Federal Court  Cour fédérale

**Date: 20100706**

**Docket: T-832-09**

**Citation: 2010 FC 728**

**Ottawa, Ontario, July 6, 2010**

**PRESENT: The Honourable Mr. Justice Mandamin**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] The Attorney General of Canada applies for judicial review of an arbitral award issued April 22, 2009 by an arbitration board (the Board) convened pursuant to the *Public Service Labour Relations Act*, (2003, c. 22, s. 2) (the *PSLRA*) to arbitrate certain collective bargaining issues between the federal government and the public service.

[2] The Attorney General makes this application on behalf of the Treasury Board of Canada (the Applicant or the Employer) which had been engaged in labour negotiations with the Professional Institute of the Public Service of Canada (the Respondent or the

Institute). The Institute is the certified bargaining agent for the public service employees belonging to the Architecture, Engineering and Land Survey (NR) Group. After several negotiation sessions, the Institute submitted a request for arbitration. The Chair of the Public Service Labour Relations Board convened a three person arbitration board with Philip Chodos as chair.

[3] The Board conducted arbitration hearings on February 16th and 18th of 2009. In its April 22, 2009 decision, the Board decided the collective agreement should include Article 21.02 requiring the Employer reimburse NR Group employees' professional membership fees where eligibility for membership is required to qualify for a position but membership is not an ongoing requirement for employment in the position.

[4] In the interim, on March 12, 2009, the *Expenditure Restraint Act* S.C. 2009, c. 2, Part 10 (*ERA*) came into force. This legislation sets out the maximum salary increase and restricts "additional remuneration" for public servants.

[5] The Applicant submits the Board exceeded its authority in deciding the collective agreement should include a provision that requires payments contrary to the *ERA* and seeks an order setting aside that portion of the Board's arbitral award relating to reimbursement of membership fees as set out in Article 21.02.

[6] I have concluded that this application should be dismissed for the reasons that follow.

**Facts**

[7] The Board was established pursuant to subsection 137(1) of the *PSLRA* by the Chair of the Public Service Labour Relations Board to deal with items in dispute between the Employer and the Institute.

[8] The previous collective agreement between the Treasury Board and the NR Group provided:

> 21.01 The Employer shall reimburse an employee for payment of membership or registration fees to an organization or governing body where membership is a requirement for the continuation of the performance of the duties of the employee's position.

This provision is continued in the collective agreement between the employer and the NR Group and is not at issue.

[9] The Institute submitted for arbitration the reimbursement of membership fees where eligibility for membership is required to qualify for a position but membership is not an ongoing requirement for employment in the position.

[10] During arbitration hearings in February 2009, the Board was made aware of the impending *Budget Implementation Act*, 2009, Bill C-10, which contained both the *Public Sector Equitable Compensation Act* and, relevant to this proceeding, the *ERA*. In light of the imminent coming into law of Bill C-10, the Institute accepted certain pay proposals by the Employer and the proposed duration of the renewed collective agreement thereby

removing these matters from arbitration. Bill C-10 received Royal Assent on March 12, 2009.

[11] The *ERA* provides that no collective agreement may provide for additional remuneration for the restraint period. Additional remuneration was defined as: "any allowance, bonus, differential or premium or any payment to employees that is similar to any of those payments".

[12] The Board issued its arbitration decision on April 22, 2009. It determined, among other things, that:

> The collective agreement shall contain a new provision (Article 21.02), which shall read as follows:
>
> > 21.02 When the payment of such fees is not a requirement for the continuation of the performance of the duties of an employee's position, but eligibility for membership in an organization or governing body is a qualification specified in the Standards for Selection and Assessment for the NR Group, the Employer shall reimburse the employee upon receipt of proof of payment, for the employee's annual membership fees paid to one organization or governing body. Reimbursement covered by the Article does not include arrears of previous years' dues. (emphasis added)

**Issues**

[13] The issues in this judicial review application are several:

a. What is the applicable standard of review?

b. Is the Applicant precluded from advancing an argument that Article 21.02 on reimbursement of membership fees is prohibited by *ERA* since it did not raise this issue before the Board?

c. Did the Board commit a reviewable error in ordering the inclusion of Article 21.02 requiring reimbursement of membership fees in the collective agreement?

