Date: 20230601

File: 566-09-45013

Citation: 2023 FPSLREB 57

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

VÉRONIQUE ST-ONGE

Grievor

and

NATIONAL RESEARCH COUNCIL OF CANADA

Employer

Indexed as
St-Onge v. National Research Council of Canada

In the matter of an individual grievance referred to adjudication

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

For the Grievor: Christopher Rootham, counsel

For the Employer: Adam C. Feldman, counsel

Decided on the basis of written submissions, filed December 9, 16, and 20, 2022, and heard via videoconference, January 16 and 17, 2023.

REASONS FOR DECISION

I. Introduction

[1] This is a grievance about an employer's action to recover an overpayment it made to one of its employees. The overpayment took place in 2019, when the employer, the National Research Council of Canada (NRC), continued to pay the grievor, Véronique St-Onge, for eight weeks, even though she had commenced a period of sick leave without pay.

[2] The grievance was originally scheduled to be heard in conjunction with five others, all involving the employer and the Research Council Employees' Association (the bargaining agent). Each grievance concerned an action by the employer to recover an overpayment from an employee. The six grievances were consolidated to be heard together from January 16 to 18, 2023, before the Federal Public Sector Labour Relations and Employment Board ("the Board").

[3] At a case management conference held on December 1, 2022, the parties' representatives proposed to make written submissions to the Board on a preliminary question, which they called "the limitations period issue", concerning the interpretation of s. 32 of the *Crown Liability and Proceedings Act* (R.S.C., 1985, c. C-50; "*CLPA*"). The parties agreed that the employer's collection of an overpayment is a proceeding that triggers s. 32 of the *CLPA*, but they disputed how the *CLPA* should apply to these grievances.

[4] The written submissions were made in relation to all six grievances on December 9, 16, and 20, 2022. The Board was not able to make a ruling on the preliminary issue in advance of the hearing.

[5] At the commencement of the hearing, the parties informed the Board that five of the six grievances had been settled. The hearing proceeded only on the sixth grievance, that of the grievor.

[6] On January 31, 2019, the grievor commenced a period of medical leave. At that time, she had enough paid sick leave to last until April 16, 2019. However, the NRC paid her until June 12, 2019. Nearly three years later, on March 10, 2022, the NRC emailed her, informing her that it would begin the collection of the overpayment,

which amounted to a total of $7673.95. She filed a grievance against the repayment, which was referred to adjudication before the Board.

[7] On the limitation period issue, the grievor argued that the employer's action to recover its overpayment took place entirely within the province of Ontario, and under the provisions of s. 32 of the *CLPA*, the provincial limitation period in Ontario should apply. The NRC's recovery action was commenced after the Ontario limitation period expired and therefore was untimely. She argued that her grievance should be allowed on that basis.

[8] The employer argued that it is a national employer, that the overpayment is owed to the Federal Crown, and that its action to recover the overpayment therefore took place "other than in a province". As such, under the provisions of the *CLPA*, a six-year limitation period would apply, and its recovery action was taken within that time limit.

[9] At the hearing, the parties did not make further submissions on the limitation period issue. The Board heard evidence and arguments related to three alternative arguments advanced by the grievor, each presented as an alternative to the one before it.

[10] The structure of this decision is as follows. I begin with a short summary of only those facts needed to analyze the limitation period issue. I then discuss s. 32 of the *CLPA* and outline the issue put before the Board by the parties. Next, I review the jurisprudence relevant to that issue. Finally, I analyze the parties' arguments and explain my reasons for decision.

[11] After considering the parties' arguments on the limitation period issue, and given the facts of this case, I find that the provincial limitation period in Ontario applies and allow the grievance.

[12] Given my decision on the limitation period issue, I do not need to consider the grievor's alternative arguments. However, in the final section, I briefly report on them.

[13] On February 3, 2023, Christopher Rootham, counsel for the grievor and her bargaining agent, was appointed as a full-time member of the Board, effective April 3, 2023. There has been and will be no discussion between this panel of the Board and him about this matter.

II. Facts about the grievance relevant to the limitation period issue

[14] This summary of the facts is restricted to those relevant to the limitation period issue.

[15] At the time these events began, the grievor was an employee of the NRC classified at the AS-3 group and level; in May 2022, her position was reclassified AS-4.

[16] After a cancer diagnosis in 2018, the grievor began a period of sick leave with pay on January 31, 2019.

[17] A discussion about the grievor's leave took place by email between her and a human resources advisor at the NRC on March 21 and 22, 2019. The advisor provided the grievor with a calculation of her leave entitlements on the understanding that her paid sick leave began on January 9, 2019; the grievor clarified that her leave began on January 31, 2019, and asked for a recalculation of her leave with the new dates.

[18] The grievor was copied on another email dated June 20, 2019, stating that she was on sick leave with pay from April 1 to 12, 2019. She was then provided with a letter dated June 27, 2019, which indicated that she proceeded on leave without pay effective April 17, 2019. The letter went on to provide her with information on disability benefits.

