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File: 569-02-39393

Citation: 2021 FPSLREB 22

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

UNION OF CANADIAN CORRECTIONAL OFFICERS - SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA - CSN

Bargaining Agent

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN v. Treasury Board (Correctional Service of Canada)

In the matter of a policy grievance referred to adjudication

Before: David Orfald, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Bargaining Agent: Corinne Blanchette, union advisor

For the Employer: Viviane Beauregard, counsel

Heard via videoconference, December 8 to 10, 2020.
(Written submissions filed December 17, 2020, and January 4, 2021.)

REASONS FOR DECISION

I. Introduction

[1] This is a policy grievance about the subject of what is termed “compulsory” or “involuntary” or “ordered” overtime. The grievance was filed on August 30, 2018, by the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN or “the union”).

[2] UCCO-SACC-CSN is the bargaining agent certified to represent correctional officers (CXs) who work for the Treasury Board (“the employer”) at the Correctional Service of Canada (CSC).

[3] Over the years, the Federal Public Sector Labour Relations and Employment Board and its predecessors (collectively, “the Board”) have adjudicated many grievances on the issue of overtime. Most of the Board’s decisions concerned grievances in which employees sought to **increase** their access to overtime opportunities. This matter is quite different; it concerns a situation in which employees do not want to be ordered to work overtime.

[4] The union filed this policy grievance on behalf of those CXs who work at Kent Institution (“Kent” or “the institution”), a maximum-security penitentiary in Agassiz, British Columbia. Kent operates with minimum required staffing levels, 24 hours per day, 365 days per year. CXs work a rotational shift schedule. Shifts are between 8 and 16 hours in duration.

[5] If a CX is unable to report for a shift, for example, due to illness or family leave, local management will ask for volunteers to work that shift. Most overtime requirements are met by CXs volunteering to take on the extra work, which is compensated at time-and-three-quarters (1.75 time).

[6] The issue in this case is what happens when correctional managers cannot find enough volunteers to cover all vacant shifts. In July of 2018, the Warden of Kent informed the local union president that a new approach to ordered overtime would be implemented. In the event that a vacant shift could not be filled by a volunteer, the Warden set out certain conditions under which correctional managers could order a CX to work an involuntary overtime shift.

[7] The union filed this policy grievance in response to that direction. It alleged that ordering involuntary overtime in the absence of operational requirements (such as an emergency or a security incident) was a violation of the collective agreement between it and the employer (expiry date: May 31, 2018; "the collective agreement"). Among other things, the union sought an order that the CSC cease and desist ordering involuntary overtime in the absence of operational requirements, such as emergencies.

[8] The grievance was referred to adjudication on October 22, 2018. The employer's reply was not issued until July 4, 2019. It took the position that the CSC had made every reasonable effort to allocate overtime on an equitable basis, in accordance with the collective agreement, but that it had to ensure that certain mandatory posts were not left vacant due to a shortage of staff. It said that the CSC was following its Bulletin #2013-06, *National Direction – Policy on the Management of Overtime for Correctional Officers*, which contains a section on when involuntary overtime may be ordered at the discretion of the manager on site. Although the employer denied the grievance, it said that it was open to resolving the issue through labour-management consultation or mediation.

[9] At the hearing, the parties provided two very different theories of the case. The union led with the argument that under the collective agreement, all overtime is voluntary, and the employer does not have the authority to order it. The employer argued that the collective agreement is silent about voluntary overtime and that therefore, management has the right to order it in the way it sees fit.

[10] For the reasons that follow below, I find both positions unsupported by the collective agreement language. Therefore, I will consider the union's alternative argument, which is that the way involuntary overtime has been ordered at Kent is inconsistent with the collective agreement and an unreasonable exercise of management rights.

[11] This is a rather complicated analysis, but my finding is that the sustained and chronic reliance on involuntary overtime to address what is in effect a shortage of staff is not consistent with the collective agreement. I reached this finding after considering both the overtime provisions of the collective agreement and the language on hours of work and shift scheduling, as well as the case law submitted by the parties.

[12] While the practice of ordering involuntary overtime has become continued and chronic at Kent, the exact scope and scale of the problem is not possible to determine, given the evidence tendered. For that reason, I am limiting my order to a declaration. I understand that this will leave the parties with having to work out solutions to reduce the level of involuntary overtime being ordered. However, I do not find it possible to go further, considering the content of the collective agreement and the limitations on the Board's power in this matter under the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). I do offer some recommendations that may be of assistance to the parties.

[13] In addition to addressing the merits of the grievance, the reasons that follow also explain my decision to grant a request by the employer to seal certain exhibits as confidential.

II. Summary of the evidence

A. Introduction

[14] The parties cooperated in preparing a joint book of documents consisting of collective agreements, national policy documents, job descriptions, email correspondence, operational plans, and several reports on overtime. Much of the summary of evidence that follows draws on this material and is not in dispute.

[15] The union called two witnesses, both CXs and members of the UCCO-SACC-CSN local executive at Kent. A CX since 2011, Mitch Hammond is the local's grievance coordinator and vice-president. A CX since 1998, Eli Raymond started as the local president in 2018, shortly after the Warden announced the change in overtime practice.

[16] The employer also called two witnesses. Michael Velichka started at the CSC in 1991 and for most of the past 20 years has occupied different positions in the Security Branch at CSC National Headquarters, where he participated in the development of the CSC's security policies and deployment standards. As of the hearing, he occupied the position of Project Manager at the CSC's Security Operations Division. John Kearney has worked in labour relations at the CSC since 2004 and has contributed to the development of the CSC's overtime management policies, bulletins, guidelines, and systems. As of the hearing, his role was as the senior director, human resources modernization governance.

[17] The witnesses called by the parties reflected their two very different theories of the case. The union's witnesses testified to the local situation at Kent and to how vacant shifts were filled both before and after the policy change in the summer of 2018. This reflects the union's basic position that the practice of ordering involuntary overtime at Kent is not warranted, not operationally required, and not in accordance with the collective agreement or national policy. The employer did not call local managers to testify; instead, its witnesses focused on the national policies within which local managers operate. This reflected its basic position that ordering overtime is allowed under the collective agreement and under national policy and that the decisions of local management at Kent cannot be addressed through this policy grievance.

[18] Consequently, very little of the evidence is actually in dispute. Therefore, I will summarize a significant portion of it without referring to the witnesses.

B. Correctional operations and shift schedules

[19] Kent is the only maximum-security penitentiary in B.C. It houses a few hundred inmates in 8 units. CXs perform security duties; supervise inmates, the institution, and visitors; and respond to emergencies. They have peace officer status. They work shifts, which can be of 8, 12.5, 12.75, or 16 hours in duration.

[20] The assignment of officers to shifts follows a process that is set out in the collective agreement, in particular within articles 21 (Hours of Work) and 34 (Modified hours of work) and at Appendix "K". The appendix is a letter of understanding between the parties "… with Respect to the Effective Scheduling for the Correctional Service of Canada" ("Appendix K").

[21] Both the union and employer witnesses testified about the importance of the process set out at Appendix K and how it relates to the deployment of CXs and the CSC's requirements. Appendix K requires management and the union to agree at a local level on how employees are to be assigned to a shift schedule. Once a local schedule is developed, Appendix K requires that a national committee review it, which is to certify that it meets the principles outlined in the appendix. The appendix also states that "[o]nce a shift schedule has been approved and implemented, it shall only be altered by the mutual consent of the local Union and management and after the subsequent review and certification by the national committee."

[22] Mr. Raymond testified that the shift schedule at Kent has CXs working 6 days in a row, followed by some days of rest, then 6 more days in a row, followed by more days of rest. The schedule normally starts with 2- or 3-day shifts starting at 6:30 a.m., followed by one 16-hour shift, then 2- or 3-evening shifts. The joint committee works to find shift patterns that work in terms of both total average hours of work and other provisions of the collective agreement. For example, Appendix K provides that officers not be scheduled for more than one 16-hour shift per 6 days.

[23] Mr. Raymond also testified that the schedule needs to respect the rule in the collective agreement (at clause 21.02(b)) not to schedule the start of an employee's next shift within eight hours of the end of the employee's previous shift. However, in building schedules, attempts are often made to try to provide for more than eight hours. For example, "You would not have a 10:30 p.m. end time followed by a 6:30 a.m. start time the next day," he said.

[24] For each scheduled shift, an officer is assigned to a particular post. Each post is composed of 2 or 3 specific post assignments. For example, an officer assigned to a 12.75-hour day shift might work from 06:30 to 11:30 in the gym, from 11:30 to 14:30 in the kitchen, and from 14:30 to 19:15 in the tower. An officer assigned to an 8-hour evening shift might be posted from 14:30 to 18:00 in a unit and then from 18:00 to 22:30 in a control post.

[25] Individual post assignments are governed by national standards on the deployment of correctional officers. These set out the number of officers required for different types of posts, the duties of each post, and the scope for making operational adjustments to each post.

C. Filling vacant posts through overtime offers

[26] Given the shift schedules and the CSC's deployment standards, correctional managers must take action to address a vacancy when one or more CXs are not able to report to work. One choice is to fill the post with someone working overtime. Another is to make an operational adjustment that allows officers to be reassigned from one post to another, thus avoiding the overtime requirement.

[27] When filling a post with someone working overtime, a manager will initially call for volunteers using the CSC's "Scheduling and Deployment System" (SDS). The SDS

notifies CXs of an overtime opportunity. Offers first go to those CXs with the least number of overtime hours that year. If an officer turns down the offer, the overtime is offered to the next person in line.

[28] Mr. Kearney testified that the SDS was developed in 2007 and rolled out in 2009. He stated that it has evolved over the years in accordance with collective agreement and policy changes and in response to adjudication decisions on overtime grievances.

