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

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

BETWEEN

MÉLANIE BEAULNE, ERICK CARRIÈRE, ÉRIC LABELLE, ÉRIC LANGLOIS, EMMANUEL LINDOR, MATTHIEU PROULX, AND DAMIEN SABOURIN

Grievors

and

SENATE OF CANADA

Employer

Indexed as
Beaulne v. Senate of Canada

In the matter of grievances referred to adjudication under paragraph 63(1)(a) of the *Parliamentary Employment and Staff Relations Act*

Before: Chantal Homier-Nehmé, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievors: Geneviève Brunet Baldwin, counsel

For the Employer: George Vuicic, counsel

Heard at Ottawa, Ontario,
January 14, 2020,
and by written submissions dated February 5, 21, and 28, 2020.
[FPSLREB Translation]

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Individual grievances referred to adjudication

[1] On December 24, 2015, the Senate Protective Service Employees Association ("the bargaining agent" or "the union") referred grievances ("*Sabourin et al.*") to the Public Service Labour Relations and Employment Board (PSLREB) in which the grievors alleged that the Parliamentary Protective Service ("the employer") breached the procedure for allocating overtime set out at article 21 and Appendix C of the collective agreement between the Senate of Canada and the bargaining agent, which expired on September 30, 2017 ("the collective agreement"). On January 4, 2018, the parties signed an agreement to settle the grievances ("the memorandum of agreement") and to determine how future errors in allocating overtime shifts would be dealt with. This decision deals only with the divergent interpretations of the memorandum's paragraphs dealing with future errors in allocating shifts.

[2] The memorandum of agreement provides as follows:

> …
>
> *Whereas grievances were filed by members of the Association under Beaulne et al. (466-SC-402 to 408) claiming full overtime compensation for an administrative error; and*
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> *Whereas the employer accepted that the error occurred but the remedy sought by the grievors was not accepted by the employer; and*
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> *Whereas the grievances were referred to arbitration [sic] before the Federal Public Sector Labour Relations and Employment Board;*
>
> *Whereas the parties have agreed to a settlement for resolving the grievances and an understanding on the manner in which errors in overtime will be treated moving forward;*
>
> *Therefore, the parties agree as follows:*
>
> 1. *The Employer will compensate the grievors for the overtime hours missed at the overtime rate stated in the collective agreement, including shift premiums. The overtime compensation can be received in pay or in compensatory time as per the collective agreement.*
> 2. *The grievors withdraw their grievances effective immediately. The SPSEA takes responsibility for informing the Federal Public Sector Labour Relations and Employment Board that the matter is resolved.*
> 3. *Upon the signing of this agreement, when an employee is qualified, entitled, and available to work overtime as per the*

collective agreement, but is not offered the overtime due to an error by the employer, the employer will substitute the employee's regular pay for his/her next regular scheduled shift(s) with the applicable overtime pay rate equal in hours to the overtime hours that were missed by the employee. This pay adjustment will also include any shift premiums the employee would have received had the overtime shift been properly offered.

For example*: Due to an error, the employer failed to offer "Officer Jim" a 12-hour overtime shift on his first day of rest. Officer Jim's next regular shifts are 8 hours on Monday and 8 hours on Tuesday at the regular rate of pay. To compensate for the overtime error, Officer Jim will be paid in line with the SPSEA collective agreement as follows:*

- *The overtime rate on Monday (4 hours at time and one half + 4 hours double time)*
- *The overtime rate on Tuesday (4 hours at double time) + Regular pay for remain [sic] shift hours*

4. *The Association understands and accepts that the administration of overtime is currently performed by members of the bargaining unit. From the signature of this memorandum of agreement, errors made by a member with respect to these duties will be formally addressed by the employer through administrative or disciplinary measures where there is justification to do so. It is further understood and accepted that the employer will not tolerate whatsoever any form of dishonesty or collusion between members with respect to overtime allocation or compensation.*
5. *Where possible, the employer may implement policy, procedures, or technology for reducing potential errors. The Association will be consulted as per the collective agreement prior to implementations of this nature.*
6. *This agreement will remain in effect until the parties agree to amend or cancel it, or where the matter is addressed through a new collective bargaining agreement.*

…

[3] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the PSLREB and the title of the *Public Service Labour Relations and Employment Board Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board") and the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365).

II. Summary of the evidence

[4] The parties submitted a joint statement of facts. The bargaining agent summoned Brian Faust and Erick Carrière. When the memorandum of agreement was negotiated and the grievances were referred, Mr. Faust was the union's president and Mr. Carrière was its vice president. The employer called Shawn Garby, a labour relations advisor.

[5] In the grievances, the grievors alleged that the employer contravened the collective agreement by inappropriately allocating overtime shifts and claimed "[translation] full compensation" for the error. At article 21 and Appendix C, the collective agreement provided that overtime was provided based on availability and on the seniority of the employees on the overtime list. When an overtime shift was available, employees were called in order of seniority, and the employer offered them the opportunity to work the overtime shift. The corporal or sergeant manages personnel and is responsible for allocating overtime shifts. According to Mr. Carrière's testimony, both the corporal and the sergeant are members of the union.