**Legislation**

[14] The Board was established by the Chair of the Public Service Labour Relations Board to determine matters in dispute between the Employer and the Institute in the course of collective bargaining. The applicable legislation is the *PSLRA* and the *ERA*, in particular:

*Public Service Labour Relations Act*, 2003, c. 22, s. 2.

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| 137. (1) On receiving a request for arbitration, the Chairperson must establish an arbitration board for arbitration of the matters in dispute. | 137. (1) Sur réception de la demande d'arbitrage, le président établit un conseil chargé de l'arbitrage du différend. |
| (2) The Chairperson may delay establishing an arbitration board until he or she is satisfied that the party making the request has bargained sufficiently and seriously with respect to the matters in dispute. | (2) Le président peut attendre, avant de donner suite à la demande d'arbitrage, d'être convaincu que le demandeur a négocié suffisamment et sérieusement en ce qui touche le différend visé par celle-ci. |
| … | … |
| 146. (1) Except as otherwise provided in this Part, the arbitration board may determine its own procedure, including the date, time and place of its proceedings, but both parties must be given a full opportunity to present evidence and make representations. | 146. (1) Sauf disposition contraire de la présente partie, le conseil d'arbitrage peut fixer ses modalités de fonctionnement, notamment la date, l'heure et le lieu de ses séances, en donnant toutefois aux parties l'occasion de présenter leurs éléments de preuve et leurs observations. |
| … | … |
| 148. In the conduct of its proceedings and in making an | 148. Dans la conduite de ses séances et dans la prise de ses décisions, le conseil |

arbitral award, the arbitration board must take into account the following factors, in addition to any other factors that it considers relevant:
(a) the necessity of attracting competent persons to, and retaining them in, the public service in order to meet the needs of Canadians;
(b) the necessity of offering compensation and other terms and conditions of employment in the public service that are comparable to those of employees in similar occupations in the private and public sectors, including any geographic, industrial or other variations that the arbitration board considers relevant;
(c) the need to maintain appropriate relationships with respect to compensation and other terms and conditions of employment as between different classification levels within an occupation and as between occupations in the public service;
(d) the need to establish compensation and other terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered; and
(e) the state of the Canadian economy and the Government of Canada's fiscal circumstances.

d'arbitrage prend en considération les facteurs qui, à son avis, sont pertinents et notamment :
a) la nécessité d'attirer au sein de la fonction publique des personnes ayant les compétences voulues et de les y maintenir afin de répondre aux besoins des Canadiens;
b) la nécessité d'offrir au sein de la fonction publique une rémunération et d'autres conditions d'emploi comparables à celles des personnes qui occupent des postes analogues dans les secteurs privé et public, notamment les différences d'ordre géographique, industriel et autre qu'il juge importantes;
c) la nécessité de maintenir des rapports convenables, quant à la rémunération et aux autres conditions d'emploi, entre les divers échelons au sein d'une même profession et entre les diverses professions au sein de la fonction publique;
d) la nécessité d'établir une rémunération et d'autres conditions d'emploi justes et raisonnables compte tenu des qualifications requises, du travail accompli, de la responsabilité assumée et de la nature des services rendus;
e) l'état de l'économie canadienne et la situation fiscale du gouvernement du Canada.

*Expenditure Restraint Act*, 2009, c. 2, s. 393.

| | |
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| 2. The following definitions apply in this Act. | 2. Les définitions qui suivent s'appliquent à la présente loi. |
| "additional remuneration" means any allowance, bonus, differential or premium or any payment to employees that is similar to any of those payments. | « rémunération additionnelle » Allocation, boni, prime ou autre paiement semblable à l'un ou l'autre de ceux-ci versés aux employés. |
| … | … |
| 6. Subject to the other provisions of this Act, the right to bargain collectively under the Canada Labour Code, the Parliamentary Employment and Staff Relations Act and the Public Service Labour Relations Act is continued. | 6. Sous réserve des autres dispositions de la présente loi, est maintenu le droit de négocier collectivement sous le régime du Code canadien du travail, de la Loi sur les relations de travail au Parlement et de la Loi sur les relations de travail dans la fonction publique. |
| … | … |
| 11. In the event of a conflict between a provision of this Act and a provision of any other Act of Parliament, including a provision in Part X of the Financial Administration Act, the provision of this Act prevails to the extent of the conflict, unless the other Act expressly declares that it or any of its provisions apply despite this Act. | 11. Les dispositions de la présente loi l'emportent sur les dispositions incompatibles de toute autre loi fédérale, y compris celles de la partie X de la Loi sur la gestion des finances publiques, sauf dérogation expresse des dispositions de l'autre loi. |
| … | … |
| 24. No collective agreement that is entered into, or arbitral award that is made, after the day on which this Act comes into force may provide, for any period that begins during the restraint period, for any increase to the amount or rate of any additional remuneration that applied to the employees governed by the collective agreement or the arbitral | 24. Aucune convention collective conclue — ou décision arbitrale rendue — après la date d'entrée en vigueur de la présente loi ne peut, à l'égard de toute période commençant au cours de la période de contrôle, prévoir une augmentation des montants ou des taux de toute rémunération additionnelle applicable, avant la prise d'effet de la convention ou de la décision, aux employés régis |