D. Operational adjustments

[29] An operational adjustment is defined in an employer document as "… a process whereby the complement of security staff is reduced for a full or partial shift. There must also be a corresponding adjustment to the institution's operational routine and/or duties performed by staff to support the reduced complement."

[30] The nature of some posts means that no operational adjustments can be made that would allow them to be vacant, except in cases of emergency. In other words, staffing them is mandatory.

[31] Other positions can be left vacant without making an operational adjustment affecting the institutional routine. For example, a CX assigned to the escort post can be reassigned to a vacant post elsewhere in the institution if no inmates require escort that day. No change in routine is required, and there is no impact on inmates.

[32] The third category of operational adjustment require changes of routine at the institution. For example, a shortage of officers might lead to a decision not to fill a gym post for that shift, meaning that the gym routine might be cancelled. Or if a shortage of officers means that all posts related to inmates' work or education activities cannot be filled, one unit might have to go on a weekend activity schedule, which requires few posts.

[33] Operational adjustments that require a routine change are sometimes referred to as a "rolling lock-down". It can mean that inmates are prevented from engaging in certain types of programs or activities for a particular period. These are distinguished from lockdowns that may be required in the case of an emergency.

[34] When a correctional manager makes an operational adjustment that requires a change in routine, CSC policy requires the use of an "operational risk assessment tool", also referred to as a "threat-risk assessment" or "TRA Form".

[35] In those situations, the form directs managers to "… take into account the health and safety of staff and also ensure that the basic needs of inmates are met."

E. The practice at Kent before July 2018

[36] Both Mr. Hammond and Mr. Raymond testified about the practice at Kent when a vacancy occurred before the summer of 2018. First, the SDS would be used to seek volunteers. If that did not work, managers had access to a binder that listed those employees who liked to work additional overtime. They would phone those employees and invite them to take the vacant shift.

[37] The other strategy for dealing with a vacancy, before summer 2018, was to make an operational adjustment that reduced the number of staff required for a particular shift. A manager would first close a post that did not require a routine change — such as the escort post discussed earlier in this decision. The officer who was supposed to fill that post would then be assigned to a more essential, vacant post. However, if that solution did not solve the vacancy, the manager would then consider making an operational adjustment that required a change in routine.

[38] Mr. Hammond and Mr. Raymond testified that before July of 2018, it was rare for anyone to be ordered to work overtime. It was understood that in cases of emergency, such as a security lockdown, a CX might have to work overtime into the next shift. Overtime might also be necessary following a security incident, to complete a report or ensure that evidence was secured, for example, after a cell search or after placing an inmate suspected of drug possession in a dry cell. However, overtime was not normally ordered to cover a regular shift.

[39] Mr. Hammond testified that in an emergency situation, such as an overnight watch or sudden requirement for an escort, a manager might go into the institution and ask for volunteers to stay for an extra shift. He testified that "… there would be 20 of us around, and the message was 'sort it out or I will have to order someone to do it,' and we always worked it out." Mr. Raymond testified that the only time he saw overtime ordered was if the institution ran out of adjustments it could make. He said

that in nine years of work before 2018, he experienced only one involuntary ordered night shift.

F. The July 2018 change in practice at Kent

[40] On June 28, 2018, the warden of Kent, Marie Cossette, initiated a formal consultation process with the local union on the issue of "overtime ordering". In a memo to the union, she stated that the *Policy on the Management of Overtime for Correctional Officers* allows for the ordering of involuntary overtime once the voluntary overtime offering procedures are exhausted. She said that Kent wanted to develop a system to ensure transparency and fairness in the ordering process. She outlined two options for doing this: (1) correctional managers would use their discretion to determine whom to order, or (2) a spreadsheet would be developed to track how many times each CX had been ordered, and the correctional manager would order the officer who had been ordered the least amount of times.

[41] In the summer of 2018, the labour-management consultation process had broken down, according to Mr. Hammond. No in-person union-management committee meetings were taking place. Therefore, the consultation process took place only in writing.

[42] Mr. Hammond testified that in response to Ms. Cossette's request for consultation on ordering overtime, he reviewed CSC policy documents and consulted with union advisors in other regions. He helped the former local president prepare the response of the UCCO-SACC-CSN local, dated July 4, 2018.

[43] The union took the position that ordering CXs to work overtime directly after their shifts was inconsistent with the collective agreement and CSC policy and that it should occur only in emergency situations. It said that staff shortages do not constitute an emergency and stated that it opposed the ordering of involuntary overtime to deal with staff shortages. It warned that imposing overtime would have mental-health impacts, contribute to staff burnout, and exacerbate staff shortages. It proposed the continued use of rolling lockdowns in the face of staff shortages and recommended that all CXs acting out of rank be returned to their substantive positions to fill vacant positions.

[44] On July 25, 2018, Ms. Cossette responded to the union's position and announced that she would proceed with a modified direction on ordering overtime, as follows:

> *1. Kent Institution will make every reasonable effort to allocate overtime (OT) work on an equitable basis while respecting the Corrective [sic] Agreement and Labour Relations Bulletin # 2013-06, Policy on the Management of Overtime for Correctional Officers;*
>
> *2. Once an OT becomes available, Correctional Officers (CO) who have signed up on the SDS for availability will be offered;*
>
> *3. Once the voluntary OT list is exhausted, the desk Correctional Manager (CM) may ask all other COs on site if they wish to stay for OT;*
>
> *4. The desk CM may cold call or send messages to other COs to offer OT;*
>
> *5. Once the voluntary OT list is exhausted, COs on shift may be ordered to work involuntary OT;*
>
> *6. Once a CO is ordered for OT, his/her name and the time of the ordering will be recorded on a spreadsheet. The person who has the least amount of ordering may be ordered first. This list will be re-set [sic] from the beginning of each fiscal year.*
>
> *7. If a few COs have the same times of ordering, the person who has the least years of service may be ordered first.*

G. The policy grievance

[45] As noted earlier, UCCO-SACC-CSN filed this policy grievance in response to Ms. Cossette's direction on August 30, 2018, which it referred to adjudication on October 22, 2018.

[46] Also as noted earlier in this decision, the employer did not reply to the grievance until July 4, 2019. The response stated:

> …
>
> *In the present case, the employer ordered correctional officers to work overtime in accordance with Bulletin #2013-06* (National Direction – Policy on the Management of Overtime for Correctional Officers*) which provides direction on the management of overtime. Specifically, Section 2: "Involuntary Overtime Ordered" states that the determination of who will work overtime is subject to operational requirements and the discretion of the manager on site.*
>
> *In order to ensure that mandatory posts were not left vacant, and following unsuccessful attempts to hold labour-management*

> *consultations to resolve the issue of shortage of staff, an assessment was made by management regarding operational adjustments plans, post orders and standards (i.e. which posts could be left vacant operationally, and which posts were required to be staffed due to security and operational needs). Despite these efforts, some mandatory posts were still vacant. Management had no other option than to order compulsory overtime. However, every reasonable effort to allocate overtime on an equitable basis was made while respecting the overtime provision of the collective agreement.*
>
> …

H. The new policy in practice

[47] Mr. Hammond and Mr. Raymond testified that different correctional managers applied Ms. Cossette's direction differently. Some made greater use of cold calls, text messages, and requests for volunteers (steps 3 and 4 of the process described earlier). Others were quicker to jump right to step 5 and to order officers to work an additional shift.

[48] Mr. Hammond acknowledged that some correctional managers made significant efforts to organize voluntary overtime a week in advance but that it was not done consistently.

[49] What they said stopped as of July 26, 2018, was the use of any operational adjustments requiring changes in routine. The union noted that it asked for the disclosure of any TRA forms completed since June of 2018 but that the employer had none to disclose. This was evidence that Kent managers stopped making operational adjustments, it argued. The employer stated that completing a TRA form was not always required.

[50] The joint book of documents contained contradictory evidence on the use of operational adjustments at Kent. There were emails from the Assistant Warden instructing correctional managers to make operational adjustments on the use of the gym before ordering staff to work involuntary overtime. At the same time, a report on operational adjustments recorded in the SDS was also submitted on consent. It listed approximately 60 events in which posts were operationally adjusted between November of 2018 and March of 2019. However, the vast majority events were related to "unit construction" in March of 2019.

[51] Mr. Hammond testified that the union had cross-referenced data about the use of ordered overtime by comparing it to the raw data "roll call" that lists shift assignments and replacements. It was clear that ordered overtime was being used in place of operational adjustments.

[52] In its response to the policy grievance, the employer had said that the requirement to work mandatory overtime was a response to staff shortages. It also indicated that management took many measures before ordering overtime, including making operational adjustments. It said that overtime was ordered only because "… some mandatory posts were still vacant."

[53] I note that this reply was not consistent with the testimony of the union's witnesses. They said involuntary overtime was being regularly used for posts that could be operationally adjusted. The employer did not call any witnesses who could testify to the use of operational adjustments at Kent. I was provided with no evidence about why Kent management felt the need to reduce or eliminate the use of operational adjustments and to increase its use of involuntary overtime.

I. The level of involuntary overtime being worked

[54] As for the level of involuntary overtime worked since the change in policy, the evidence submitted came in very different forms. The parties provided two examples of the spreadsheets used to record incidents of ordered overtime, one for CX-01s, and one for CX-02s. However, the union witnesses testified that there were errors in the sheets, particularly missing data.

[55] Despite its concerns about the accuracy of the spreadsheets, the union compiled a count of the times involuntary overtime had been ordered between July of 2018 and September of 2020. It transcribed these by hand to monthly calendar sheets. This data indicated that the use of involuntary overtime tended to be highest in the summer months and in October. Mr. Hammond testified that staff shortages were higher in the summer months due to vacation schedules and in the fall due to hunting season.