[6] During the internal grievance process, the employer acknowledged that errors were made when allocating overtime shifts. However, it did not agree with the bargaining agent's requested remedy, which was to compensate the grievors for the entire lost overtime shifts.

[7] The employer was only willing to offer them another opportunity to work an overtime shift. The bargaining agent refused the offer and stated that such a remedy would prejudice other employees who were now entitled to overtime shifts.

[8] According to the testimonies of Mr. Faust and Mr. Carrière, the collective agreement gave priority to any employee who worked overtime, up to four overtime shifts. The employer's position of allowing employees to work overtime for hours lost at another time prejudiced other employees in several ways, which is why that option was unacceptable to the bargaining agent.

[9] In October 2017, the parties initiated discussions to settle the grievances. Mr. Faust and Mr. Carrière discussed things with Mr. Garby. First, Mr. Garby proposed that those employees who had filed grievances be remunerated at overtime rates for their next regular shifts, at half the lost overtime.

[10] At that time, the bargaining agent wanted the grievors compensated for all the lost overtime. According to the testimonies of Mr. Faust and Mr. Carrière, its position has never changed. Mr. Garby acknowledged that the grievances claimed the total lost for errors in allocating overtime shifts.

[11] That was the bargaining agent's initial position, according to Mr. Garby. However, the employer did not want to write "[translation] a blank cheque" to the grievors. It was not comfortable paying them while they were at home and not working. His goal was to make the bargaining agent change its initial position. According to his recollection, it had not taken a position on compensation for future errors.

[12] Mr. Garby testified that the employer's initial position was to compensate employees for future errors through the difference between the overtime that they would have received had they worked the lost overtime shifts and the pay for their regular shifts at the overtime rate.

[13] Mr. Garby said that at no time did Mr. Faust and Mr. Carrière object to his proposal on compensation for future errors. They did not insist that members be reimbursed for the total amount lost. Mr. Garby used the "Officer Jim" example, which was ultimately incorporated into paragraph 3 of the memorandum of agreement. He said that he remembered explaining the example to Mr. Faust and Mr. Carrière. He testified that he made several calculations with them. He confirmed that the chart adduced as evidence reflects the remuneration provided at paragraph 3 of the memorandum of agreement.

[14] Mr. Garby testified that employees who end up being victims of future errors would be paid at the overtime rate for their next regular shifts. It was out of the question that employees be paid at the overtime rate in addition to their regular shifts. Otherwise, the employer would never have entered into such an agreement since the union would have made no compromise. According to Mr. Garby, the employer expected that the bargaining agent would come up with a compromise for future errors. That is why the agreement was successful.

[15] Mr. Carrière and Mr. Faust testified that during their discussions with Mr. Garby, they raised the example of designated holidays to support their position. Mr. Carrière testified that as he recalled, Mr. Garby understood his example of payment for

designated holidays. Mr. Carrière remembered that Mr. Garby replied that he understood. Had Mr. Garby said "No", the discussion would have ended. According to him, the employer had what it wanted, and the employee had all his or her money. He intended to submit that settlement offer, as he understood it, to a members' vote at a union meeting. He had no authority to approve the settlement offer without the members' consent.

[16] Mr. Garby testified that he did not recall any discussions or references to payment for designated holidays. He remembered only discussing the "Officer Jim" example and making the calculations with Mr. Faust and Mr. Carrière. He believed that they understood how the calculation would be made. Had the employer accepted the bargaining agent's interpretation, the grievances would have been allowed, and the memorandum of agreement would not have been necessary. Otherwise, the grievors would have received their salaries for the regular shifts and the full amount for the lost overtime.

[17] In cross-examination, Mr. Faust explained that he did not insist that the memorandum of agreement refer to "[translation] designated holidays" because it was their mutual understanding of the remuneration calculation for future errors.

[18] In November 2017, the parties concluded a memorandum of agreement to settle the grievances and to cover future errors. Mr. Garby prepared the first draft of it and then sent it to Mr. Faust and Mr. Carrière on November 5, 2017. At paragraph 1, the first draft indicated that the employees who had filed grievances would be reimbursed half the overtime lost at the overtime rate as provided in the collective agreement. According to Mr. Garby, at that moment, no discussions had taken place about compensation for future errors provided in paragraph 3.

[19] On November 8, 2017, Mr. Faust and Mr. Garby discussed their respective understanding of the compensation proposed at paragraph 1 of the draft memorandum of agreement. Paragraph 1 referred to half of the hours lost. According to Mr. Garby's recollection, the parties had agreed that compensation would be for half the hours lost, not a complete remuneration. Mr. Faust, for his part, did not recall agreeing to half because the union members would not have accepted such an offer.