[19] Despite the above communications, the NRC continued to pay the grievor on a biweekly basis until June 12, 2019. She was aware that she was paid until that date but testified that as a result of confusion in the emails sent to her, as well as the effect of her illness and treatment, she did not realize at the time that her sick leave had run out and that she had been overpaid.

[20] In July 2019, the grievor's application for long-term disability benefits was approved, retroactive to May 2, 2019. She commenced a gradual return to work in February of 2020.

[21] The NRC did not take action to claim the recovery of the overpayment until March 10, 2022. The action it took was in the form of an email to the grievor, stating that the overpayment occurred between April 17, 2019, and June 12, 2019, and amounted to a total of $7673.95.

[22] The grievance was filed on March 15, 2022. It was referred to adjudication on June 17, 2022. After the grievance was filed, the NRC agreed to begin the recovery of the amount owed at the rate of $15 per pay period.

[23] It is not disputed that the NRC is a separate employer under the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), with employees across the country, and that it is headquartered in Ottawa, Ontario. It is also not disputed that the NRC's pay administration is done in Ontario, the author of the demand for the recovery of the overpayment worked in Ontario, and the grievor lived and worked in Ontario. While there was contradictory testimony at the hearing about when the grievor ought to have known that she had been overpaid, it is not disputed that the NRC did not make a claim to recover the overpayment until March 10, 2022.

III. The *CLPA* and the issue before the Board

[24] Section 32 of the *CLPA* reads as follows:

Provincial laws applicable	***Règles applicables***
32 *Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.*	***32*** *Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent lors des poursuites auxquelles l'État est partie pour tout fait générateur survenu dans la province. Lorsque ce dernier survient ailleurs que dans une province, la procédure se prescrit par six ans.*

[25] The parties agreed that s. 32 of the *CLPA* applies to this matter. Specifically, they agreed that the employer's action to collect the overpayment it made to the grievor was a proceeding by the Crown and was a "cause of action" against the grievor. They also agreed that no other Act of Parliament provides a limitation period that applies in this situation.

[26] Their dispute is whether the overpayment collection was a cause of action "arising otherwise than in a province". Their written submissions to the Board addressed this issue.

[27] The grievor's position was that the cause of action arose in a province and that provincial law should apply. In this case, that would be the limitation period set out in the Ontario *Limitations Act, 2002* (SO 2002, c. 24, Sched. B) at s. 4: 2 years. However, during the COVID-19 pandemic, the Ontario government passed regulations extending the limitation period by a total of 183 days. Therefore, if the Ontario limitation period applies in this matter, it would be 2 years plus 183 days. Accordingly, the grievor argued, the limitation period would have ended on December 13, 2021, and the action that the NRC took to recover the overpayment on March 10, 2022, was untimely.

[28] The employer's position was that the cause of action arose otherwise than in a province given that it is a national employer, the collective agreement is national in scope, and the recovery was undertaken to recover a debt owed to the Receiver General of Canada, which is a federal entity that does not exist within one province. As such, the six-year limitation period spelled out in s. 32 of the *CLPA* would apply, and therefore, the NRC's action to recover the overpayment it made to the grievor was timely.

IV. Jurisprudence on the application of s. 32 of the *CLPA*

[29] Most of the parties' arguments about the proper interpretation of s. 32 of the *CLPA* were made in relation to the case law they submitted. I find that the easiest way to present these arguments is to go case by case. I will not review every case referenced by the parties; instead, I will focus on those most germane to the issue before the Board.

[30] I note that some of the cases cited by the parties refer to s. 39 of the *Federal Courts Act* (R.S.C., 1985, c. F-7), which contains an almost identical provision to s. 32 of the *CLPA* except broken into two subsections, as follows:

39 (1) *Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings in the Federal*	***39 (1)*** *Sauf disposition contraire d'une autre loi, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent à toute instance devant la Cour*

Court of Appeal or the Federal Court in respect of any cause of action arising in that province.	*d'appel fédérale ou la Cour fédérale dont le fait générateur est survenu dans cette province.*
***(2)** A proceeding in the Federal Court of Appeal or the Federal Court in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.*	***(2)** Le délai de prescription est de six ans à compter du fait générateur lorsque celui-ci n'est pas survenu dans une province.*
…	[…]

[31] The grievor argued that considering their identical wording, cases interpreting s. 39 of the *Federal Courts Act* have been used to interpret s. 32 of the *CLPA* and vice versa, which the employer did not dispute.

[32] In this review of the case law, I will start with the 2003 ruling of the Supreme Court of Canada (SCC) in *Markevich v. Canada*, 2003 SCC 9. As a decision of the SCC, it is a leading case on the application of s. 32 and is referred to in many of the other cases cited by the parties.