[56] Based on a review of the monthly calendar counts tendered into evidence by the union, it appears that the total number of orders recorded over a 26-month period starting in July of 2018 was 1232, for an average of 47 per month.

[57] It is difficult to assess the accuracy of this tally, but I have to take it at face value. No other report was produced by either party to document the level of involuntary overtime worked since July of 2018. Mr. Kearney testified that the SDS is designed to provide local management and local union officers with access to a series of reports. Mr. Raymond testified that as the local president, he does not have access to SDS reports beyond his own schedule and the officers that are listed. No reports from the SDS were tendered as evidence.

[58] I was not presented with any evidence that put the level of involuntary overtime worked into a comparative perspective with the total number of regularly scheduled shifts or the total number of volunteer shifts worked.

J. Overtime in national policy and other documents

[59] The *Policy on the Management of Overtime for Correctional Officers* went through a number of iterations over the years. The one in effect at the time of the events in question was Bulletin #2013-06, dated November 5, 2013.

[60] Mr. Kearney testified that he was involved in drafting this policy and its earlier iterations. Section 2 deals with "Involuntary Overtime (Ordered)" and reads as follows:

> *9 Ordering of Employees on Shift*
>
> *Once the voluntary overtime offering procedures have been exhausted, employees on shift may be ordered to work involuntary overtime.*
>
> *The determination of who will work during such circumstances is subject to operational requirements and the discretion of the manager on site.*
>
> *Some employees may be ordered to work an overtime shift contiguous to their regular shift - in order to complete a specific task required from that employee (i.e. completion of an incident report, etc.).*
>
> *10 Emergency/Crisis Situations*
>
> *If additional employees need to be called to the site during an emergency, the qualified employees living the shortest distance away from the site should be ordered first to work overtime.*
>
> *During an emergency, management reserves the right to decide how to order overtime.*

[61] Section 2(b) of the policy bulletin states that managers will "[e]nsure they have exhausted all operational options before overtime is considered …". When Mr. Kearney

was asked about that in cross-examination, he testified that he did not agree that the CSC had to "exhaust" all operational options. He said that while managers have to control and reduce the use of overtime, they also have to consider which operational changes are permissible and are capable of being done. He said that the CSC has ordered involuntary overtime since before UCCO-SACC-CSN was certified as the CXs' bargaining agent.

[62] The CX-01 and CX-02 job descriptions entered as exhibits do not specifically address the issue of overtime but do discuss hours of work. For example, the CX-01 job description states, "Working a rotating shift schedule (including weekends) disrupts the incumbent's personal life, routine and social/family support networks. Shift work may also involve working in isolation for varying periods (e.g. night shift)." It goes on to add, "The incumbent may be called upon to work for a number of consecutive hours in exceptional or emergency situations."

[63] Mr. Hammond was directed to the letter of offer he had signed when he was hired as a CX. Among other terms and conditions of employment, the letter stated that the "[a]bility to work shifts, variable hours, overtime, weekends, and statutory holidays is an operational requirement for this position." He acknowledged that he had accepted that requirement; however, he testified that his understanding is that overtime will be ordered only in cases of emergency.

[64] Several recent CX job postings were entered as exhibits. Among other things, they state that "[e]mployees may be required to work overtime."

[65] A self-assessment questionnaire used as part of the CX recruitment process was entered as an exhibit. One of the questions in it read as follows: "26. Unforeseen situations can happen in an institution, which lead to consequences for the personnel on duty. An example might be the need to continue a shift to address an incident. Would you accept a job that required you to work overtime on very short notice?"

[66] Mr. Raymond was questioned about this document and acknowledged that the requirement to continue a shift because of an incident was introduced as an "example". However, he also stated that while many documents and conversations discuss what is required in emergencies, there was never any mention of having to work an extra shift to keep a unit open.

[67] Mr. Kearney and Mr. Raymond both testified about the content of Bulletin #2006-02 on *Staff Working Excessive Hours in the Workplace*. It was released following a coroner's report after a CSC employee died after driving off the road on the way home from work. It sets out a maximum 16.5-hour work shift within a 24-hour period. When this it not possible "due to emergency or exceptional situations", the bulletin states that local management must take "every precaution reasonable in the circumstances to ensure the health and safety of their staff." To accomplish this, the bulletin directs local managers to take "special measures" such as rest periods, transportation home, and overnight accommodations in the local area.

K. Employee concerns and health-and-safety issues

[68] Mr. Hammond and Mr. Raymond testified that CXs have made a number of complaints about having to work involuntary overtime. The biggest complaint is that someone on the list has been skipped. Many complaints were made when the order to work overtime conflicted with personal events, medical appointments, or childcare responsibilities. Members complained that some correctional managers did not try to recruit volunteers through the text-message system. They complained that some orders were issued for a full shift even if they were not required for it.

[69] Mr. Raymond testified that the ordering of overtime was "the number one issue" that bargaining unit members in his local were concerned about. He said that the local union commissioned an employee survey that indicated significant problems related to morale, job satisfaction, and trust in management. The survey was carried out by an organizational consultant with experience at the Royal Canadian Mounted Police. He concluded the report by stating. "One thing appears very clear from the survey data. If quick action is not taken in light of employee concerns then the situation is only likely to get even worse, posing significant risks."

[70] The level of concern placed the local union in a difficult situation, Mr. Raymond testified. He stated that he was aware of many situations in which employees volunteered to take back-to-back overtime shifts that resulted in them having to work more than 16.5 hours in a 24-hour period, even up to 36 hours in a row. As the co-chair of the Occupational Health and Safety Committee, he knew that employees should not work that much overtime. However, if that rule were enforced, management would simply have to order more involuntary overtime. He testified that he had no right answer about how to balance these things.

[71] Some CXs have filed individual grievances about the imposition of involuntary overtime. Ten grievance forms were entered as exhibits, but Mr. Hammond testified that they did not comprise all the individual grievances. He had presented the grievances at the first and second levels but understood that they were being held in abeyance at the final level pending the outcome of this policy grievance.

[72] The local's objection to the ordering of involuntary overtime also led it to make, on August 2, 2018, a complaint under s. 127,1, Part II, of the *Canada Labour Code* (R.S.C., 1985, c. L-2; "the *Code*"). The specific complaint was with respect to those employees ordered to work a second 8-hour shift (for a total of 16 hours) who received only an 8-hour break before the start of their next (regularly scheduled) shift. The local argued that an 8-hour gap does not allow an employee enough time to sleep, given the need to commute home and return to work. An employee with a 1-hour commute could get as little as 4 or 5 hours of sleep. One with a 30-minute commute could get as little as 5 or 6 hours of sleep, the local said in the complaint.

[73] The Warden responded to the s. 127.1 complaint on May 7, 2020, some 18 months after it was made. After reviewing the collective agreement, the *Policy on the Management of Overtime for Correctional Officers*, the CX work description, and the CSC "Self-Assessment Questionnaire", the Warden determined that no danger existed.

[74] Mr. Raymond acknowledged that the local has not yet gone to Employment and Social Development Canada to challenge the Warden's ruling.

L. Subsequent consultation

[75] Mr. Hammond was asked during cross-examination if he had ever initiated a consultation with the CSC's commissioner about excessive requirements to work overtime, as provided for at clause 21.11 of the collective agreement. He testified that he is involved only in local union-management consultation. The issue has been raised locally and has been escalated to a regional level.

[76] He also acknowledged that at Kent, the in-person labour-management committee meetings have resumed, and that the issue of involuntary overtime is being discussed through that process. He acknowledged that some improvements have been made; for example, creating an email system for cold calls to increase the number of

overtime opportunities filled by volunteers. However, the core issue remains unresolved, he said.

M. Involuntary overtime elsewhere in the country

[77] The parties referenced one other example of the issue of involuntary overtime arising at a CSC facility. Entered as an exhibit on consent was a protocol for the use of involuntary overtime adopted by agreement between the Acting Warden and the Local President at the CSC's Regional Reception Centre in Quebec in July of 2017. It provides managers with a six-step process for ordering overtime. They must first "… ensure that all possible operational adjustments were made", second "… ensure that all volunteers … have been contacted", and third, "[h]old back the staff from the previous shift and ask if there is a volunteer …".

[78] Following those steps, the manager may (step 4) order overtime based on reverse seniority, providing that the manager (at step 5) accounts for the ordered overtime so that "… the CX who was involuntarily KEPT back will be last the next time." Finally, at step 6, the protocol states that if an employee is ordered to stay on involuntary overtime and is unable to, he or she must provide reasons in writing and obtain the correctional manager's approval.

III. Summary of the arguments

[79] I will very briefly summarize the parties' arguments in this section. The more detailed analysis of their arguments is in the reasons that follow.

[80] For UCCO-SACC-CSN, the issue is whether the collective agreement allows the employer to compel an employee to work overtime when the employee does not want to work it. While recognizing the obligation to work overtime in emergency situations, the union argued that at clause 21.10, the collective agreement does not allow the employer to order an employee to work overtime. When it orders employees to work an entire second shift, the CSC violates the collective agreement.

[81] Alternatively, if the Board finds that the employer can order overtime worked, the union argued that the employer's exercise of that right in this situation was unreasonable. Before the change in July of 2018, the employer made regular use of operational adjustments requiring a routine change and was able to fulfil overtime requirements through voluntary offerings. CXs sometimes have to work overtime in

cases of emergency or to complete a task at the end of their shifts, but Kent started using involuntary overtime to cover entire shifts. This is not a reasonable decision, considering the collective agreement as a whole, including those provisions that set out how shift schedules are developed, as well as the health-and-safety article.