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| award immediately before the collective agreement, or the arbitral award, as the case may be, becomes effective.<br>…<br>27. No collective agreement that is entered into, or arbitral award that is made, after the day on which this Act comes into force may provide, for any period that begins during the restraint period, for any additional remuneration that is new in relation to the additional remuneration that applied to the employees governed by the collective agreement or the arbitral award immediately before the collective agreement or the arbitral award, as the case may be, becomes effective.<br>…<br>56. Any provision of any collective agreement that is entered into — or of any arbitral award that is made, or of any terms and conditions of employment that are established — after the day on which this Act comes into force that is inconsistent with this Act is of no effect. | par celle-ci.<br>…<br>27. Aucune convention collective conclue — ou décision arbitrale rendue — après la date d'entrée en vigueur de la présente loi ne peut, à l'égard de toute période commençant au cours de la période de contrôle, prévoir de rémunération additionnelle qui est nouvelle par rapport à celle applicable, avant la prise d'effet de la convention ou de la décision, aux employés régis par celle-ci.<br>…<br>56. Est inopérante toute disposition d'une convention collective conclue — ou d'une décision arbitrale rendue ou de conditions d'emploi établies — après l'entrée en vigueur de la présente loi et incompatible avec celle-ci. |

**Standard of Review**

[15] Both Applicant and Respondent rely on the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*).

[16] The Applicant submits the appropriate standard of review in this case is correctness.

[17] In its standard of review analysis, the Applicant concedes an arbitration board is specialized in settling labour disputes and fashioning arbitral awards and their findings and remedial orders should be accorded deference. However, the Applicant also submits the purpose of an arbitration board is to assist the parties in concluding collective agreements and only decide outstanding issues. It argues this limits the board's specialized role, function and expertise.

[18] The Applicant submits the substantive issue raised requires an analysis and interpretation of the *ERA*, a matter in which the Board has no expertise. Since the question before the Board deals with legislation outside the Board's normal area of expertise, it requires review on a standard of correctness.

[19] The Respondent argues the proper standard of review in this case is reasonableness.

[20] The Respondent points to the Board's decision as one made by a highly specialized tribunal in the area of labour relations and collective bargaining. It submits that where an arbitration board interprets its own or related statutes a deferential standard of reasonableness is appropriate.

[21] In *Dunsmuir*, the Supreme Court takes a robust view of jurisdiction. True jurisdiction questions arise "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal

must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction." *Dunsmuir,* para. 59.

[22] It must be remembered that *Dunsmuir* was a case concerning an arbitrator decision under the New Brunswick *Public Service Labour Relations Act* R.S. N.B. 1973 c. P-25. Applying a standard of review analysis, the Supreme Court considered as relevant factors the presence of a privative clause, the nature of the regime and legislative purpose, the nature of the legal question at issue, and the expertise of the tribunal. The arbitrator's decision was protected by a privative clause; he was presumed to have expertise in interpreting the enabling statute; and he had to decide a question of law but not one of central importance to the legal system. The Supreme Court concluded that decision should be reviewed on the standard of reasonableness. It went on to hold the adjudicator's interpretation of the relevant statutory provisions was unreasonable.

[23] In *Public Service Alliance of Canada v. Canadian Federal Pilots Association and Attorney General of Canada,* 2009 FCA 223 at paras. 30 – 34. (*PSA*), Mr. Justice Evans for the majority of the Federal Court of Appeal noted that a tribunal may exceed its jurisdiction in one of two ways. First, a tribunal will act beyond its jurisdiction if it errs on a question of law where the standard of review is correctness. Second, a tribunal may err in its interpretation of a "mere" question of law where the standard of review is reasonableness.