[20] Mr. Carrière confirmed that he was furious with the first draft because it did not reflect their exchange. He was not happy. He had informed Mr. Garby by email that he

could not propose that offer to the members. On November 15, 2017, he asked for a meeting with the director, Jane MacLatchy, to express his frustration. He explained to her that a memorandum of agreement had been put together but not for half the overtime. She told him that she would verify things on her side.

[21] Mr. Garby explained that he had understood from his discussions with the bargaining agent that it would accept half the compensation claimed in the grievances. He did not recall that the bargaining agent would not accept half or that the grievors could not be convinced to accept half. He testified that at that moment, he had the authority to offer only half the amount claimed in the grievances. He would not have attempted to include that wording in the memorandum of agreement had he believed that the bargaining agent would not have accepted the offer. He was insulted that the union now appeared to accuse him of trying to include words in the memorandum of agreement without its knowledge.

[22] The bargaining agent's representatives consulted their counsel to revise the draft memorandum of agreement and made some minor amendments. The document has the word "half" in paragraph 1 crossed out. No amendments were proposed to paragraph 3, which referred to the applicable remuneration for future errors. On December 1, 2017, Mr. Faust sent the draft memorandum of agreement with the proposed changes to Mr. Garby. He had struck out, in red, the word "half" in the first paragraph and had added in red "[translation] including shift premiums and meal allowances".

[23] On December 13, 2017, Mr. Garby sent another draft of the memorandum of agreement and accepted the bargaining agent's proposed changes. In his email, Mr. Garby confirmed that the overtime shift premium would be paid to eligible employees under paragraph 1. However, the employer did not agree to pay the meal allowance because the grievors did not work the shifts. And he indicated that he added to paragraph 5 that the employer would not be limited in its ability to avoid future errors in allocating overtime shifts. Mr. Garby attached to his email a chart showing the remuneration of all employees covered by paragraph 1 of the memorandum of agreement.

[24] Mr. Garby acknowledged that his email did not mention that he had made a change to the second point in paragraph 3, in the Officer Jim example. Mr. Garby

testified that he did not recall whether he or the bargaining agent had added the additional text. He explained that the addition of that text simply reflected the fact that in the Officer Jim example, the amount equivalent to the lost overtime would have already been paid at the applicable overtime rate; the remaining hours would be paid according to the employee's regular hourly rate. Mr. Faust replied that he agreed with the draft memorandum of agreement as revised by Mr. Garby.

[25] In cross-examination, Mr. Garby stated that he never said that employees would receive half the amounts due for future errors. He simply referred to the Officer Jim example and the calculation.

[26] On January 24, 2018, Mr. Carrière emailed Mr. Garby to inform him that the bargaining agent had reviewed the draft memorandum of agreement and that the words "include any shift premiums" were missing after "overtime pay rate" in paragraph 3. Mr. Garby replied that it was an oversight and that he would add those words. The parties signed the memorandum of agreement on January 24, 2018.

[27] Sometime after the memorandum of agreement was signed, the parties' interpretations of paragraph 3 diverged. On March 5, 2018, Mr. Faust wrote to Mr. Garby that there was confusion because the bargaining agent had always taken the position that the employee would not lose money and that overtime would be paid in addition to the normal salary.

[28] In cross-examination, Mr. Garby acknowledged that according to the bargaining agent's calculations, an employee who would have worked a 12-hour overtime shift would normally be paid for a total of 22 hours. However, according to the wording in paragraph 3 of the memorandum of agreement, the employee would be paid for only a total of 10 hours. According to Mr. Garby, this calculation was not made with the bargaining agent during the memorandum of agreement's negotiation. The bargaining agent had not proposed any such wording.

[29] Mr. Garby explained that the remuneration provided in paragraph 3 of the memorandum of agreement represents the difference between what the employee would have been paid for a regular shift after a missed overtime shift and what the employee would have been paid had the overtime shift been worked. According to Mr. Garby, this reflects the compromise that was essential for the employer. Therefore, the affected employees would benefit from being paid at the overtime rate for the

regular shifts that they would have worked. However, employees affected by future errors would not receive full compensation for lost overtime shifts in addition to their regular shifts.

[30] Both Mr. Carrière and Mr. Faust had understood that paragraph 3 of the memorandum of agreement provided that the word “substitute” meant that the employer would pay employees at the applicable overtime rate in addition to their regular shift pay. Therefore, employees who will be future victims of errors would be paid at the applicable regular shift rate in addition to the overtime rate. According to Mr. Faust and Mr. Carrière, the word “substitute” meant “[translation] replace in addition to”. According to Mr. Faust, employees are to be paid as provided in the collective agreement. If so, they should not lose their regular shift salaries. Mr. Faust explained that pay is tied to pension. If pay changes, pension is affected. Under the memorandum of agreement, the employer deducts the hours worked from the pay, which has an enormous impact. According to him, the employer cannot do it without signing leave-without-pay forms.