[82] UCCO-SACC-CSN asked that the Board declare that the employer has violated the collective agreement and that it order the employer to cease and desist ordering CXs to work involuntary overtime. It also requested that the Board remedy the violation by compensating those employees who were ordered to work with time off equivalent to the amount of involuntary overtime they worked.

[83] The employer argued that the collective agreement does not prevent it from ordering overtime. The requirement for CX employees to work overtime is reflected in both that agreement and in its policy documents and bulletins. The CSC has significant security obligations to meet, and when it hires CXs, it makes it clear that overtime work may be required. As the collective agreement is silent on the issue of mandatory overtime, management rights take precedence.

[84] The employer argued that because this is a policy grievance, this case is about whether the employer, across the country, is allowed to order overtime to fill vacant spots. This is not a group or individual grievance about whether an unreasonable amount of overtime has been ordered at Kent. Individual grievances have been filed on the issue. The reasonableness of management's direction should not be addressed in a policy grievance.

[85] The CSC has had the right to order overtime and has for decades used that right, and it would be wrong of the Board to take it away through this grievance. The Board cannot amend the collective agreement to state that overtime can be ordered only in cases of emergency, as stated in s. 229 of the *Act*. If UCCO-SACC-CSN wants to change the rules for ordering overtime, the place to do it is the bargaining table.

[86] The employer also objected on jurisdictional grounds to the union's raising of the health-and-safety article of the collective agreement. There is another administrative process for making complaints about unsafe workplaces, under which the union made a complaint. By virtue of s. 220(2) of the *Act*, the union may not file a policy grievance when another administrative process provides for a remedy, the employer argued.

[87] Finally, the employer argued that the Board should seal certain documents filed as exhibits with respect to the deployment of correctional officers.

IV. Reasons

[88] I will examine the parties' arguments in more detail under the following headings:

a) Does the use of a policy grievance prevent the union from addressing the specific circumstances at Kent?
b) Does the collective agreement prevent the employer from ordering involuntary overtime?
c) Is the ordering of overtime at Kent in violation of the collective agreement?
d) Are the employer's objections related to the health-and-safety article of the collective agreement well-founded?
e) What order should the Board make if a violation of the collective agreement is found?
f) Should the Board seal the exhibits requested by the employer?

A. Does the use of a policy grievance prevent the union from addressing the specific circumstances at Kent?

[89] This is a policy grievance filed under s. 220 of the *Act*, which gives both parties to a collective agreement the right to "… present a policy grievance to the other in respect of the interpretation or application of the collective agreement or arbitral award as it relates to either of them or to the bargaining unit generally."

[90] The employer argued that because the union filed a policy grievance, the issue before the Board is whether, across the country, the employer is allowed to order overtime to fill vacant posts. The union's case should fail because it provided evidence only from Kent. It argued that if the union wants to challenge the reasonableness of the employer's decisions at Kent, it should do so via either a group grievance or individual grievances, not through a policy grievance.

[91] The union did not reply in detail to this argument. However, it maintained that the Board could inquire into the specifics of the situation at Kent and determine whether the policy set out by CSC management there is consistent with the collective agreement.

[92] I do not accept the employer's argument. It essentially argued that a union cannot file a policy grievance if the actions being grieved are restricted to a single institution or workplace. This is an unnecessarily restrictive reading of s. 220(1) of the

Act. The Board has often ruled on policy grievances in which the issue in dispute concerned only one workplace or institution.

[93] For example, in a 2011 decision, the Board upheld a policy grievance involving these same parties concerning the application of the shift-scheduling provisions at Appendix K, although it involved only CX-01s working a single shift (the night shift) at a single facility; see *Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN v. Treasury Board (Correctional Service of Canada)*, 2011 PSLRB 120 ("*Ontario Regional Treatment Centre*").

[94] The Board also upheld a policy grievance involving the CSC and a different bargaining agent concerning one subgroup of employees (cooking staff) in certain regions of the country; see *Public Service Alliance of Canada v. Treasury Board (Correctional Service of Canada)*, 2015 PSLREB 10. In that decision, the Board determined that the employer was incorrectly applying the salary protection provisions of the workforce adjustment appendix to the collective agreement at issue in that case.

[95] I acknowledge that the Board's finding in this case might apply across the country for the CSC and that the Board must be attentive to that reality in its decision making. However, it is not a rationale for not making findings on a policy grievance that emerges from this particular fact situation.

[96] Policy grievances can offer parties a more efficient process for resolving collective-agreement disputes, which the Board recognized soon after they were written into the *Act* in 2005 (see *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2008 PSLRB 84 at para. 64). This recognition is in keeping with the preamble to the *Act*, which states that "… the Government of Canada is committed to fair, credible and **efficient** resolution of matters arising in respect of terms and conditions of employment …" (emphasis added). In this case, this goal is reinforced by the fact that several individual grievances have been placed in abeyance, pending this decision on the policy grievance.

[97] There is no bar against filing both a policy and individual grievances on the same matter (see *Professional Institute of the Professional Institute of the Public Service of Canada v. Treasury Board*, 2019 FPSLREB 7 at paras. 92 and 93). However, s. 232 of the *Act* does limit the remedies that can be ordered if "… a policy grievance relates to a

matter that was or could have been the subject of an individual or a group grievance …".

B. Does the collective agreement prevent the employer from ordering involuntary overtime?

[98] Let me now turn to the union's first argument, which is that the collective agreement prevents the employer from ordering employees to work overtime.

[99] The parts of the collective agreement most pertinent to this matter are clauses 21.10 and 21.11, which read as follows:

> ***21.10*** *Assignment of overtime work*
>
> *The Employer shall make every reasonable effort:*
>
> *a. to allocate overtime work on an equitable basis among readily available qualified employees,*
>
> *b. to allocate overtime work to employees at the same group and level as the position to be filled, that is, Correctional Officer 1 (CX-1) to Correctional Officer 1 (CX-1), Correctional Officer 2 (CX-2) to Correctional Officer 2 (CX-2) etc.*
>
> *However, it is possible for a local Union to agree in writing with the institutional warden on another method to allocate overtime. and*
>
> *c. to give employees who are required to work overtime adequate advance notice of this requirement.*
>
> ***21.11*** *The Union is entitled to consult the Commissioner or the commissioner's representative whenever it is alleged that employees are required to work unreasonable amounts of overtime.*

[100] UCCO-SACC-CSN argued that because clause 21.10 requires the employer to make every reasonable effort to allocate overtime "among readily available" employees, the parties to the collective agreement intended all overtime to be voluntary. An employee who does not want to work overtime is not "readily available" and therefore should not be ordered to work it.

[101] The union acknowledged that CXs have an obligation to work overtime in a situation such as an emergency or to complete tasks related to a security incident. This is part of the CXs' professional obligation, which they voluntarily accept.

[102] The employer argued that clause 21.10 does not state that all overtime shall be voluntary. It noted the language in clause 21.10(c), which speaks to employees being

"required to work overtime". Further, clause 21.11 sets out a process for addressing situations when employees "… are required to work unreasonable amounts of overtime." The use of the word "required" in both clauses indicates that overtime can be involuntary.

[103] Otherwise, the collective agreement is silent on ordering overtime, argued the employer. Therefore, management retains the right to establish rules for its ordering, which it has done through its national policy, in job descriptions, and in its orientation material and in this case, through the Warden's July 2018 directive.

[104] Clause 21.10 does not explicitly state that all overtime shall be voluntary. Neither does it explicitly state that the employer may order compulsory overtime, although I do find that the use of the phrase "required to work overtime" indicates that overtime may be ordered. I will consider that while referencing the jurisprudence cited by the parties.

[105] In support of its argument, the union cited Brown and Beatty, *Canadian Labour Arbitration*, 5th Edition, at section 5:3210, which states that "… if the agreement stipulates that management may assign overtime work to those of its employees who are willing and able, necessarily overtime will be characterized as being voluntary in nature." I find this reference helpful but believe that a distinction can be made between the phrase "readily available" as used in clause 21.10 and the words "willing and able" referenced in Brown and Beatty. The word "willing" suggests that an employee agrees to take on the overtime work in a way that "readily available" does not.

[106] The union also referenced a number of cases in which arbitrators upheld that overtime cannot be imposed.

[107] In *Canadian Pacific Railway Company v. Teamsters Canada Rail Conference*, 2014 CanLII 51685 (CA LA) ("*CPR/Teamsters*"), the Canadian Pacific Railway Company ("the Company") was challenged for issuing a policy stating that it could impose mandatory overtime for certain "maintenance-of-way" workers. The collective agreement in that case contained language stating that calls for overtime would be issued in order of seniority. It did not contain explicit language stating that overtime could be ordered; nor did it contain explicit language stating that all overtime was voluntary.

[108] The Company argued that it retained the right to order the most junior employees to perform overtime if volunteers could not be found. Having heard evidence that the employer had never compelled overtime, the arbitrator concluded as follows: "Having regard to the relevant provisions of the collective agreement and to the past practice between the parties, I am persuaded that by their conduct and by their words, the parties have made clear their intent that overtime is voluntary." The Court of Queen's Bench of Alberta upheld that decision (see *Canadian Pacific Railway Company v. Canadian Railway Office of Arbitration*, 2016 ABQB 179).

[109] In this matter, the clear evidence from both parties is that CXs may be required to work overtime that they did not volunteer for. The union witnesses testified that they understand that there is a requirement to work overtime in an emergency situation or to complete an essential task after their shifts (such as to secure evidence or to complete an urgent security duty). Although they may accept it as a professional obligation, doing so does not make it voluntary. They also testified that before the July 2018 policy change, being ordered to take on an entire shift as overtime was rare, and done only if no operational adjustments could be made. Following *CPR/Teamsters* and considering past practice leads me to conclude that clause 21.10 does leave open the possibility of involuntary overtime in specific circumstances such as emergencies or the completion of essential tasks following a shift.