[24] Justice Evans was of the view that a standard of review analysis was required when a tribunal is said to have misinterpreted a provision of its enabling statute.

[25] The Board is an ad hoc tribunal appointed by the Chair of the PSLRB to arbitrate issues concerning collective bargaining between Treasury Board and the Institute. The intent of Part 1 of the *PSLRA* and the provisions concerning the Board's function is resolution of collective bargaining issues in order to achieve collective agreement. As the Supreme Court in *Dunsmuir* stated: "The *PSLRA* establishes a time- and cost-effective method of resolving employment disputes." para. 69 Although the Supreme Court was considering the role of an arbitrator under New Brunswick legislation, the same may be said of the federal *PSLRA* in respect of labour arbitration boards.

[26] While there is no express privative clause for section 137(1) *PSLRA* arbitration boards, the Board is a specialized tribunal with expertise in labour relations and collective bargaining. The parties raised no issues with respect to the Board's expertise. Certainly, the *PSLRA* mandates a role supporting the presumption it possesses such expertise. Therefore, its decisions would be due a degree of deference on review.

[27] Justice Iacobucci held that an administrative tribunal could consider statutes external to its governing legislation. He wrote in *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157 (CBC) at para. 48:

> As a general rule, I accept the proposition that curial deference need not be shown to an administrative tribunal in its interpretation of a general public statute other than its constituting

> legislation, although I would leave open the possibility that, in cases where the external statute is linked to the tribunal's mandate and is frequently encountered by it, a measure of deference may be appropriate. However, this does not mean that every time an administrative tribunal encounters an external statute in the course of its determination, the decision as a whole becomes open to review on a standard of correctness. If that were the case, it would substantially expand the scope of reviewability of administrative decisions, and unjustifiably so. Moreover, it should be noted that the privative clause did not incorporate the error of law grounds, s. 18.1(4)(c) of the Federal Court Act, R.S.C., 1985, c. F-7 (as amended by S.C. 1990, c. 8, s. 5). This tends to indicate that some level of deference should be provided. (emphasis added)

[28] A labour arbitration board's interpretation of outside legislation will warrant deference "where the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result", *Toronto Board of Education v. Ontario Secondary School Teachers' Federation, District 15*, [1997] 1 S.C.R. 487. This direction has application in this proceeding.

[29] The newly enacted *ERA* is not the Board's home statute but deals extensively with collective bargaining matters. The impending legislation was the subject of submissions with respect to other matters before the Board. While the *ERA* is recently enacted and would not yet be frequently encountered, the legislation is replete with references to 'arbitral awards' 'collective agreements', 'rates of pay', and 'additional remuneration', all of which is the subject matter of the Board's labour relations knowledge and expertise.

[30] In *Attorney-General of Canada v. The Professional Institute of the Public Service of Canada*, 2010 FC 578 (*PIPSC*), Madam Justice Tremblay-Lamer held that a decision

by an arbitration board not to consider *ERA* required review on a standard of correctness. Here, the issues are materially different. In the former, the arbitration board refused to consider submissions concerning *ERA's* applicability. In the latter, while no objection to reimbursement as eventually expressed in Article 21.02 had been raised, there is no evidence the Board refused to consider the *ERA* when considering Article 21.02.

[31] The Board was clearly aware of Bill C-10. The subject came up in the course of the February hearings and the legislation came into effect the following month. The Board made express reference to being advised of the imminent coming into law of Bill C-10 and, given its presumed knowledge and expertise in collective bargaining matters, the Board would be aware of the included *ERA* legislation once it was proclaimed.

[32] In *PSA*, Justice Evans stated:

> To conclude, in order to establish that the Board has exceeded its jurisdiction by misinterpreting a provision in its enabling statute, which neither raises a question of law of central importance to the legal system nor demarcates its authority vis-à-vis another tribunal, an applicant must demonstrate that the Board's interpretation was unreasonable. para. 50

[33] The question before the Board and now before the Court is whether Article 21.02 offends the provisions of the *ERA* as being "additional remuneration" which is prohibited. This is a question of law which turns on interpretation of the language in the legislation. The nature of the legal question is not one of centralized importance to the legal system.