[31] In cross-examination, Mr. Carrière acknowledged that he never suggested removing the word “substitute” from paragraph 3 of the memorandum of agreement. He explained that the first time, the employer wanted to pay only half. He told it that that was impossible and that the members would not accept losing money. He said that had the bargaining agent accepted half, it would have been at the beginning, not later. He understood that the “Officer Jim” example meant that the employer would pay the normal salary for the two days in question and then overtime for the following hours. He acknowledged that there was no mention of paying the employee as if it were a public holiday. However, the employee was also not supposed to lose his or her normal salary.

[32] Mr. Faust explained that in his view, they understand paragraph 3 of the memorandum of agreement as a win-win for the bargaining agent and the employer. The employer received what it wanted, which was the employees’ work, and the employees received their salaries and overtime. The compromise was that the employer did not pay a salary to employees who did not work. The employees would be paid lost overtime in addition to their normal salaries.

[33] In cross-examination, Mr. Faust acknowledged that there was no reference to "[translation] in addition to" and that only the word "substitute" appeared. They were under the impression that paragraph 3 of the memorandum of agreement indicated that employees would be paid as for a holiday. Deducting the normal salary was never discussed.

III. Reasons

[34] Applying the reasoning in the Federal Court of Appeal's decision in *Amos v. Canada (Attorney General)*, 2011 FCA 38, the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2) gives the Board jurisdiction to decide whether the memorandum of agreement is final and binding on the parties and whether they have complied with it and, if not, the appropriate order to render in the circumstances.

[35] The parties signed the memorandum of agreement and concurred that it was binding and final. Neither party argued that the memorandum of agreement was invalid. It allowed settling all the grievances as well as setting out compensation for any future errors in allocating overtime shifts.

[36] The Board's role is not to render a decision on the merits of the grievances but to determine the memorandum of agreement's interpretation and application. Specifically, the Board must determine whether the employer respected the terms of the memorandum of agreement, its application, and its interpretation.

[37] At the hearing, the parties confirmed that all the grievances were settled by applying the memorandum of agreement. The affected employees received full compensation for their lost overtime shifts. The only issue to be decided is the interpretation of the part of paragraph 3 of the memorandum of agreement about future errors in allocating overtime shifts.

[38] The bargaining agent tendered a 19-page submission that can be summarized in 3 main arguments. The employer tendered a 29-page submission. The bargaining agent then replied with an 8-page submission. I will deal with the bargaining agent's arguments and the employer's response in succession.

[39] To begin with, the bargaining agent contended that full compensation for employees without requiring them to work a makeup shift is the only remedy possible under clause 21.06 of the collective agreement and the Board's jurisprudence. The

bargaining agent referred to the Board's decision in *Mungham v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 106 at para. 34, in which the adjudicator held that were the grievor forced to work the lost shift, other employees' rights would be affected. On that issue, the bargaining agent cited the Board's decision in *Hunt v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 65, in which it concluded that the employer's requirement to work the missed additional shift would prejudice other employees.

[40] Furthermore, the bargaining agent argued that clause 21.06 of the collective agreement provided that when several days of overtime were involved, the first employee to be called to work should be offered the overtime, to a maximum of four shifts. The Board's case law and the collective agreement confirm that the employer's position would cause prejudice to employees of the sort that it would be unacceptable for the bargaining agent to agree that the regular-shift pay rate would be substituted with or replaced by the lost overtime rate.

[41] The bargaining agent pointed out that if the memorandum of agreement is interpreted in the employer's proposed way, employees would receive less than 50% of the full amount that they are owed. According to the bargaining agent's arguments, if the employer's interpretation is correct, "Officer Jim", under the scenario set out in the memorandum of agreement, would receive only 10 hours of compensation instead of the 22 that he is owed. Under the employer's interpretation, employees would be paid at the overtime rate only for lost hours but would have their normal pay subtracted from that amount, which is completely unacceptable, particularly given that only regular hours are pensionable. Paragraph 3 of the memorandum of agreement is to be interpreted so that compensation for a lost overtime shift is added to the employee's next regular shift. The bargaining agent submitted that the term "substitute" found in paragraph 3 means a replacement in addition to an employee's normal salary.

[42] The bargaining agent submitted that the context of the parties' negotiations is relevant and that it must be considered when interpreting paragraph 3 of the memorandum of agreement, citing the Supreme Court of Canada's decision in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, to support that proposition. At paragraph 60 of that ruling, the Court found that the parol-evidence rule does not preclude considering the circumstances and that in fact such evidence is consistent

with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of written documents, not to change or overrule it.

[43] The bargaining agent also emphasized that the Board accepted that approach in *Fehr v. Canada Revenue Agency*, 2017 FPSLREB 17 at para. 67, referring to the principle in *Sattva* as a more modern approach to contract interpretation that was more practical and based on common sense instead of technical rules of construction. In *Fehr*, the Board held that a decision maker must read the contract as a whole, giving words their ordinary and grammatical meanings, "… consistent with the surrounding circumstances known to the parties at the time the contract was formed." According to the bargaining agent, the circumstances revealed that it asked and understood that compensation would be paid in full.