[110] The collective agreement in *Canada Post Corporation v. Canadian Union of Postal Workers*, 2012 CanLII 51069 (CA LA) ("*Canada Post*"), contained specific language that allowed the Canada Post Corporation to compel overtime. However, the agreement also specified that the corporation would take "… reasonable measures to ensure that assignments to work overtime … will be minimized." In that case, the arbitrator found the employer had erred by not using temporary letter carriers in lieu of compulsory overtime and ordered the corporation to rescind a directive that compelled overtime from the affected workers.

[111] In C*anadian Paperworkers Union Local 101 v. Quebec and Ontario Paper Company, Thorold Division* 1992 CarswellOnt 1167 24 LAC (4th) 163 ("*Canadian Paperworkers Union*"), the employer was operating a paper plant 24 hours per day via three 8-hour shifts. It had tried using voluntary overtime to encourage workers to attend a weekly safety meeting. Faced with poor attendance, the company ordered 1 hour of mandatory overtime to take place on each Monday day shift, so that the

incoming evening shift could attend the safety meeting. The collective agreement in that case contained mandatory overtime language (by which workers would have to stay at their posts if their "mate" failed to report on time). However, in upholding the grievance, the arbitration board found that the employer was not ordering overtime as outlined in the collective agreement and instead was unilaterally changing the shift start and end times.

[112] The difficulty of relying too closely on *Canada Post* and *Canadian Paperworkers Union* is that the arbitrators' rulings depended significantly on the precise wording of very distinct collective agreements. The overtime articles at issue were not similar to the one between UCCO-SACC-CSN and the employer. As such, neither case would help me conclude that the CSC is outright prevented from ordering any overtime.

[113] The parties put before me only one Board decision that addressed the issue of involuntary overtime. *Baldasaro v. Treasury Board (Correctional Service of Canada)*, 2012 PSLRB 54, involved the same parties and the same language at clause 21.10 that is at issue in this case, albeit from a previous collective agreement. *Baldasaro* was adjudicated as a test case for some 500 individual grievances concerning access to overtime offerings. The union sought to have involuntary overtime tracked alongside voluntary overtime and therefore factored into which employees should be offered overtime opportunities.

[114] In *Baldasaro*, at para. 55, the Board concluded that "[h]ad the parties wanted to make a distinction between the mandatory and voluntary allocation of overtime, they would have written it into the collective agreement …". It also concluded that the employer ought to track involuntary overtime through its SDS, so that involuntary overtime hours would be considered as the employer went about meeting its collective-agreement obligation to distribute overtime equitably.

[115] In his testimony before me, Mr. Kearney confirmed that following the release of the Board's decision in *Baldasaro*, the CSC made modifications to the SDS so that it would track both types of overtime.

[116] The Board's conclusion in *Baldasaro* indicates that both types of overtime are covered by clause 21.10. Furthermore, the union's argument in *Baldasaro* that the employer should track involuntary overtime makes sense only if the amount of it being

worked was large enough to affect who was being offered voluntary overtime opportunities.

[117] Finally, I will note that the content of the protocol negotiated between the Acting Warden and the UCCO-SACC-CSN local at the Quebec Regional Reception Centre makes it clear that the union has encountered involuntary overtime before and that it has negotiated agreements with management as to how it is to be managed in a local context.

[118] In conclusion, I find no basis to conclude that clause 21.10 **prevents** the employer from ordering involuntary overtime. Consequently, there is no basis for ordering that the employer cease and desist all ordering of involuntary overtime.

C. Is the ordering of overtime at Kent in violation of the collective agreement?

[119] What then of the union's alternative argument that even if the collective agreement allows for ordering involuntary overtime, the way it is being done at Kent is inconsistent with that agreement or is an unreasonable exercise of management rights?

[120] This is a far more complex question. Examining it means looking not just at clause 21.10 but at the language of the collective agreement as a whole, in particular the provisions on hours of work and shift scheduling.

[121] To examine this question, I will start by reviewing the evidence that I heard.

[122] I have uncontradicted evidence from the unions' witnesses, Mr. Hammond and Mr. Raymond, demonstrating that until July 26, 2018, the level of involuntary overtime was low and was restricted almost entirely to emergency situations. The evidence was that ordered overtime was very rarely used for entire shifts, until the Warden changed the policy.

[123] Mr. Kearney testified that across the country, the employer uses involuntary overtime to cover regular shifts, but no specific evidence or data was provided in support.

[124] I note that in 2012, Mr. Kearney had also testified in *Baldasaro* about when involuntary overtime was used. At paragraph 7, the Board reported his testimony as follows:

> *7 Mr. Kearney testified that the employer differentiates voluntary overtime from mandatory overtime. Employees are called for mandatory overtime to satisfy very specific operational requirements and at the employer's discretion. For example, employees who are members of Institutional Emergency Response Teams (IERT) are required to work overtime with no opportunity for refusal when called as part of an IERT. Those overtime hours are recorded separately, and not used to compute and assess the equitable allocation of overtime.*

[125] This earlier testimony is in line with that of the union witnesses in this matter. It is also in line with the overall message in the *Policy on the Management of Overtime for Correctional Officers*, which is that CXs may have to work involuntary overtime in emergency situations, and it is consistent with the overall message in their job descriptions and recruitment material.

[126] There is no doubt in my mind that Warden Cossette's July 26, 2018, message represented a change in policy and practice for CXs at Kent. It involved moving from a situation in which involuntary overtime was normally used only for emergencies or security incidents to one in which it was regularly being ordered to fulfil entire regular shifts.

[127] I do not think it is possible to determine the precise level of involuntary overtime being worked at Kent on the basis of the evidence tendered by the parties. The best estimate provided was from Mr. Hammond, who had transcribed to a monthly calendar the record of involuntary overtime maintained by the employer. As noted earlier, this evidence indicates an average of 47 overtime shifts ordered per month since July of 2018 — on average, more than one shift a day. No employer witnesses testified to the level of involuntary overtime being worked at Kent, and no reports out of its SDS were tendered as evidence.

[128] The employer's response to the policy grievance was that Kent adopted the new overtime policy due to staff shortages after unsuccessful attempts to hold local labour-management meetings to resolve the issue. I heard testimony from the union witnesses that workplace issues and low morale were contributing factors to the staff shortages. That testimony was reinforced by the employee survey that an organizational consultant conducted for the union. I heard no evidence from the employer witnesses on this subject. It may be that there are other root causes to the staff shortages. But the explanation that staff shortages are the underlying problem was not contradicted.

[129] The employer also said that management had no other option than to order compulsory overtime to fill some mandatory posts due to staff shortages. I agree that a staff shortage may cause an emergency that requires the ordering of overtime. But there are two problems with the employer's response. First, it suggests a temporary problem. The evidence provided by the union shows that the practice of ordering overtime has continued over time. In fact, the data for September 2020 (the last month submitted into evidence) was that 81 orders for overtime had been made that month. Secondly, the evidence from the union witnesses was that the employer effectively ceased using operational adjustments to cover staff shortages. In other words, involuntary overtime is being used beyond filling "some mandatory posts" (per the employer's response).

[130] On the basis of the evidence I heard, I am left to conclude that involuntary overtime has moved from being a rare occurrence before July 2018 to being a regular occurrence since then. No other explanation of the underlying problem was provided other than staff shortages. I conclude that management at Kent is making sustained and chronic use of involuntary overtime to address those shortages.

[131] Had this policy grievance been filed as a freeze complaint under s. 107 of the *Act*, an entirely different type of analysis would have flowed from that conclusion.

[132] As a policy grievance, the analysis must flow from the collective agreement. The question that must be examined is whether the employer's sustained and chronic use of involuntary overtime is consistent with the collective agreement or alternatively is an unreasonable exercise of management rights.

[133] I will start by returning to clause 21.10. While I have concluded that it does not prevent the employer from ordering involuntary overtime, I also note that it states that the employer "… shall make every reasonable effort to allocate overtime work on an equitable basis among readily available qualified employees …". The words "readily available" have to be given meaning. While in my analysis, they do not provide a right to refuse a particular request, they do convey a requirement that employees be "readily available". The union's case indicates that the level of involuntary overtime being worked is causing serious problems for employees. Its witnesses testified that the ordering of involuntary overtime was the number one complaint of its members.

Employees complained that having to work this overtime on short notice has created problems with personal and family commitments, such as childcare.

[134] The words "on an equitable basis" in clause 21.10 also have to be given meaning. The data from the tracking sheets presented indicated that some CXs have been ordered several times, whereas the majority have not been ordered or were only ordered once. The testimony of the union's witnesses was that some correctional managers make an effort to avoid ordering, whereas others do not. Equity requires both transparency and fairness.

[135] The words "every reasonable effort" in clause 21.10 also must be given meaning. They provide a basis for the Board to consider whether management is properly considering alternatives to ordering overtime — in other words, whether the new policy at Kent is in fact reasonable.

[136] The union noted that an earlier version of clause 21.10 (in the collective agreement that expired on May 31, 2002) was prefaced with the words, "**Subject to the operational requirements of the service,** the Employer shall make every reasonable effort …" (emphasis added). Those words were dropped from the collective agreement signed on June 26, 2006 (expiry date: May 31, 2010), and are not in the current collective agreement (expiry date: May 31, 2018). The removal of the words, "Subject to the operational requirements of the service", means that the employer must fulfil all the obligations of clause 21.10, argued the union. It cannot use operational requirements to reduce those obligations.