[33] *Markevich* involved an action commenced in 1998 by what was then Revenue Canada (now the Canada Revenue Agency) with respect to taxes owed by a taxpayer in British Columbia for the years 1980 to 1985. The federal government argued that under the *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.); "*ITA*"), no statute of limitation existed. The SCC rejected that argument. It found that the collection of overdue taxes owed was a proceeding governed by s. 32 of the *CLPA*. It then considered whether that collection was a cause of action that arose in a province or otherwise than in a province. With respect to the collection of federal taxes, it concluded the latter as follows, at paragraphs 39 and 40:

> *39 Tax debts created under the* ITA *arise pursuant to federal legislation and create rights and duties between the federal Crown and residents of Canada or those who have earned income within Canada. The debt may arise from income earned in a combination of provinces or in a foreign jurisdiction. The debt is owed to the federal Crown, which is not located in any particular province and does not assume a provincial locale in its assessment of taxes. Consequently, on a plain reading of s. 32, the cause of action in this case arose "otherwise than in a province".*
>
> *40 A purposive reading of s. 32 supports this finding. If the cause of action were found to arise in a province, the limitation period*

> *applicable to the federal Crown's collection of tax debts could vary considerably depending upon the province in which the income was earned and its limitation periods. In addition to the administrative difficulties that potentially arise from having to determine the specific portions of tax debts that arise in different provinces, the differential application of limitation periods to Canadian taxpayers could impair the equitable collection of taxes. Disparities amongst provincial limitation periods could foreseeably lead to more stringent tax collection in some provinces and more lenient collection in others. The Court can only presume that in providing for a limitation period of six years to apply to proceedings in respect of a cause of action arising otherwise than in a province, Parliament intended for limitation provisions to apply uniformly throughout the country with regard to proceedings of the kind at issue in this appeal.*

[34] With respect to Revenue Canada's actions on behalf of the province of British Columbia to recover the taxpayer's provincial tax debt, the SCC determined that the provincial limitation period there should apply. That being said, I note that the limitation period in B.C. was also six years, so the distinction had no practical application to the facts of that case. The SCC found that the action to recover the unpaid taxes was taken well beyond the six-year mark provided for under s. 32 of the *CLPA* and under the B.C. statute, and so Revenue Canada was barred from collecting either debt.

[35] The employer argued that the SCC's reasoning in *Markevich* should apply to the overpayments at issue in this case. The federal public sector is composed of employees of the Federal Crown employed across the country. The overpayment was claimable pursuant to a collective agreement that applied across Canada. As with the *ITA*, the employer is collecting the overpayment under the procedure of a federal statute, namely, s. 155(3) of the *Financial Administration Act* (R.S.C., 1985, c. F-11; "*FAA*"); see *Gardner v. Canada (Border Services Agency)*, 2009 FC 1156 at paras. 38 to 41. That section of the *FAA* gives the Receiver General of Canada the authority to recover any overpayment made from the Consolidated Revenue Fund. Both of these are federal entities not located in any particular province.

[36] The employer also argued that the Board should apply the purposive approach adopted by the SCC in *Markevich*. If provincial limitation periods applied, federal employers would face administrative challenges when recovering overpayments that would vary from province to province. The result would not be equitable to hundreds

of thousands of federal public service employees because some jurisdictions have much shorter limitation periods.

[37] The grievor argued that tax collection is materially different from the collection of an overpayment from an employee. It also pointed out that Parliament responded to the SCC's decision in *Markevich* by amending the *ITA* in 2004 to create a 10-year limitation period for all tax debt collections across Canada, regardless of the province of the taxpayer; see s. 222(4)(b) of the *ITA* and *Canada v. Gibson*, 2005 FCA 180 at paras. 10 to 13.

[38] In other words, following the SCC's decision in *Markevich*, Parliament had the opportunity to address any concerns about the inequities of different provincial limitation periods under the *CLPA*. It decided to do so only with respect to the collection of tax debts, the grievor argued.

[39] The second case I will consider is *Dansou v. Canada Revenue Agency*, 2020 FPSLREB 100. This is the only decision of the Board (or its predecessors), cited by the parties or known to me, which directly addresses the application of s. 32 of the *CLPA* in the context of a grievance under the *Act*.

[40] In *Dansou*, the Canada Revenue Agency (CRA) had made an overpayment to the grievor when it converted her from one classification standard to another. The CRA took the position that the Board did not have jurisdiction to decide a grievance about an overpayment. However, the Board determined that it had jurisdiction (see paragraphs 23 to 27). The Board then addressed the application of s. 32 of the *CLPA*. The grievor in that case argued that the Quebec limitation period should apply, because that is where she lived and worked. The Board concluded that the overpayment arose other than in a province, given the location of the grievor in Quebec, "… the centralized nature of the pay system (the email that provided details for the recovery came from the compensation service located in Ottawa) and the general application of the collective agreement throughout Canada" (see paragraph 31).

[41] Then, after considering the SCC's decision in *Markevich*, the Board also stated the following, at paragraph 33:

> *[33] The reasoning in the* Markevich *ruling, which provided uniformity in the application of tax debts, seems to apply in this case as well, contrary to what the grievor argued. It would seem to*

> *be iniquitous and contrary to harmonious labour relations if the overpayment recovery limitation period varied from province to province. In the absence of a stipulation to the contrary in the collective agreement or in law (e.g., workers' compensation, which is expressly delegated to provincial authorities for federal employees), it seems preferable to me to adopt the reasoning in* Markevich *and provide a uniform approach for overpayment recovery.*

[42] In this case, the employer argued that the Board should follow the reasoning of the Board in *Dansou*. A uniform approach to the recovery of overpayments would be equitable and harmonious in the labour relations context of the federal government, it argued. Federal employees who have been overpaid are in debt to their employer, the Federal Crown. The Board should follow *Markevich* and *Dansou* and avoid the administrative complications that would result from following provincial limitation periods. Furthermore, using provincial limitation periods would result in a lottery approach to the collection of overpayments; those federal employees who reside in a "limitation paradise" would receive unjust enrichment in comparison to their colleagues, the employer argued.