[44] The bargaining agent also referred to the example in paragraph 3 of the memorandum of agreement, which states, "compensate for the overtime error". It asserted that this confirms its clear interpretation of the memorandum of agreement's purpose. Furthermore, the bargaining agent alleged that substituting normal salary for overtime remuneration is valid only with respect to overtime hours lost or missed and does not provide for subtracting an employee's hours worked normally or lesser compensation than what is owed.

[45] The employer replied that the parties are sophisticated and that they have been involved in collective bargaining for a long time. And both parties had experienced representatives during the memorandum of agreement's negotiations. It also noted that the bargaining agent consulted its legal counsel. It maintained that there is only one reasonable interpretation of paragraph 3 and that any misunderstanding on the part of the bargaining agent is a unilateral mistake for which it must bear the burden. In its view, the memorandum is unambiguous, and the term "substitute" cannot be interpreted to mean that employees would receive both overtime compensation and their normal salaries.

[46] The employer argued that in contract interpretation, the ordinary and grammatical sense of a word must be examined; it cited case law to that effect, and it pointed out that the definition in the *Oxford English Dictionary*, Sixth edition, for the term "substitute" is to "put a person or thing in place of another." According to the employer, the term "substitute" cannot bear the bargaining agent's proposed meaning,

and that interpretation goes squarely against the ordinary grammatical meaning of the term.

[47] The employer disputed the bargaining agent's interpretation of paragraph 3 as penalizing employees by deducting compensation from normal salary. It argued that the formula in paragraph 3 of the memorandum of agreement gives an advantage to employees who missed overtime shifts by paying them at a higher rate of pay for their next normal shifts.

[48] The employer argued that the bargaining agent's arguments about the context of the negotiations has no bearing on interpreting paragraph 3 of the memorandum of agreement because all the discussions about full compensation related to paragraph 1 and past grievances and were quite distinct from later discussions about compensation for future errors. Even though the parties operated on different assumptions about the meaning of the term, neither one made any statement about the meaning or interpretation of paragraph 3. The bargaining agent's argument has no logical basis and does not account for the specific "Officer Jim" example in the memorandum of agreement.

[49] The employer argued that if the bargaining agent based itself on a mistaken assumption, it was a unilateral mistake on its part that it cannot use to relieve itself from the clear contractual terms of the memorandum. The employer cited three decisions to support that assertion. In *BHP Billiton Diamonds Inc. v. P.S.A.C.*, 2007 CarswellNat 6246, (2007) 161 L.A.C. (4th) 152, *Sifto Canada Inc. v. CEP, Local 37-0-2* (2005), 83 C.L.A.S. 342, and *Teck Cominco Metals Ltd. v. U.S.W.A., Local 480* (2006), 154 L.A.C. (4th) 161, the union claimed that it was a mutual error. The arbitrator ruled that instead, it was a unilateral mistake as the union was the only party to misunderstand the terms of the agreement and as the employer's understanding was clearly reflected in the agreement's wording. In such a situation, the arbitrator held that the risk must be assumed by the party that misunderstood the terms to which it had agreed. According to the arbitrator's conclusion, the employer was unaware of the union's mistake and was under no obligation to ensure that the union understood the agreement in the same way it had.

[50] The employer referred to the *Detroit Windsor Tunnel LLC v. Unifor, Local 195*, 2013 CarswellNat 4620, (2013) 237 L.A.C. (4th) 423, arbitration decision, in which it

was concluded that even had the union based itself on a genuine misunderstanding, the agreement was sufficiently clear to be interpreted literally. The employer emphasized that case to also argue that had any representations been made, the clear wording in the memorandum of agreement serves as its own representation and overrides any earlier ones.

[51] In a more recent decision, *Taylor v. Deputy Head (Canada Border Services Agency)*, 2021 FPSLREB 80, the Board noted, "In cases of collective agreement interpretation, the academic authorities and jurisprudence have consistently held that adjudicators and labour boards should first look at the words used in the collective agreement not only in the context of a particular clause but also in the collective agreement as a whole." That is the same approach that the Supreme Court of Canada adopted in *Sattva*. And I conclude that the same reasoning applies in the context of interpreting a memorandum of agreement.