[137] The employer argued that although the words, "Subject to the operational requirements", were dropped from clause 21.10, the concept still has meaning, and it pointed to a definition of "operational requirements" found at article I-A of the *Global Agreement Between CSC and UCCO-SACC-CSN* ("the *Global Agreement*") signed on February 1, 2018. The *Global Agreement* is a form of two-tier bargaining that takes place between the union and the CSC (see s. 110 of the *Act*).

[138] The difficulty of this argument is that the definition of "operational requirements" at article I-A is in a section of the *Global Agreement* that concerns article 14, "Leave with or without pay for union business". There is no indication that it applies to other provisions of the *Global Agreement*, let alone the provisions of the collective agreement in general or clause 21.10 in particular. Even if this definition did

have application beyond article 14, article I-A defines operational requirements as an "emergency situation", such as an escape or hostage situation, or an "… immediate situation which endangers the life, safety or health of employees, inmates or the public …". If this applied to the operation of clause 21.10, it reinforces the union's argument that overtime should be ordered only in emergency or urgent situations, rather than to cover ongoing staff shortages.

[139] As noted earlier, clause 21.11 must also be considered in this analysis. It states that the union "… is entitled to consult the Commissioner or the commissioner's representative whenever it is alleged that employees are required to work unreasonable amounts of overtime." The existence of this clause in the collective agreement indicates to me that the parties acknowledge that overtime may be required, that they turned their minds to it in collective bargaining, and that they provided for a consultative process to discuss that situation.

[140] The evidence in this case was that the labour-management process had broken down before the summer of 2018, so the parties never met in person to discuss the Warden's new policy. However, I also heard evidence that in-person labour-management committees have resumed and that the issue of involuntary overtime is an ongoing subject of discussion.

[141] The employer suggested that since consultation is taking place, its obligations under clause 21.11 have been met. I heard very little about the quality and nature of that consultation, other than noting that is has clearly not resolved the issue, and the union arguing that the choices offered by management in July of 2018 were only between two forms of involuntary overtime (ordered entirely at the discretion of the manager, or ordered with a system of tracking). I agree that consultation is taking place; I do not agree that the existence of this clause means that management has an unrestricted right to order overtime.

[142] There is one other clause to consider within the overtime provisions of the agreement, clause 21.16, which reads as follows:

> *21.16 Emergency situation*
>
> *In the case of an emergency, as determined by the Employer, an employee who works a regularly scheduled shift and is required to work continuously during the entire period between the end of the said regularly scheduled shift and the start of the next regularly*

> *scheduled shift is entitled to time and three-quarter (1 3/4) compensation for all hours continuously worked after the end of the said regularly scheduled shift.*

[143] The employer argued that this clause is only about compensation. However, I do not interpret it that way. It clearly indicates that the parties understand that having to work continuously from one regular shift through until the next regularly scheduled shift will take place in the case of an emergency, albeit as determined by the employer. When considered alongside the testimony about past practice and the wording of the employer's policy documents, this gives credence to the union's assertion that involuntary overtime is normally restricted to emergencies.

[144] Beyond the overtime provisions in the collective agreement, the union argued that the imposition of overtime is inconsistent with the provisions that require mutual agreement when building shift schedules. This argument requires looking at several other collective agreement articles.

[145] Article 21 of the collective agreement addresses both hours of work and overtime. Clause 21.01 is titled "Day Work", and it establishes a 40-hour work week. The CXs at Kent are not day workers and therefore are covered by clause 21.02, entitled "Shift Work", which establishes that when an employee works on a rotating or irregular basis, they shall work an average of 40 hours a week. However, clause 21.02 also states that shift workers work 8.5 hours per day, which is not true of CXs at Kent. One must look to article 34, titled "Modified Hours of Work", for the provisions that allow for modifying the 8.5-hours-per-day schedule in clause 21.02.

[146] The first term of article 34 reads as follows:

> *1. General Terms*
>
> *The scheduled hours of work of any day as set forth in a work schedule, may exceed or be less than the regular workday hours specified by this agreement; starting and finishing times of shifts, meal breaks and rest-breaks shall be established by agreement between the Employer and the Union at the local level, and approved according to Appendix "K". The daily hours of work are consecutive.*

[147] As noted in the summary of evidence earlier in this decision, Appendix K outlines the process by which shift schedules are built at a local level through

agreement between management and the union and then are approved at a national level as being in accordance with the collective agreement.

[148] The provisions of article 34 are generally set out as modifications to certain other provisions of the collective agreement, most of which are not relevant to this matter. However, article 34 also contains the following language:

> …
>
> *3. Specific application*
>
> *For greater certainty, the following provisions shall be administered as provided herein:*
>
> …
>
> *Minimum number of hours between shifts*
>
> *The provision in this collective agreement relating to the minimum period between the termination and commencement of the employee's next shift shall apply to an employee subject to modified hours of work.*
>
> …

[149] Therefore, article 34 does not modify and in fact reinforces certain provisions of clause 21.02, which sets out the shift-schedule rules. They read as follows:

> *21.02 When a shift is scheduled for an employee on a rotating or irregular basis:*
>
> …
>
> *b. every reasonable effort shall be made by the Employer:*
>
> *i. not to schedule the commencement of an employee's shift within eight (8) hours of the completion of the employee's previous shift,*
>
> *ii. to ensure an employee assigned to a regular shift cycle shall not be required to change his or her shift more than once during that shift cycle without his or her consent except as otherwise required by a penitentiary emergency. A change of shift followed by a return to the original shift is considered as one change;*
>
> *and*
>
> *iii. to avoid excessive fluctuations in hours of work;*
>
> ….

[150] Clause 21.02(b)(i) requires the employer to make every reasonable effort not to schedule the commencement of an employee's shift within eight hours of when the employee's previous shift ends. I heard testimony that this was being respected when

overtime was ordered, although the union argued that an eight-hour break between shifts did not allow an employee enough time to commute.

[151] Clause 21.02(b)(ii) requires the employer to make every reasonable effort not to change an employee's shift more than once per cycle except, as required by an emergency. Clause 21.02(b)(iii) requires it to make every reasonable effort to avoid excessive fluctuations in hours of work.

[152] I will not quote all of Appendix K, but I think it is important to note the following provisions, which apply to the situation at Kent:

> …
>
> *(B) Modified shift schedules (Article 34)*
>
> *Ensure shift schedules deploy employees for the correct hours of work in accordance with the collective agreement.*
>
> *Build shift schedules to reflect the operational need of the institution. The current business need is eight (8), sixteen (16) and twenty-four (24) hour correctional activity coverage and shift schedules shall be developed based on the identified business need.*
>
> *Deploy employees to the identified business need, that is, for twelve decimal seven five (12.75) hour shift schedules the majority of shifts shall be twelve decimal seven five (12.75) hour shifts for twelve (12) hour correctional activities.*
>
> *To maximize substitute relief positions there shall not be any overlap in the shift schedules. There shall be an equitable distribution of substitute relief positions for each day of the week, that is, twelve decimal seven five (12.75) hour substitute relief positions for twelve (12) hour correctional activities.*
>
> *Employees working a modified shift schedule that contains twelve (12) or more hours shall not be scheduled more than four (4) consecutive shifts in a row.*
>
> *Employees working a modified shift schedule that contains a sixteen (16) hour shift shall normally be scheduled to only one sixteen (16) hour shift in a shift cycle.*
>
> *The process to determine how employees are assigned to a modified shift schedule is determined by mutual agreement at the local Labour Management Committee level. In cases where mutual agreement cannot be reached on a priority rating system, the institution shall assign among all the employees who have expressed interest and meet the requirements of the position, the employee with the most years of service as a correctional officer.*
>
> …

[153] That language contains several important principles. Shift schedules must meet the institution's needs. At the same time, they must respect the hours-of-work provisions in the collective agreement. New criteria are added; for example, the principle that an employee who works a 16-hour shift shall normally work only 1 such shift per schedule. Recall that Mr. Raymond testified that this is how the schedules at Kent are built: employees normally work 6 days in a row and will work 2 or 3 day shifts, followed by a 16-hour shift, and then 2 or 3 evening shifts.

[154] However, the principle that stands out the most is the final one, which is that the process for assigning employees to shift schedules is to be determined by mutual agreement between management and the union at a local level. This principle was upheld in the Board's decision on a policy grievance between these same parties, cited earlier, *Ontario Regional Treatment Centre*.

[155] The relationship between the issues of overtime, hours of work, and shift schedules is addressed in many of the cases that the parties placed before me.

[156] Recall that in *Canadian Paperworkers Union*, the employer had ordered employees working each Monday day shift to work one additional hour of overtime, so that the incoming evening shift could attend a mandatory safety meeting, which allowed the paper plant to continue operating during the meeting. The arbitration board in that case recognized that the relevant collective agreement allowed for imposing mandatory overtime but concluded that the employer's unilateral action violated the collective agreement language setting out a fixed shift schedule. At paragraph 25, the board wrote:

> *25 The crux of these cases is that a negotiated management rights clause (if there is one – here there is not), and a negotiated work schedule must be read together. Unless the agreement contemplates one right totally eclipsing the other, an express or implied right to schedule overtime cannot be exercised so regularly, routinely, and predictably, as to effectively alter a negotiated work schedule; for to read it that broadly would negate a negotiated term of the agreement and render it meaningless. Overtime may be scheduled as necessary, but an employer cannot make "overtime hours" a required and routine part of the employees' regular work schedule without thereby changing that schedule. And that kind of change requires union consent.*

[157] The employer argued that the Board has determined that the rules for establishing shifts do not apply to overtime. In *Munroe v. Treasury Board (Correctional*

Service of Canada), 2010 PSLRB 56, a grievor had agreed to attend a training session (in 2007) from 07:00 to 15:00 on overtime hours, in advance of a scheduled shift start of 18:30 that day. The grievor had argued that he should not have had to report to work until 22:30 so that he would have an eight-hour break. While granting the grievance on the grounds of estoppel, the Board determined that an eight-hour break did not apply to scheduled shifts, stating at paragraph 16 as follows:

> *16 Clause 21.02 of the collective agreement applies to hours of work scheduled for employees working on a rotating or irregular basis. For those employees, the employer has to make every reasonable effort not to schedule the commencement of a shift within eight hours of the completion of a previous shift. That does not apply to overtime shifts but rather only to scheduled shifts. In fact, the collective agreement does not prevent an employee from working an overtime shift commencing or ending within eight hours of a scheduled shift.…*

[158] In *Munroe*, the Board went on to quote from *Lauzon v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 126, the second case cited by the employer. In *Lauzon*, the employer denied overtime to someone because of the rule requiring an eight-hour break between shifts. The Board determined that the employer's decision was wrong. It said that the rule in clause 21.02(b) should not apply to overtime.