[43] The grievor argued that *Dansou* could be distinguished on the facts. In *Dansou*, the grievor worked in Quebec, but the overpayment was claimed by CRA headquarters in Ottawa. Those facts mean the cause of action arose "otherwise than in a province", and the six-year limitation period in s. 32 of the *CLPA* should apply.

[44] For the reasons already noted, the grievor argued that the Board was wrong in *Dansou* to follow *Markevich* because tax collection is of a different nature than the collection of a salary overpayment. Perhaps the Board in *Dansou* was not aware that Parliament had amended the *ITA* to provide for a 10-year limitation period outside the confines of the *CLPA*, she argued.

[45] The grievor also argued that in *Dansou*, the Board erred in applying a "consequential analysis" to interpret the *CLPA* to arrive at its preferred interpretation. The Board may apply a consequential analysis to the interpretation of collective agreements to ensure that it reaches a "fair" result (see *Consolidated-Bathurst v. Mutual Boiler*, [1980] 1 S.C.R 888 at p. 901). However, a consequential analysis has no place in statutory interpretation, absent an ambiguity in the statute; see *R. v. Huggins*, 2010 ONCA 746 (CA) at para. 17, and *Bedwell v. McGill*, 2008 BCCA 526 at para. 31. In this case, there is no ambiguity in s. 32 of the *CLPA*, the grievor argued.

[46] The grievor further argued that the Board compounded its error by relying, at paragraph 33 of *Dansou*, upon "harmonious labour relations" as a principle for its interpretation of the *CLPA*. While this principle can arguably be relied on to interpret the *Act*, there is no authority for interpreting a statute of general application such as the *CLPA* on that basis. The *CLPA* is not about labour relations, and Parliament cannot be presumed to have had harmonious labour relations in mind when drafting that statute, the grievor argued.

[47] The grievor argued that the Board should not be guided by *Markevich* or *Dansou* but should engage in a factual analysis of the cause of action to determine whether the provincial or federal limitation period applies. This was the approach taken in a series of court decisions that the grievor relied on, to which I will now turn. She said that none of these cases appeared to have been presented to or considered by the Board in *Dansou*.

[48] Applying the logic of these cases to this one, the grievor argued that the Board should find that all elements of the cause of action arose in Ontario because she lived in Ontario, worked in Ontario, and was paid in Ontario, and the NRC is headquartered in Ontario, its compensation services are based in Ontario, and the author of the demand for repayment worked in Ontario.

[49] The grievor cited these four cases that engaged in a factual analysis of the cause of action in situations that did not involve an employment issue or overpayments:

- In *Brazeau v. Attorney General of Canada*, 2019 ONSC 1888 at para. 385 (upheld by Ontario Court of Appeal, in part, in 2020 ONCA 184), in a class action on behalf of mentally-ill inmates placed in administrative segregation, the cause of action was found to have occurred "otherwise than in a province" because although the Correctional Service of Canada's head office was in Ontario, inmates were moved from penitentiaries in one province to another, and their cases were reviewed by a national committee located in several provinces.
- In *Apotex Inc. v. Astrazeneca Canada Inc.*, 2017 FCA 9 at paras. 109 to 116 (leave to appeal to SCC refused, 2017 CanLII 32937), breaches of patent rights were found to have arisen in a province if both the inducement to infringe and

the act of infringement occurred in the same province but "otherwise than in a province" if the acts took place in separate provinces.

- A claim alleging a violation of rights under the *Canadian Charter of Rights and Freedoms (The Constitution Act*, 1982, Schedule B to the *Canada Act 1982* (UK), 1982, c 11) in the context of a criminal investigation was found to have arisen in a province even though the investigation was conducted by the Royal Canadian Mounted Police (RCMP) and included officers from other provinces; see *Pearson v. Canada*, 2006 FC 931 at para. 58 (leave to appeal to SCC refused, 2008 CanLII 48610).
- Similarly, an action for damages against the Federal Crown was found to have occurred in the province of Newfoundland and Labrador, given that the plaintiff conducted his fishing activities, applied for licenses, and was refused them by the local office of the federal Department of Fisheries and Oceans; see *Genge v. Canada*, [1995] F.C.J. No. 1086 (TD) (QL) at para. 7.

[50] The employer made no arguments with respect to those four cases.

[51] The grievor cited six cases in which courts have applied s. 32 of the *CLPA* in the manner she argued, in the context of overpayment or employment situations.

