The employer argued that past practice need not be considered, as the language of Appendix I is unambiguous. With respect to estoppel, there is no evidence to suggest that the Treasury Board was even aware of the practice of paying overtime to fieldworkers working Saturdays and Sundays in the field. The doctrine of estoppel does not apply. The substantive elements of the memo and of Mr. Schleen's September 26, 2000, email merely reflect discussions that took place at a local level. There is no evidence that the Treasury Board was involved.

[56] In fact, argued the employer, the only evidence tendered in this hearing proves the contrary true: Mr. Sullivan testified to bringing this matter to upper management's attention, which is the only way the Treasury Board was eventually made aware of it. There is certainly no evidence that the Treasury Board condoned the practice, because once Mr. Sullivan identified the issue, steps were taken to correct it. Even clawing back the overtime that had been paid in the past was considered, but in the interests of employer-employee relations, it was not done.

[57] The employer thus argued that estoppel was not created in this case.

[58] For the above reasons, argued the employer, these grievances should not be allowed.

VII. Decision and reasons on the grievors' grievances (other than in file 8864)

[59] I do not find the wording of Appendix I to be ambiguous or unclear.

[60] The text of Appendix L changed slightly when it became Appendix I. The most important change is the inclusion of the words "compensatory leave". However, I

cannot agree with the grievors that the sudden appearance of those words was the direct reflection of a decision at a local level to begin paying overtime for fieldwork performed on Saturdays and Sundays during the field season.

[61] A plain reading of Appendix I reveals no reference, explicit or otherwise, to the overtime scheme referred to in detail in the memo or more broadly in Mr. Schleen's September 26, 2000, email.

[62] I am not surprised that earnest discussions took place in 1999 and 2000 at a local level about how the grievors might be compensated similarly to others working alongside them in the field season. Fieldwork is difficult, and it is frequently performed under very challenging conditions. It is very important work, and it should be rewarded as handsomely as possible.

[63] I am also not surprised that the mechanism ultimately implemented (to be clear, the mechanism for paying overtime for Saturdays and Sundays) did not make its way into the collective agreement in explicit language, because it all seems a bit contrived; an ad-hoc approach to a perceived workplace inequity. An approach which worked well, up until the Treasury Board caught wind of it.

[64] This is because the approach is not consistent with the plain wording of the collective agreement (Appendix I). One cannot be a day worker and a shift worker at the same time.

[65] From approximately November to approximately April every year, by anyone's definition, the grievors are day workers and not shift workers. They lead a 9-to-5, weekends-off existence. The purpose of their work during the winter months is to come up with a battle plan to combat the evil and ubiquitous sea lamprey during the field season. Everyone on both sides of the table, management and employees, knows how important a flexible field schedule is to the effective accomplishment of this important task. Appendix I is an essential tool, and one that is mutually acceptable to both management and employees in effectively planning and implementing a sea lamprey control program.

[66] For a day worker, Saturday and Sunday are the normal days of rest. If a day worker is obliged to work on a Saturday or a Sunday, the collective agreement explicitly spells out the overtime that is payable.

[67] Shift workers are not day workers. In that respect, counsel for the employer supplied the decision in *Chafe v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112. A useful definition of "shift work" appears as follows at paragraph 61:

> *[61] … the Canadian Oxford Dictionary (Toronto, 1998) defines "shift work" as "work conducted in often variable periods independent of a standard work day, usually at night (tired after a month of shift work)". The website for the Sloan Work and Family Research Network of Boston College provides the following definitions of "shift work":*
>
> > Shift work refers to a job schedule in which employees work hours other than the standard hours of 8 a.m. to 5 p.m. or a schedule other than the standard workweek – Monday through Friday in the United States (Grosswald, 2004, p. 414).
> >
> > In general, the term 'shift work' is quite vague and includes any organization of working hours that differ from the traditional diurnal work period; sometimes it is a (sic) synonymous of irregular or odd working hours (Costa, 2003, p 264).
> >
> > …most studies on shiftwork classify shift workers as anyone working outside regular daytime hours (i.e. between approximately 7 a.m. and 6 p.m., Monday through Friday). Under these definitions, shift workers include all people working evening shift, night shift, rotating shifts, split shifts, or irregular or on-call schedules both during the week and on weekends (Institute for Work & Health, n.d.).
> >
> > Shiftwork is defined as work outside day hours, Monday to Friday. It includes weekend work, and jobs which start substantially before 7 am and finish at 7 p.m. or later (Wallace, n.d.).
> >
> > The standard workday unfolds during an 8-5 timeframe. We consider shift workers to be individuals who work nonstandard hours." (Root, 2004).
>
> [Sic throughout]