[159] However, it is important to look closely at the Board's reasons in *Lauzon*. The conclusion it reached, at paragraph 23, assumed that the overtime in question was voluntary, as follows:

> *23 An employee covered by the collective agreement works an average of 40 hours per week. Among other things, the content of clauses 21.01 to 21.09 determines how those hours are scheduled. Clause 21.02(b)(i) imposes a restriction on the employer in scheduling hours of work, so that an employee, when it is reasonably feasible, is not forced to commence a shift within eight hours of the completion of the previous shift. A different logic is applied to overtime availability;* ***the employee makes the decision to be available, not the employer.*** *The employee can then decide to make himself or herself available at any time, even within the eight hours after the end of a previous shift. If the parties wanted to impose such a restriction on employees, they would have written one into clause 21.10 or into one of the other overtime clauses of article 21, but they did not.*
>
> *(emphasis added)*

[160] The logic of the Board's conclusion is that when overtime is **voluntary**, the shift-restriction language does not apply, because the **employee** makes the decision to work. The Board applied the same rationale in *Munroe*, stating that it would have rejected the grievance but for the union's estoppel arguments.

[161] The logical corollary of this principle is that when the overtime is **involuntary**, and the **employer** makes the decision that overtime will be worked, then the shift-scheduling restrictions at clause 21.02 would apply.

[162] The language of Appendix K must also be considered. It dictates that shift schedules are to be built through a joint process, subject to agreement at the local level, subject to review and certification at the national level, and subject to change only through that joint discussion. Combined with the wording of article 21, the overall effect is to give the union and its members a strong voice in the process of building the shift schedule and to minimize involuntary disruptions to the assignment process so that employees can plan their lives accordingly.

[163] This approach is also reflected in another case placed before me by the union, *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Strescon Ltd.*, 2019 CanLII 121448 (NB LA) ("*Carpenters*"). It involved a private company that issued an order for its carpenters to work overtime in the form of 12-hour days (Monday to Friday) and on Saturdays as well, to try to meet a schedule to produce wooden frames for a concrete production job. The employees refused to work the overtime. They were handed warning letters. In the end, they did not work the overtime; nevertheless, the policy grievance proceeded to arbitration.

[164] The language of the relevant collective agreement was silent with respect to whether the employer could order overtime or whether it was voluntary. However, the hours-of-work clause stated that the regular hours of work "… shall be comprised of 40 hours, Monday through Friday, 8 hours per day" (quoted at paragraph 6 of the decision). The arbitrator found that the employer's imposition of overtime, "… if repeated and imposed, would be contrary to the Collective Agreement" (at paragraph 98).

[165] The arbitrator's ruling flowed from his analysis of the jurisprudence, reported at paragraph 76 as follows:

> *76 As indicated, where the imposition of overtime has become recurrent and sustained, which can be compulsory or mandatory, it is no longer legitimate overtime, but has morphed into an actual change of the regular or normal "hours of work". It is a situation where arbitrators have determined* [it] *just and equitable to consider the nature and essence of the extra work, on a case by case basis.*

[166] The arbitrator's decision in *Carpenters* was based in large part on a similar arbitration decision in *Unisource Canada Inc. v. C.E.P., Local 539* (2005), [2005] A.G.A.A. No. 123 (QL); 84 C.L.A.S. 287; "*Unisource*"). At paragraph 95 of *Carpenters*, the arbitrator endorses the finding of the arbitrator in *Unisource*, who had concluded as follows at paragraph 56:

> *56 … While there is no doubt that normal business demands will require some amount of overtime to be necessary, the Employer must arrange its staffing and operations in such a way that mandatory overtime does not become so common and routine as to render a 40 hour work week, to which it is contractually committed, meaningless. How it chooses to organize its affairs to accomplish this objective and comply with the contract is up to management as long as its approach is consistent with the collective agreement.*

[167] I will note that the arbitrator's ruling in *Unisource* was based on an evidence-rich data set and testimony with respect to the level of overtime being worked, specifically that "… overtime work of at least several hours per week per employee is routinely expected over the course of a year" (at paragraph 40).

[168] I do not have before me the same level of data about involuntary overtime at Kent as the arbitrator did in *Unisource*. This makes it more difficult to assess whether the level of involuntary overtime has reached the point that it has rendered the hours-of-work provisions "meaningless", as the arbitrator in *Unisource* put it.

[169] On the other hand, already, CXs are working a large amount of voluntary overtime. Although no specific data was presented to me, the testimony of the union witnesses was that overtime is regularly offered and regularly volunteered for, not necessarily because employees really want to work overtime but because there is a willingness to help ensure posts are covered. Any involuntary overtime being worked comes on top of that. I also note that the arbitrator's decision in *Carpenters* was purely a theoretical analysis, done in the absence of any overtime having been worked.

[170] Considering all this analysis, I conclude that the sustained and chronic use of involuntary overtime to address staff shortages is a violation of the collective agreement. Clearly, the agreement allows for involuntary overtime to be ordered in emergency situations or to ensure the completion of security duties, such as securing evidence. It may also legitimately be used to address short-term or unforeseen staff shortages when other alternatives for filling mandatory posts do not exist, which was in fact reflected in the employer's reply to this policy grievance. However, the way involuntary overtime is being used at Kent crosses the line into a mechanism for filling vacant shifts on a sustained and chronic basis. By doing so, considering the wording of both the overtime language at clauses 21.10 to 21.16 and the hours-of-work language at clause 21.02, article 34, and Appendix K, I have to conclude that its practice is a violation of the collective agreement.

[171] Given this conclusion, I find that the decision at Kent was an unreasonable exercise of management rights and would also succeed on that basis. The evidence clearly shows that the predominant message of management to CXs is that overtime may be required in emergency situations. The *Policy on the Management of Overtime for Correctional Officers* states clearly that manager should exhaust "all operational options" before overtime is considered. The CX job description reads that "The incumbent may be called upon to work for a number of consecutive hours in exceptional or emergency situations." Kent is not following this. The CX recruitment questionnaire discussed earlier asked prospective employees if they would be prepared to work overtime on very short notice due to "unforeseen situations" and "incidents." No mention is made in any of the employer's documents about employees being ordered to work overtime due to ongoing staff shortages. Finally, the prior practice at Kent clearly demonstrated a commitment to keep involuntary overtime to a minimum.

[172] The union made convincing arguments that it was not reasonable for management to depart from its national policy documents and its past practice at Kent.

D. Are the employer's objections related to the health-and-safety article of the collective agreement well-founded?

[173] In addition to its arguments about the overtime and hours-of-work articles of the collective agreement, the union argued that the Board should consider the wording of article 18, which reads as follows:

> ***18.01*** *The Employer shall make reasonable provisions for the occupational health and safety of employees. The Employer will welcome suggestions on the subject from the Union, and the parties undertake to consult with a view to adopting and expeditiously carrying out reasonable procedures and techniques designed or intended to prevent or reduce the risk of employment injury or illness.*

[174] The employer objected to the jurisdiction of the Board to determine this grievance based on the health-and-safety article of the collective agreement. It argued that another administrative process for making complaints about unsafe workplaces is in place, namely, the one under s. 127.1 of the *Code*. By virtue of s. 220(2) of the *Act*, the union may not file a policy grievance when another administrative process is in place that provides for a remedy, it argued. Not only could the union make a complaint under the *Code*, but also, it did so in this case.

[175] The evidence before me was that on August 2, 2018, before this grievance was filed, the local president made a complaint that ordering involuntary overtime was unsafe. The complaint said that the minimum break of eight hours between shifts did not allow time for employees to both commute and sleep. The Warden of Kent responded to the complaint on May 7, 2020. She determined that ordering involuntary overtime was not unsafe. The local is still considering whether it wishes to go to Employment and Social Development Canada to challenge the Warden's ruling.

[176] The employer also argued that *Ristivojevic v. Canada Revenue Agency*, 2020 FPSLREB 79 stands for the proposition that the health-and-safety article of the collective agreement is only consultative and does not create substantive rights (at paragraphs 242 to 244).

[177] The union argued that its case does not rest on the health-and-safety article. It stated that it is not asking the Board to decide if the *Code* has been violated. However, the article is part of the collective agreement. When interpreting that agreement, the Board must consider the entirety of it. The evidence of the union witnesses was that involuntary overtime is a major concern of employees, that there is a health impact, and that employees are finding the workplace stressful, which results in more leave and in more ordering of overtime. The union argued this was a vicious circle.

[178] The union also argued that there is case law indicating that grievances may be filed with respect to the health-and-safety article of the collective agreement.