[52] The first three of these cases applied a provincial limitation period based on the facts behind the cause of action:

- In *Canada v. Parenteau*, 2014 FC 968, a former member of the Canadian Armed Forces who had taken education and training courses was asked to repay certain costs, and he later signed an agreement to defer the repayment of those costs. At paragraph 45, the Federal Court concluded that all elements of the cause of action arose in the province of Quebec and applied the three-year limitation period there (resulting in the recovery being allowed).
- In *Kyssa v. R.*, [1995] F.C.J. No. 1220, a federal public service employee brought an action claiming that he had been promised a reclassification. At paragraph 22, the Federal Court dismissed the claim on its merits, concluding that a reclassification had not been promised, but also determined that the applicable limitation period was provincial (Ontario) and that therefore, the claim was untimely.

- In *Rouleau v. Canada (Attorney General)*, 2016 QCCS 4887, the Canadian Armed Forces claimed that a retired member was overpaid some $50 000 in benefits. When he lost a grievance against the overpayment, the retired member launched a court action against the recovery. The Attorney General argued that the claim was out of time. The Quebec Superior Court, at paragraph 103, determined that the laws of Quebec applied, including a rule that effectively suspended the limitation period during the period in which the grievance process ran, and the action was found timely.

[53] These two of the six cases applied the six-year federal limitation period:

- The case of *Plumadore v. Canada (Attorney General)*, 2016 FC 553, involved an employee who had been excluded from his bargaining unit as a managerial employee and therefore was no longer entitled to overtime. However, he was not informed of the exclusion and therefore continued to claim and be paid overtime, amounting to more than $145 000 over a three-year period. The employee claimed a provincial limitation period should apply, and the employer's recovery action was out of time. However, the material facts upon which the recovery was claimed involved a contract made and amended in Ontario but breached in Quebec, and the Court concluded the cause of action arose in more than one province and applied the six-year federal limitation period (see paragraph 90). However, it should be noted that the Court actually allowed the employee's application on the basis of estoppel.
- In *Canada (Attorney General) v. Zucchiatti*, 2016 BCSC 1483, the federal government sought to recover some $27 000 in overpayments for services performed by a physician for Health Canada. The defendant brought a motion to dismiss the claim on the basis that it was commenced outside the two-year limitation period set out in B.C.'s *Limitations Act* (SBC 2012, c 13). The BC Supreme Court dismissed the motion based on the facts of the claim but went on to state that the six-year federal limitation period in the *CLPA* applied because the physician was based in B.C. but the deprivation of the Crown took place in Ottawa (see paragraph 18).

[54] The final of these six cases was a claim of alleged negligent misrepresentation made by some RCMP officers with respect to the transfer of pensionable service from another police force; see *MacKenzie v. Canada (Attorney General)*, 2017 FC 462

(unreported) at paras. 26 to 30 and 32. The Federal Court found that because all the named plaintiffs worked outside Ontario and the alleged misrepresentation was based in Ontario, the cause of action was "otherwise than in a province", and the six-year limitation period should apply. However, for any plaintiffs based in Ontario, the Court concluded the provincial limitation period would apply.

[55] The employer made arguments to distinguish several of those cases from this one before the Board, as follows:

- On *Parenteau*, the employer argued that the cause of action was a promissory note signed by the retired member, rather than an action of recovery that was rooted in a national collective agreement or the employer's rights under the *FAA*.
- On *Kyssa*, the employer argued that the matter was decided on the merits of the claim and that the Federal Court's comments about the limitation period were in *obiter* (i.e. an expression of opinion not essential to the decision).
- The employer argued that the Quebec Superior Court determined *Rouleau* based on detrimental reliance, rather than overpayments by the Crown.
- The employer argued that *Plumadore* is at odds with the treatment of debt owed to the Crown in *Markevich*. Furthermore, because the Court had already found that the employer did not have the grounds to recover the overtime overpayments it had made, the finding that the provincial limitation periods should apply was in *obiter*.

[56] In further support of its arguments in favour of a single, equitable federal limitation period, the employer cited the decision of the Ontario Superior Court of Justice in *Authorson v. Canada (Attorney General)*, 2003 CanLII 4120 (ON SC). This was a national class action brought on behalf of military veterans alleging a mismanagement of their pensions. The employer argued that the Court in *Authorson* decided not to quibble over the peculiarities of each member of the class action. It considered the bigger picture, noted that the members of the class were located across Canada, and noted that some might have resided in more than one province throughout their careers, the employer said. It relied on *Markevich* and sought to avoid the different provincial limitation Acts and "their diverse wordings"; see paragraphs 13 and 14. The Board should do the same in this case, the employer argued.

[57] The grievor argued that the Board should not rely on *Authorson* as it was overturned and set aside in its entirety on appeal to the Court of Appeal for Ontario; see 2007 ONCA 501 and 2007 ONCA 599. The Court of Appeal did not need to decide which limitation period applied and therefore did not endorse the federal limitation period. In any case, even the Superior Court decision does not assist the employer, the grievor argued, because the facts of the case involved a class with members all across Canada, and so the action crossed provincial borders. The grievor agreed that a cause of action that crosses provincial borders engages the federal limitation period.