[52] In Brown and Beatty, *Canadian Labour Arbitration*, 3rd edition, paragraph 3:4400, on extrinsic evidence, reads as follows:

> *Parol or extrinsic evidence, in the form of either oral testimony or documents, is evidence which lies outside, or is separate from, the written document subject to interpretation and application by an adjudicative body. Although there are numerous exceptions, the general rule at common law is that extrinsic evidence is not admissible to contradict, vary, add to or subtract from the terms of an agreement reduced to writing. If the written agreement is ambiguous, however, such evidence is admissible as an aid to the interpretation of the agreement to explain the ambiguity but not to vary the terms of the agreement. The two most common forms of such evidence in labour arbitrations are the negotiating history of the parties leading up to the making of a collective agreement, and their practices before and after the making of the agreement. And in addition to its use as an aid to interpretation of a collective agreement or a settlement agreement, or to establish an estoppel, it may be adduced in support of a claim for rectification. However, for such evidence to be relied upon it must be "consensual". That is, it must not represent the "unilateral hopes" of one party. Nor can it be equally vague or as unclear as the written agreement itself.*

[53] The Supreme Court of Canada, in *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, stated at paragraphs 54 through 56 as follows:

> *54 The trial judge appeared to take* Consolidated-Bathurst *to stand for the proposition that the ultimate goal of contractual interpretation should be to ascertain the true intent of the parties at the time of entry into the contract, and that, in undertaking this inquiry, it is open to the trier of fact to admit extrinsic evidence as to the subjective intentions of the parties at that time. In my view, this approach is not quite accurate. The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination.*
>
> *55 Indeed, it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face. In the words of Lord Atkinson in* Lampson v. City of Quebec *(1920), 54 D.L.R. 344 (P.C.), at p. 350:*
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> > *… the intention by which the deed is to be construed is that of the parties as revealed by the language they have chosen to use in the deed itself.… [I]f the meaning of the deed, reading its words in their ordinary sense, be plain and unambiguous it is not permissible for the parties to it, while it stands unreformed, to come into a Court of justice and say: "Our intention was wholly different from that which the language of our deed expresses …."*
>
> *56 When there is no ambiguity in the wording of the document, the notion in* Consolidated-Bathurst *that the interpretation which produces a "fair result" or a "sensible commercial result" should be adopted is not determinative. Admittedly, it would be absurd to adopt an interpretation which is clearly inconsistent with the commercial interests of the parties, if the goal is to ascertain their true contractual intent. However, to interpret a plainly worded document in accordance with the true contractual intent of the parties is not difficult, if it is presumed that the parties intended the legal consequences of their words. This is consistent with the following dictum of this Court, in* Joy Oil Co. v. The King, *[1951] S.C.R. 624, at p. 641:*
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> > *… in construing a written document, the question is not as to the meaning of the words alone, nor the meaning of the writer alone, but the meaning of the words as used by the writer.*

[54] At paragraphs 57 and 58 of *Eli-Lilly*, the Supreme Court of Canada found that there was no ambiguity in the parties' contract and that the intent was clear based on the contract's plain meaning. As such, the Court did not resort to any of the extrinsic evidence adduced as to the parties' subjective intentions at the moment the contract was drafted.

[55] *Canadian Labour Arbitration*, at paragraph 4:2100, states as follows:

> *It has often been stated that the fundamental object in construing the terms of a collective agreement is to discover the intention of the parties who agreed to it….*
>
> …
>
> > *But the intention must be gathered from the written instrument. The function of the Court is to ascertain what the parties meant by the words they have used; to declare the meaning of what is written in the instrument, not of what was intended to have been written; to give effect to the intention as expressed, the expressed meaning being, for the purpose of interpretation, equivalent to the intention.*
>
> *Accordingly, in determining the intention of the parties, the cardinal presumption is that the parties are assumed to have intended what they have said, and that the meaning of the collective agreement is to be sought in its express provisions.*

[56] The memorandum of agreement's wording must be interpreted as it was written unless an absurdity results. Full effect must be given to the words used, even if it seems unfair. I see no reason not to apply these fundamental contract-interpretation rules, with respect to collective agreements, to the memorandum of understanding that the parties in this case drafted and accepted.

[57] The employer submitted that the memorandum of agreement's terms are clear and that they should be applied as they were written. The employer cited paragraph 3, which states, "… when an employee … is not offered the overtime due to an error … will substitute the employee's regular pay for his/her next regular [*sic*] scheduled shift(s) with the applicable overtime pay rate …". Nothing in the memorandum of agreement indicates that employees will receive their salaries for their next regular shifts in addition to overtime pay.

[58] As an alternative argument for the admissibility of extrinsic evidence, the bargaining agent alleged that promissory estoppel applies in light of the employer's alleged statements during the negotiations that led to signing the memorandum of agreement. The bargaining agent submitted that the employer clearly committed to 100% compensating employees prejudiced by errors in allocating overtime and that it could not hide behind a strict interpretation of the agreement's text to argue otherwise.

[59] According to the bargaining agent, the employer led it to believe throughout the negotiation of the agreement that it intended to 100% compensate for errors in allocating overtime. Consequently, it could not defend itself in this dispute behind an interpretation of the agreement that did not match the one the parties reached. It referred to the concepts used in *Canadian Paperworkers Union, Local 2995 v. C.I.P Inc., Division forestière de Maniwaki*, AZ-89141141; *Canadian Union of Public Employees, Local 3333, v. Société de transport de la Rive sud de Montréal*, 2000 CanLII 3289; and *United Food and Commercial Workers, Local 500 v. Provigo Distribution Inc., Division Maxi (Châteauguay)*, AZ-02141058.