[34] Further, the Board had before it the issue of reimbursement in question here. That issue was not removed by agreement between the parties before hand nor does the *ERA* assign such questions to another tribunal. It was left to the Board to consider the definition of "additional remuneration" and sections 24 and 27 in the *ERA* as it impacts on the reimbursement issue in question.

[35] I conclude the standard of review is reasonableness. Accordingly, the question is whether the Board's decision to include Article 21.02 as an arbitral award was unreasonable.

**Analysis**

*Is the Applicant precluded from advancing an argument that the provision on reimbursement of registration fees since it did not raise the issue before the Board?*

[36] This application for judicial review raises a unique issue. The Applicant did not take issue with respect to Article 21.02 reimbursement of membership fees in its submissions before the Board but seeks to raise them now.

[37] Parties before a tribunal cannot hold on to or discover new submissions to argue on judicial review. In the accepted course of analysis, this Court must first decide if there is a legitimate challenge to the Board's jurisdiction to decide what it did. Otherwise, the arguments raised by the Applicant, which may be valid, cannot be raised at this point because they were not raised before the Board, *Toussaint v. Canada (Labour Relations Board)*, [1993] F.C.J. No. 616 (F.C.A.) at page 399.

[38] The Applicant submits this Court can review this decision if the Board acted outside its jurisdiction. *Crevier v. A.G. (Quebec) et al*., [1981] 2 S.C.R. 220 at page 236; *Shubenacadie*, para. 41.

[39] The true difficulty here is that at the time of submissions to the Board, Bill C-10 had not yet been passed into law. The parties and the Board were aware the legislation was imminent. This is not the same as being in effect. The other *ERA* matters at issue before the Board were dealt with by agreement between the parties and removed from the Board's purview. The parties had not agreed on the proposal for reimbursement of membership fees and that issue remained before the Board.

[40] Since the *ERA* was not yet in force, the Applicant could not make submissions on the *ERA*'s application in the February 2009 hearing in respect of the Article 21.02 proposal for reimbursement of membership fees. At best such submissions would be merely anticipatory.

[41] The Board issued its arbitration award on April 22, 2009 after the *ERA* came into effect. The legislation, on its face, has application to the collective agreement under arbitration. The parties could not now expressly contract out or waive the application of the legislation once the ERA was proclaimed.

[42] In this unique circumstance, I find that the Applicant may raise an issue about the applicability of the *ERA* to the arbitral award requiring reimbursement of membership

fees set out in Article 21.02. The Applicant is limited to the issue of the application and effect of the *ERA* on Article 21.02 since the Applicant did not object to the provision on economic or other grounds before the Board.

*Did the Board commit a reviewable error in ordering the inclusion of Article 21.02 requiring reimbursement of membership fees in the collective agreement?*

[43] The Applicant had submitted that the term "additional remuneration" was not merely limited to allowances, bonuses, differentials or premiums – but any other payment that is similar to those. The benefit provided for by Article 21.02 was a new benefit that was not found in the previous collective agreement.

[44] The Applicant submits that the question is whether or not the benefit accorded by Article 21.02 was "additional remuneration" as defined in the *ERA.* The definition of "additional remuneration" includes the words "any payment to employees that is similar to any of those payments". The Applicant submits payment of Article 21.02 membership fees were not previously required and must be considered a new payment that falls within the definition of a bonus of payment similar to a bonus.

[45] Further, the Applicant submits the thrust of the *ERA* legislation was to prohibit additional public service expenditures and the membership fees constitute additional public service funding. The Applicant submits that the reimbursement of membership fees in Article 21.02 is a payment 'similar to a bonus', as it represents a payment made in addition to the employee's salary or wages." The Article applies to those employees for whom the payment of membership fees is not a requirement of employment, and thus

"confer[s] a benefit or advantage to the employee." Thus considering a reimbursement of such a payment as "additional remuneration" is consistent with the intent of Parliament and the legislative scheme of the *ERA*.