Galarneau v. Canada (Attorney General), 2004 FC 718, and *Galarneau v. Canada (Attorney General)*, 2005 FC 39, were decisions on an application by some CXs to launch a class-action suit on the impact of second-hand smoke. In them, the Federal Court rejected the application, finding that Ms. Galarneau could file a grievance on the health-and-safety article and have it referred to the Board for adjudication.

[179] I do not find the employer's objection to be well-founded. The policy grievance is clearly aimed at involuntary overtime. It does not allege a violation of the *Code*. I acknowledge the union's health-and-safety concerns, but they are not the central issue in this grievance. Having said that, the Board must interpret each article within the context of the entire collective agreement, and the health-and-safety article reflects an important commitment by the parties to discuss and act on the concerns raised by the union. Health and safety are recognized as important in the employer's bulletin on excessive hours of work (#2006-02). However, my decision in this case does not rest on article 18. My analysis rests on the proper interpretation of articles 21 and 34 and Appendix K.

E. What order should the Board make if a violation of the collective agreement is found?

[180] The Board's authority to make an order in this policy grievance is restricted by s. 232 of the *Act*, as this policy grievance is also the subject of individual grievances. The section reads as follows:

> ***232*** *If a policy grievance relates to a matter that was or could have been the subject of an individual grievance or a group grievance, an adjudicator's or the Board's decision in respect of the policy grievance is limited to one or more of the following:*
>
> ***(a)*** *declaring the correct interpretation, application or administration of a collective agreement or an arbitral award;*
>
> ***(b)*** *declaring that the collective agreement or arbitral award has been contravened; and*
>
> ***(c)*** *requiring the employer or bargaining agent, as the case may be, to interpret, apply or administer the collective agreement or arbitral award in a specified manner.*

[181] The Board's decision making is also constrained by s. 229 of the *Act*, which reads as follows:

> ***229*** *An adjudicator's or the Board's decision may not have the effect of requiring the amendment of a collective agreement or an arbitral award.*

[182] These limitations, plus the nature of the case, narrow the scope of the order I can make.

[183] I have noted that the parties approached this case from fundamentally different perspectives. The union started by arguing that no involuntary overtime should ever be ordered, and the employer argued that doing so is within management's rights, given its position that the collective agreement is "silent" with respect to involuntary overtime.

[184] I have found neither argument tenable, given the collective agreement. I have concluded that while there is scope for the employer to order involuntary overtime in emergency situations or to address security requirements, the sustained and chronic use of involuntary overtime to address what appears to be a staff shortage is not consistent with the collective agreement.

[185] An obvious solution to the staff shortage problem is for Kent management to resume the use of, or the more active use of, operational adjustments involving a routine change, when it faces the problem of vacant posts. The union's evidence showed a direct relationship between management's removal of this option and the increased use of involuntary overtime.

[186] However, the Board cannot **order** the CSC to resume a more active use of operational adjustments at Kent to address staff shortages. The collective agreement contains no language on the use of operational adjustments, and I am barred by s. 229 of the *Act* from making an order that requires an amendment to the agreement.

[187] Even if I could make such an order, the question of when operational routines affecting inmates should be adjusted lies within the parties' expertise. It is management's responsibility to adjust operational duties while considering the needs of both inmates and staff.

[188] The local union has also demonstrated that it has a clear understanding of what operational adjustments are possible under the employer's deployment standards and that it has made a clear effort to try to work with local management on this issue.

[189] The question of how and when more frequent use can be made of operational adjustments to reduce involuntary overtime is something the parties must discuss and resolve.

[190] Another obvious solution to the problem Kent is facing would be to hire more CXs or create more relief posts. Once again, the Board cannot order the employer to do this. Staffing levels are not established in the collective agreement, and I cannot write them in.

[191] Furthermore, once again, the expertise lies with the parties. Mr. Velichka testified at length about the relationship between the CSC's deployment standards and the formula it uses to calculate the number of staff it must hire at each institution. The local also has a clear understanding of staffing requirements, given its role in jointly building the shift schedule.

[192] While it seems evident that there may be a problem at Kent with respect to how the staffing formula is working, given the sustained and chronic use of involuntary overtime, the proper place for discussing the problem is at the parties' labour-management committee meetings.

[193] I have considered the union's proposed remedy that all employees who were required to work involuntary overtime be compensated with paid time off. While acknowledging that employees were paid overtime rates for this work, the union argued that involuntary overtime took time away from family and personal responsibilities and that paying them is the only way of giving them back that time. It argued that the Federal Court upheld an adjudicator's ability to make compensation awards, in the context of a policy grievance, in *Canada (Attorney General) v. Canadian Merchant Service Guild*, 2009 FC 344.

[194] I do not think it is appropriate for me to make the union's requested compensation award. First, I have concluded that not all orderings of involuntary overtime violate the collective agreement. Second, there was simply not the level of evidence presented that would allow the Board to examine whether particular orders to work overtime were "reasonable", following the collective agreement wording. Third, the parties clearly do not have a reliable data set as to when involuntary overtime was ordered, meaning that any such remedy would be administratively difficult to

implement. Finally, and most importantly, the fact remains that employees who worked involuntary overtime have already been paid at 1.75 time.

[195] I understand that individual grievances remain outstanding. As much as I would like for this policy grievance to serve as a more efficient way of resolving the dispute, those grievances may be the more appropriate place for the parties to resolve which orderings were reasonable and unreasonable.

[196] As I have found that the collective agreement does not prevent the employer from ordering overtime in some circumstances, I also cannot make the cease-and-desist order requested by the union.

[197] Therefore, my order is restricted to a declaration that the imposition of involuntary overtime on a sustained and chronic basis is a violation of the collective agreement. The employer has established that it may order overtime in emergency situations, and completing tasks after a shift, and I accept that a sudden vacancy may be an emergency that requires the ordering of overtime. But the sustained use of involuntary overtime to address what is a chronic staff shortage is not consistent with the collective agreement.

[198] In making this declaration and no other order, I find myself in agreement with the arbitrator's statement in *Carpenters*, who finished his decision (at paragraph 98) as follows:

> *98 While I am not prepared to rule favorably on the redress sought by the Union, I do validate the grievance to the extent to declare that the imposition of overtime hours in the manner as described in the grievance form, if repeated and imposed, would be contrary to the Collective Agreement. Although this may appear pyrrhic to the parties, it may, in my view, be useful to them in the future.*

[199] The solution to this dispute lies with the labour-management consultation process. I strongly encourage the parties to intensify the efforts they are making at a local level. Given the difficulties they have encountered, perhaps they would benefit from joint learning on effective labour-management consultation or from the use of preventative mediation services.

[200] I will make one final recommendation. Given the significance of this issue as a point of conflict between labour and management, the CSC ought to improve the reporting systems that allow tracking involuntary overtime. The system created at Kent

was far from reliable and complete, according to the union. No local manager was called to testify to its accuracy. The only means of generating an aggregate picture of the involuntary overtime being worked was for Mr. Hammond to manually transcribe those reports to a calendar. Based on the evidence before me I agree that is a serious problem.

[201] I noted earlier that Mr. Kearney testified that the CSC altered the SPS following the release of the Board's decision in *Baldasaro* so that both voluntary and involuntary overtime could be tracked. He also testified that reports on the overtime were accessible to local union officers. Mr. Raymond disputed it, testifying that the SDS does not offer him aggregate reports on the level of overtime that his members work.

[202] I will simply reiterate the Board's assessment in *Baldasaro* that the lack of effective information sharing between the parties on the overtime issue is contributing to conflictual labour relations. And I will repeat the Board's recommendation that "[m]ore transparent, understandable and regularly automatic reporting and discussions should take place with the union" (at paragraph 73).

F. Should the Board seal the exhibits requested by the employer?

[203] The employer requested that I order sealed the exhibits included in the parties' joint book of documents that contain information on the deployment standards for CXs and operational adjustment plans at Kent. Four exhibits were in PDF form, one of which was also provided in a Microsoft Excel format, which I have marked as a separate exhibit. The union made no submissions on the employer's request.

[204] Normally, the Board's files are publicly accessible, in accordance with the open court principle and its *Policy on Openness and Privacy*. However, the Board will consider sealing exhibits as confidential when warranted.

[205] The applicable legal test is generally referred to as the *Dagenais/Mentuck* test (in reference to *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835, and *R. v. Mentuck*, 2001 SCC 76). This test was developed in the criminal law context. The Supreme Court of Canada reformulated the test in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para. 53) in the context of an administrative law proceeding. In *Canada (Attorney General) v. Philps*, 2019 FCA 240, the Federal Court of Appeal determined that the test to be applied is that set out in *Sierra Club.*

[206] The Supreme Court held that confidentiality orders should not be issued unless they are necessary to prevent a serious risk to an important interest. The risk in question must be real and substantial. The decision maker must also assess whether the salutary effects (or benefits) of keeping certain information confidential outweigh the deleterious (or negative) effects of preventing public access to judicial proceedings.

[207] In this case, the exhibits at issue concern important security procedures within the CSC. I am satisfied that making them public could potentially jeopardize the safety of inmates, employees, and the public. Keeping this information confidential outweighs the public interest's in knowing the details of the security procedures in these proceedings. While these reasons for decision discuss the contents of the exhibits at a general level, I believe that they can be understood without the public's access to the exhibits in question.

[208] Therefore, I order the five exhibits sealed.

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

(The Order appears on the next page)

V. Order

[210] The grievance is allowed in part. The Board declares that the sustained and chronic ordering of involuntary overtime is a violation of the collective agreement.

[211] Tabs 15, 16, 17, and 20 of Exhibit J-2 ("Joint Book of Documents - Volume II") and Exhibit J-5 (the Excel version of Tab 16 of Exhibit J-2) are ordered sealed.

March 4, 2021.

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