[60] The bargaining agent submitted that the employer did the following:

> - indicated that the grievors would be 100% compensated many times during the agreement's negotiation process;
> - indicated that compensation would be added to the next regular shift;
> - indicated that compensation would be calculated as remuneration for work performed on statutory holidays;
> - agreed to remove the word "half" from the first version of the agreement but never informed the bargaining agent of adding the phrase "+ Regular pay for remain [*sic*] shift hours" in the final version of the agreement;
> - never informed the bargaining agent that employees aggrieved by future errors in allocating overtime would receive less than 100% of the amount due;
> - never informed the bargaining agent that those same employees would receive 0.5 hours for the first 4 hours of lost overtime and 1 hour for each subsequent hour of lost overtime; and
> - never informed the bargaining agent that in the "Officer Jim" example, the officer would receive 10 hours of compensation for the 22 hours lost.

[61] For its part, the employer argued that estoppel does not apply in the circumstances of this case. The bargaining agent confused the language used in the first paragraph of the agreement for the full compensation of the grievors with paragraph 3, which is about future errors. The parties' only discussion of paragraph 3 was about the "Officer Jim" example. Alternatively, if the Board's view is that Mr. Garby would have made representations about it, either verbally or by staying silent, the clear language of the memorandum of agreement prevails. To support its claim, the employer referred to the principles in *Western Grocers v. Teamsters, Local 987*, 2006 CarswellNat 862 at paras. 69 to 71. And it submitted that one party's silence cannot be the basis for an estoppel when it was unaware that the other party had not understood. See *CITV & Canwest Studios v. C.E.P., Local 1900*, 2005 CarswellNat 3856.

[62] For the following reasons, I find that the bargaining agent's arguments cannot be accepted and that the memorandum of agreement must be interpreted as written. The bargaining agent presented no evidence that the employer would have made verbal or other representations while negotiating the memorandum of agreement.

[63] The parties' disagreement involves the interpretation of paragraph 3 of the memorandum of agreement, which provides as follows:

> *3. Upon the signing of this agreement, when an employee is qualified, entitled, and available to work overtime as per the collective agreement, but is not offered the overtime due to* ***an error by the employer, the employer will substitute the employee's regular pay for his/her next regular scheduled shift(s) with the applicable overtime rate equal in hours to the overtime hours that were missed by the employee****. This pay adjustment will also include any shift premiums the employee would have received had the overtime shift been properly offered.*
>
> For example*: Due to an error, the employer failed to offer "Officer Jim" a 12-hour overtime shift on his first day of rest. Officer Jim's next regular shifts are 8 hours on Monday and 8 hours on Tuesday at the regular rate of pay. To compensate for the overtime error, Officer Jim will be paid in line with the SPSEA collective agreement as follows:*
>
> - *The overtime rate on Monday (4 hours at time and one half + 4 hours double time)*
> - *The overtime rate on Tuesday (4 hours at double time) + Regular pay for remain [sic] shift hours*
>
> [Emphasis added]

[64] The parties had sophisticated representatives specialized in federal public sector labour relations. The employer had a labour relations advisor. The bargaining agent was represented by its president and vice president, and its representative at the hearing had reviewed the memorandum of agreement. The parties were responsible for ensuring that they understood the agreement and its application.

[65] Paragraph 3 of the memorandum of agreement is clear and unambiguous. It is not necessary to use extrinsic evidence to interpret the memorandum. I agree with the union's argument that the memorandum's wording must be interpreted in the context of the settlement as a whole and must make sense in that context. That principle is consistent with the Supreme Court of Canada's decision in *Sattva* and the Board's decisions in *Taylor* and *Fehr* with respect to the interpretation of contracts. Therefore,

I must interpret the memorandum of agreement as a whole, giving the words used their ordinary and grammatical meanings consistent with the circumstances that the parties knew of when the memorandum was concluded.

[66] At paragraph 4:2100 of *Canadian Labour Arbitration*, Brown and Beatty wrote the following:

> …
>
> *When faced with a choice between two linguistically permissible interpretations, however, arbitrators have been guided by the purpose of the particular provision, the reasonableness of each possible interpretation, administrative feasibility, and whether one of the possible interpretations would give rise to anomalies.*
>
> …

[67] According to the doctrine of estoppel, by words or conduct, one of the parties made a promise or assurance that was intended to affect their legal relationship and to be acted on. Furthermore, the party that received the promise must prove that by relying on the promise, it took some action or in some way changed its position. Consequently, the party that makes assurances or promises to the detriment of the other party cannot require the strict application of the agreement.