V. Analysis and reasons

[58] In this grievance, the parties agreed that the first issue to be determined by the Board is the interpretation and application of s. 32 of the *CLPA*. If I determine that the cause of action took place in the province of Ontario, then the Ontario provincial limitation period would apply, in this case, 2 years plus 183 days. The grievance would be allowed on the basis that the NRC's claim to recover the overpayment was made outside that window. If I determine that the cause of action arose "otherwise than in a province", then the federal limitation period would apply: 6 years. I would then consider the grievor's alternative arguments to decide the grievance.

[59] I agree with the grievor's argument that s. 32 of the *CLPA* provides a presumption that provincial limitation periods apply to all proceedings by or against the Federal Crown, with an exception for proceedings that arise "otherwise than in a province". This is evident based on a plain reading of the section. This interpretation is assisted by the marginal note to s. 32, which reads "Provincial laws applicable"; see Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th edition, at 466 to 468. The employer did not dispute this argument.

[60] The grievor argued that "… a cause of action arises in a province if all the elements of the cause of action occur in that province …"; see *Apotex Inc.*, at para. 114. The exception occurs only in circumstances when the cause of action arises in more than one province, in a combination of provinces, or outside a province altogether (i.e., abroad); see *Vu v. Attorney General of Canada*, 2020 ONSC 2447 at paras. 65 and 66.

[61] The grievor argued that to determine where the cause of action arose in this case, the Board should look to the undisputed facts that she lived in Ontario, that she worked in Ontario, that the NRC is headquartered in Ontario, that its compensation

system is managed in Ontario, and that the author of the March 10, 2022, claim for repayment of the overpayment was also based in Ontario. All these facts should lead the Board to conclude that the cause of action arose entirely within the province of Ontario, and the provincial limitation period there should be applied.

[62] I find that the case law cited by the grievor supports the use of a factual analysis to determine whether the cause of action at issue occurred in a province or otherwise than in a province. See paragraph 27 of *Markevich*, in which the SCC defined "cause of action" as "… a set of facts that provides the basis for an action in court".

[63] In those cases involving the application of s. 39 the *Federal Courts Act*, a provincial limitation period was applied despite the involvement of federal institutions (*Pearson*, involving the RCMP, and *Genge*, involving the federal Department of Fisheries and Oceans). In *Brazeau*, a federal limitation period was applied because it was a class action involving inmates from across the country and a national committee located in several provinces. Nevertheless, the decision was rooted in the specific facts of the case.

[64] In *Apotex*, the factual analysis led to the application of the federal limitation period if the cause of action arose in more than one province, and the provincial limitation period if all elements of the cause of action were located in Ontario.

[65] Turning to those cases that involved either s. 32 of the *CLPA* or s. 39 of the *Federal Courts Act* in employment situations, the courts in *Parenteau*, *Kyssa*, and *Rouleau* all noted that the facts would lead to the application of a provincial limitation period, while the courts in *Plumadore* and *Zucchiatti* found that the federal limitation period should apply. Although some of these cases were decided on other grounds, and therefore, the findings about the cause of action were effectively made in *obiter* (*Kyssa*, *Plumadore*, and *Rouleau*), in each of these cases, the courts endorsed a fact-based analysis. Each of these employment situations involved the federal government as either the plaintiff or defendant.

[66] The 2017 decision of the Federal Court in *MacKenzie* is similar in outcome to *Apotex*. The Court in *MacKenzie* found that the federal limitation period should apply for those RCMP members based in provinces other than Ontario, while the provincial one would apply to any who worked in Ontario. Relying on *Pearson*, the Court said the following at paragraph 32:

> *[32] In this matter, only where all elements of the alleged RCMP negligent misrepresentation, including the making of the alleged statement and the receipt of the alleged statement, are demonstrated to have occurred in Ontario where the RCMP is headquartered, could it be said that the cause of action may have arisen in the same province.…*

[67] As noted, the employer did make some specific arguments as to why the Board ought not to rely on some of those six cases in this matter.

[68] However, the employer's position really boils down to these two major arguments:

- because the overpayment was made from a federal entity (the Consolidated Revenue Fund) and its repayment was owed to a federal entity (the Receiver General of Canada), so the cause of action arose otherwise than in a province; and
- following *Markevich* and *Dansou*, the Board should use a purposive approach and apply the federal limitation period so that all federal employees facing an overpayment repayment are treated uniformly, for reasons of equity, fairness, and consistency.

[69] On the first of these arguments, I agree that ultimately, the grievor's pay was made from the Consolidated Revenue Fund and that the overpayment is owed to the Receiver General of Canada. They are both federal entities, which, like the Federal Crown, are not located in a particular province. The employer argued that because these entities are federal in nature, the Board should find that the cause of action arose otherwise than in a province, and the federal limitation period should apply.

[70] However, the very existence and wording of s. 32 of the *CLPA* undermines this argument.

[71] The *CLPA* is an Act of the Canadian Parliament. It is titled, "An Act respecting the liability of the Crown and proceedings by or against the Crown", and in s. 2, "Crown" is defined as "Her Majesty in right of Canada". In other words, the *CLPA* governs actions by or against the Federal Crown, which is the Government of Canada. Section 32 must be read in this light.

[72] Despite the fact that the *CLPA* applies to the Federal Crown, s. 32 clearly provides that provincial limitation periods will apply when the cause of action arises within a province. For further authority on this point, see M. Morris & J. Brongers, *The 2019 Annotated Crown Liability and Proceedings Act* at pages 1 to 6, cited by the grievor.