[68] The above definitions apply with 100% accuracy to the grievors during the field season, when they perform fieldwork away from the Sault Ste. Marie headquarters. I

find that I quite agree with Dr. Wheatley when she states as follows in her February 16, 2011, email:

> *SLCU [Sea Lamprey Control Unit] employees working during the field season have work schedules that resemble shift schedules, as they are variable and rotational in nature. In order to better reflect this operational reality, effective immediately, SLCU employees covered by Appendix I will be viewed as shift workers for the duration of the field season. Shift workers are entitled to shift premium pay and weekend premium pay, as per Article 27.01 and 27.02. Shift workers are not entitled to overtime compensation for their normal hours of work on Saturdays and/or Sundays if these days are considered work days as part of their regular shift schedule.*

…

[69] For shift workers who work as many as 18, 19, or 20 days in a row (or perhaps even more), these consecutive days of work are followed by a number of consecutive days of rest. It is logical, and self-evident, to state that for shift workers, Saturdays and Sundays are no longer the normal days of rest. Sometimes they do happen to be days of rest, depending upon how the field schedule works out, but as often as not, they are workdays.

[70] Shift premiums, as per article 27 of the collective agreement, still apply, of course, as well as overtime provisions for work that extends beyond a 7.5-hour workday. Article 27 is not ousted by Appendix I.

[71] Appendix I contains no explicit language for paying overtime for working on a Saturday or Sunday that happens to fall within a period of consecutive workdays. The grievors are fortunate to have benefitted from it as long as they did and are fortunate not to have been obliged to make repayments.

[72] The cardinal presumption when interpreting collective agreements is that the parties are assumed to have intended what they said and that the meaning of the collective agreement is to be sought in its express provisions (see Brown and Beatty, *Canadian Labour Arbitration*, 5th ed., at para. 4:2100, "The Object of Construction: Intention of the Parties").

[73] The grievors correctly observed that the words "compensatory leave" appear only in the collective agreements that followed the discussions (at a local level) on

paying overtime for working Saturdays and Sundays during the field season. However, I cannot accept that the only conclusion to be drawn from that choice of words is a clear intention to pay overtime for Saturdays and Sundays worked during the field season, when those days fall within a period of scheduled workdays.

[74] True, the words “compensatory leave” certainly used to apply to the overtime accrued for working on a Saturday or a Sunday, but the term “compensatory leave” also applies to overtime earned for working in excess of a 7.5-hour workday. The evidence makes it clear that this type of overtime is a regular occurrence during fieldwork, so it would only seem logical that the drafters of Appendix I deliberately used the term “compensatory leave”. They would have known that frequently, fieldworkers remain on the job for more than 7.5 hours in a single working day. After all, this is the nature of fieldwork. It makes sense that the drafters would clearly state that compensatory leave must be used as soon as it is earned and that it must attach to the consecutive stretch of days of rest that follows the stretch of workdays.

[75] Since the language of Appendix I is unambiguous, it is not necessary to turn to a past practice or the doctrine of estoppel. In any case, I find that the Treasury Board was not a party to the 1999 and 2000 agreements to pay overtime for Saturdays and Sundays worked during field season. The doctrine of estoppel does not apply.

[76] For these reasons, the issues raised in grievances 566-02-8860 to 8863, 8865, and 8866 are denied. The employer has not infringed the collective agreement.

VIII. Reasons with respect to the second aspect of the policy grievance

[77] I find the language of Appendix I unambiguous. When engaged in fieldwork during the field season, when the workday does not start and end in the Sault Ste. Marie headquarters, the provisions of article 28 do not apply. For shift workers, during the field season, Saturdays and Sundays are not considered days of rest if they should happen to fall within a stretch of consecutive workdays. Therefore, under these circumstances, overtime compensation simply for working on a Saturday or a Sunday is not contemplated by the collective agreement. This aspect of policy grievance 569-02-199 is denied as well.

[78] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

IX. Order

[79] The grievances are dismissed.

August 12, 2019.

James Knopp,

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