[68] According to the bargaining agent, the circumstances revealed that it asked and understood that compensation would be paid in full. Unfortunately, I heard no evidence to that effect. Although supposedly, Mr. Faust and Mr. Carrière inferred from their discussions with Mr. Garby that the grievors would be paid in full for the lost overtime shifts in addition to their regular shift salaries, paragraph 3 of the memorandum of agreement does not provide that. The evidence demonstrated clearly that the union and the employer had different understandings of paragraph 3 of the memorandum of agreement. This does not amount to promises or assurances from the employer.

[69] No evidence allows me to conclude that Mr. Garby would have made such assurances or promises, either in words or by conduct. I find that Mr. Garby did not attempt to ensure that Mr. Faust and Mr. Carrière clearly understood paragraph 3 of the memorandum of agreement. However, this is insufficient to support the bargaining agent's estoppel argument.

[70] In labour relations, parties generally invoke the principle of estoppel to support a deviation from a collective agreement (such as past-practice arguments). In *Dubé v. Canada (Attorney General)*, 2006 FC 796, the fundamental criteria for establishing estoppel are noted as the following:

> 1. a clear and precise promise, expressed or implied, to change the parties' legal relationship; and
> 2. a promise that led its receiver to act differently than it would have in other circumstances.

[71] Mr. Garby did not make a clear and precise promise or assurance by words, by conduct, or by silence. The memorandum of agreement's preamble is clear and precise; the employer did not agree to full compensation for future errors. With no proof of a clear and precise promise or assurance, the estoppel argument must be rejected.

[72] As for the remainder of the memorandum of agreement, despite the wording in paragraph 4, the employer did not adduce evidence that employees responsible for allocating overtime acted dishonestly when doing so. However, it is clear that that was a concern of the employer, since it included a paragraph to that effect in the memorandum of agreement.

[73] Paragraph 4 of the memorandum of agreement recognizes that the persons who allocate overtime are members of the bargaining unit and gives the employer the right to set up audit programs and impose discipline on employees who reportedly allocated overtime incorrectly.

[74] Even if the employer recognized that overtime had been allocated improperly, it leads me to believe that it suspects some kind of improper motives, such as friendship or favouritism, in allocation decisions and that it does not and never has condoned such practices. In essence, from the employer, I sense a whiff of, "It's your fault; your members run the system, and not in our name." If so, it did not use that argument to explain its reluctance to fully compensate for the error. The parties submitted no evidence or argument to that effect.

[75] I emphasize that the terms of the memorandum of agreement, in the "Officer Jim" example, state that employees will be compensated for the error "… in line with the SPSEA collective agreement …", and I do not see how compensation of less than 50% of what is owed is in line with the collective agreement. The bargaining agent was

under the impression that paragraph 3 of the memorandum of agreement meant that overtime would be paid in addition to normal salary. It seems to me that that impression was based on the meaning of "overtime" in clause 21.01(a) of the collective agreement, which defines the following: "For the purpose of this Article, 'overtime' is defined as authorized work performed in excess or outside of the scheduled work day [*sic*] or work week [*sic*]." Therefore, it would be implied in the term "overtime". However, the preamble at the top of the memorandum of agreement indicates without a doubt that the employer did not agree to full compensation, which suggests that the agreement was a compromise even if the union did not see it at the time. I cannot ignore the clear and unambiguous language in the memorandum of agreement's preamble.

[76] I see that the union did not understand what the employer did, and based on Mr. Garby's testimony, I find that the employer hoped that the union would not realize it. I do not find credible Mr. Garby's testimony that he did not know that the union sought full compensation. I do not believe that Mr. Garby understood from his discussions with the bargaining agent that it would agree to half the compensation claimed in the grievances. Nor do I think that Mr. Garby did not recall that the bargaining agent would not agree to half. Clearly, the bargaining agent did not understand Mr. Garby's "Officer Jim" example.

[77] I see no evidence that the employer knew that that was what it was. However, I am sure that it suspected as much and that it did nothing to clarify the situation. Even if this is not a case of estoppel, it might strongly seem like an unfair practice.

[78] I find that the memorandum of agreement must be interpreted based on the written words in their entirety and based on giving them their ordinary and grammatical meanings, consistent with the circumstances that the parties knew of when the agreement was concluded. Its wording indicates clearly that the employer disagreed with the bargaining agent's requested remedy, which was full salary and compensation for lost overtime shifts.

[79] Paragraph 3 of the memorandum of agreement states clearly that the employer will replace the regular salary for the next regular shift with the overtime rate equal to the hours of the lost overtime shift. I agree with the employer and the dictionary definition it submitted that the word "substitute" means "replace"; it is synonymous

with substitute. The memorandum of agreement's wording cannot be interpreted to mean **replacing in addition to** an employee's normal salary.

IV. Conclusion

[80] The employer correctly interpreted and applied the memorandum of agreement.

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

(The Order appears on the next page)

V. Order

[82] The grievances' files are closed.

October 21, 2022

FPSLREB Translation

Chantal Homier-Nehmé,
a panel of the Federal Public Sector
Labour Relations and Employment Board