[73] Had Parliament wanted the six-year time limit to apply to any or all actions involving the Federal Crown, or even any or all actions involving a debt owed to the Federal Crown, it could have very simply said so. Instead, s. 32 defaults to the prescription and limitation periods in force in a province, which apply to the Federal Crown "… in respect of any cause of action arising in that province …". If I were to accept the employer's argument, there is simply no work for those words to do. If all actions involving the federal government are otherwise than in a province, then s. 32 as worded would be entirely redundant.

[74] I believe that in this case, the employer is confusing the national nature of one of the **parties** with the **cause of action**. In the s. 32 *CLPA* and s. 39 *Federal Courts Act* cases examined earlier, it is the latter that the courts have looked at and applied. As noted, most of the cases cited by the grievor involved claims by or against the Federal Crown. None of the court cases cited automatically applied the federal limitation period because the Federal Crown was involved. Even in *Markevich*, the federal limitation period was applied not because Revenue Canada was a national institution or the amounts were owed to the Receiver General of Canada but because the cause of action involved the collection of federal income tax, which by its very nature involves income earned anywhere in Canada. The SCC specifically said this, at paragraph 40:

> *40 … The Court can only presume that in providing for a limitation period of six years to apply to proceedings in respect of a cause of action arising otherwise than in a province, Parliament intended for limitation provisions to apply uniformly throughout the country with regard to* ***proceedings of the kind at issue in this appeal****.*
>
> [Emphasis added]

[75] The proceeding at issue in *Markevich* was the collection of federal income taxes. The SCC's ruling established that the limitation period for a proceeding to collect unpaid taxes was 6 years. However, the effect of that ruling lasted only until a year later, when Parliament passed legislation to amend the *ITA* and provide for a limitation

period for tax collection of 10 years, thereby removing such proceedings from the purview of the *CLPA*.

[76] *Markevich* does not say that the federal limitation period in s. 32 applies to **all debts** involving the Federal Crown. At paragraph 1, the SCC stated that:

> *1 … The issue in this appeal is **narrow and easily stated**: that is, whether federal and provincial limitation periods when exceeded apply to the Crown's ability to exercise its statutory powers to collect **tax debts**.…*
>
> …
>
> [Emphasis added]

[77] I am not convinced that the SCC's ruling in *Markevich* mandates that the federal limitation period should apply to all debts owed to the Federal Crown. None of the numerous cases cited by the grievor that postdate *Markevich* apply it to that end (*Zucchiatti*, *Plumadore*, *MacKenzie*, *Parenteau*, or *Rouleau*). In fact, only one of those cases — *Plumadore* — even mentions *Markevich*, and for reasons already cited, the Court in that case concluded that the federal limitation period should apply based on the facts of the case, not because the debt was federal in nature.

[78] I have some sympathy for the employer's second argument, which is that a single federal limitation period should apply to overpayments across the federal public sector, for reasons of uniformity and fairness. Therefore, it is tempting to follow the Board at paragraph 33 of *Dansou* and conclude that a single common limitation period across the public service is in the interests of fairness and harmonious labour relations, regardless of the specific facts of how the cause of action arose. The outcome argued for by the grievor means that the facts of each overpayment claim would have to be assessed to determine whether a provincial limitation period applies or whether the six-year limitation period set out in s. 32 of the *CLPA* applies. It means that two employees, doing the same job, for the same employer, and facing the same overpayment situation could face different limitation periods, depending on the specific facts of their situations.

[79] However, of all the cases cited by the parties, other than *Dansou*, only *Authorson* applied the federal limitation period in the interests of avoiding the "diverse wordings" of the different provincial limitation acts. I do not find *Authorson* a strong authority for this conclusion, given that it involved a class of members located all

across Canada, some of whom, the Court noted, might have resided in more than one province. Arguably, therefore, it relied on the facts of the case, rather than a purposive interpretation of the *CLPA* in the interests of fairness. Further, as the grievor argued, the decision was set aside on appeal (and leave to appeal to the SCC was denied, 2008 CanLII 1388).

[80] The interest of fairness must be kept in perspective. I find that the employer's argument went too far when it said that the application of a provincial limitation period would in some cases result in a "limitation paradise". Granted, the Ontario limitation period of two years is quite a bit shorter than the federal limitation period of six years. But a two-year time frame for an employer to collect on its overpayment is hardly a paradise for the affected employee. It still allows the employer plenty of time to initiate the collection of its overpayment.

[81] Furthermore, a 2-year limitation period applicable to the employer can hardly be considered a paradise, considering that an employee has just 25 days to file a grievance that they have been underpaid. (In one case cited by the grievor, an arbitrator determined that an employer was subject to the same limitation period that applied to grievances; see *Montreal (Ville) v. Assoc. des pompiers de Montreal inc.*, 2007 CarswellQue 14529 at para. 26).

[82] However, the chief problem I have with this argument of the employer is that I am simply not convinced that it is open to the Board to decide, in the interest of fairness, that a federal limitation period should apply to all overpayment situations involving federal employees.

[83] I agree with the grievor that the Board's statement at paragraph 33 of *Dansou* was effectively made in *obiter*, as it had already found that the cause of action had originated in two provinces (see paragraph 31).

[84] I also agree with the grievor that s. 32 of the *CLPA* is not ambiguous. The authorities that she provided do not suggest that I can apply the principle of fairness to a task of statutory interpretation if the language of the statute is clear; see also *Bedwell*, at para. 31.

[85] The grievor also argued that there is no authority for interpreting a statute of general application such as the *CLPA* on the basis of harmonious labour relations, as

the Board did at paragraph 33 of *Dansou*. In my view, the preamble of the *Act* does place a high priority on the fostering of harmonious labour relations, and it can be used to help determine a purposive interpretation of the *Act*. Like *Dansou*, this is a grievance being determined under the *Act*, and it is not inappropriate for the Board to keep harmonious labour relations in mind when determining the matters that come before it.

[86] However, the *CLPA* sets out the provisions that govern proceedings by and against the Federal Crown, and s. 32 provides for provincial limitation periods as a default; see *Morris and Brongers*. There is no ambiguity in the *CLPA* that requires a purposive interpretation.

[87] As discussed, the structure and wording of s. 32 of the *CLPA* and the preponderance of the case law requires the Board to engage in a fact-based analysis of where the cause of action arose. I find myself in agreement with the Federal Court of Appeal's 2017 decision in *Apotex*, which found as follows at paragraph 113:

> *[113] While I understand and am sympathetic to the practicality of such an interpretation* [of a single six-year limitation period] *… where the law is set out in a statute, a court must articulate the law as it is defined in that statute. Here the statute requires an inquiry into the place where each cause of action arose.*

[88] If Parliament wished to establish a single limitation period for the recovery of all overpayments made to federal employees, for the purposes of uniformity and consistency, it could do so through legislation — the *Act*, the *FAA*, or other. Given the wording of s. 32 of the *CLPA*, therefore, such overpayments would be covered by another Act of Parliament and exempt from the application of s. 32, as is now the case for the *ITA*.

[89] In this matter, for the reasons outlined earlier in this decision, my inquiry into the place where each cause of action arose leads me to conclude that the overpayment recovery arose in the province of Ontario. Given that the Ontario limitation period was 2 years (plus 183 days due to the extensions enacted because of the COVID-19 pandemic) and that the overpayment situation ended on June 12, 2019, the Ontario limitation period expired effective December 13, 2021. As the claim to recover the overpayment was made only on March 10, 2022, it was untimely. As such, the grievance is allowed.

[90] After the grievance was filed, the employer began to recover the overpayment at the rate of $15 per pay period. The appropriate remedy is for the employer to cease the recovery and return to the grievor those amounts already deducted from her pay. I expect that the parties will be able to determine the correct amount without the Board's assistance, but will retain jurisdiction for a period of 90 days in the event they cannot.

VI. Alternative arguments

[91] As noted, at the hearing, the grievor made three alternative arguments, should the Board not agree with her position on the limitation period issue. Each was presented as an alternative to the one preceding it, meaning that if the grievance was allowed in accordance with that argument, the Board need not consider the next one in line.

[92] The first alternative argument was that of promissory estoppel. She argued that the employer's overpayment represented a promise, on which she relied, to her detriment. As such, she argued that the employer should be estopped from collecting the overpayment.

[93] The employer acknowledged that it made some mistakes with the grievor's pay. However, it argued that the requirements of promissory estoppel are not met in this case. It argued that the overpayment that it made did not represent a clear and unequivocal promise. It also argued that the grievor should have been aware of the overpayment well before the claim was made and that she should have taken steps not to rely on it.

[94] The second alternative argument was one of contributory fault: the overpayment and a delay informing the grievor of it were the employer's responsibility, in whole or in part. To the extent that the overpayment was the employer's fault, the employer could not recover it, or not all of it, she argued.

[95] The third and final alternative argument was that the grievor suffered mental distress as a result of the employer's errors in processing her shift from paid work to leave without pay and then to long-term disability, for which she should receive damages. She argued that if any repayment remained after the Board's consideration of

her other arguments, the amount of the damages should be set at a level required to offset the required repayment.

[96] The employer argued that the Board has never applied the principle of contributory fault to a grievance before it and that it should not do so with this case. It also argued that a case such as this one should not result in the payment of damages for mental distress, which should be reserved for severe cases involving terminations or discrimination. It asked the Board to dismiss the grievance at each of the alternative grounds argued by the grievor.

[97] As I have already allowed the grievance because the repayment claim was initiated after the Ontario limitation period had expired, I will not report the evidence presented on these alternative arguments; nor will I make a decision on the parties' submissions.

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

(The Order appears on the next page)

VII. Order

[99] The grievance is allowed.

[100] Payroll deductions for the overpayment are to cease, and the NRC is to reimburse the grievor the total sum of the deductions it made up to the point of cessation, all within 90 days of this decision.

[101] The Board will retain jurisdiction over the above remedy for a period of 90 days in the event the parties be unable to come to an agreement as to quantum.

June 1, 2023.

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