[46] The Applicant refers to law dictionaries which define bonus as:

> The Dictionary of Canadian Law, 2nd ed.
>
> 1. Gratuity; premium
> 2. 2. "…[M]ay be a mere gift or gratuity as a gesture of goodwill, and not enforceable. Or it may be something which an employee is entitled to on the happening of a condition precedent and is enforceable when the condition is fulfilled. But in both cases is it something in addition to or in excess of what has been ordinarily received.
>
> Black's Law Dictionary, 8th ed.
>
> 1. A premium in addition to what is due or expected<year-en-end bonus>. In the employment context, workers' bonuses are not a gift or gratuity; they are paid for services or on consideration in addition to or in excess of the compensation that would ordinarily be given…"(emphasis added)

[47] The difficulty with resorting to law dictionaries is that they often take their definitions from the context of jurisprudence. The quote from the Dictionary of Canadian Law is taken from *Minister of National Revenue v. Great Western Garment Co.*, [1948] 1 D.L.R. 225 at 233. The word 'bonus' in the Wartime Salaries Order was undefined and the presiding judge consulted both the Webster's International Dictionary and the Oxford Concise Dictionary before referring to case law for the proposition that a bonus was an "addition to wages" which he found to be applicable. The definition in Blacks Law

Dictionary 8th ed. relies on American case law which is somewhat far afield. Legal dictionaries are helpful when drawn from cases more on point.

[48] In *PIPSC* Justice Tremblay-Lamer undertook an analysis of whether the membership fees fell within the definition of "additional remuneration" in *ERA.* She stated:

> [22] The definition of "additional remuneration" in that statute is not closed and extends not only to specific categories of payments but also to payments "*similar to*" (my emphasis) these categories. Both the word "similar" and the *ejusdem generis* maxim of interpretation suggest that to constitute "additional remuneration" within the meaning of section 2 of the *ERA*, a payment "must be of the same general nature or character as" those enumerated in that provision (*Gurniak v. Nordquist*, 2003 SCC 59, [2003] 2 S.C.R. 652 at par. 31 (emphasis in the original); Ruth Sullivan, *Sullivan on the construction of* 10 *Statutes*, 5th ed. (Markham, Ont.: LexisNexis, 2008) at 231). In my opinion, the payment stipulated by the membership fees article is not of the same general nature or character as an allowance, bonus, differential or premium.
>
> [23] It is not similar to an "allowance." The *Canadian Oxford Dictionary* defines this term broadly, as "an amount or sum given to a person, esp[ecially] for a stated purpose." However, it's well known legal meaning is somewhat narrower; an allowance is a payment the amount of which is arbitrarily predetermined and for the use of which the recipient need not account (*Canada (Attorney General) v. MacDonald* (1994), 94 D.T.C. 6262 (F.C.A.)). To receive a payment under the Registration Fee Article, an employee does in fact need to account for the registration fees paid, and cannot receive more than what he or she has paid out.
>
> [24] The payment pursuant to the Registration Fee Article is also not similar to a "bonus," which, according to the *Canadian Oxford Dictionary*, is either "an unsought or unexpected extra benefit," or "an amount of money given in addition to normal pay, in recognition of exceptional performance or as a supplement at Christmas etc." The first definition is not relevant in the context of this case: a benefit stipulated in a collective agreement is obviously not "unsought or unexpected." The second definition is also

> inapplicable here. The payment by the employer of an employee's professional membership fees has nothing to do with the employee's performance (all the more so when the professional membership is not seen as necessary to the employer), and yet is not a mere gift such as a "Christmas bonus."
>
> [25] Further, the payment pursuant to the Registration Fees Article is in no way similar to a differential, which the *Canadian Oxford Dictionary* defines as "a difference in wage or salary between industries or categories of employees in the same industry."
>
> [26] Nor is it, finally, similar to a premium, which is, according to the same source, "a sum added to … wages, … a bonus" or "a reward or prize." As explained above, the Membership fees article does not create a bonus; nor does constitute a reward for anything.
>
> [27] The payment pursuant to the Registration Fee Article is, rather, a reimbursement. A reimbursement is different from the classes of payment discussed above, which all represent additions to an employee's basic pay. It is, according to the *Canadian Oxford Dictionary*, a "repay[ment]" of expenses incurred by a person. The fact that the Membership fees article uses the terms "reimbursement" and "reimburse," while not determinative, suggests that an employee will have to demonstrate that he or she has in fact paid professional fees before being compensated for such a payment; and compensation is a repayment of the amount paid out by the employee on account of such fees, albeit it only up to a stipulated maximum. A reimbursement is a well-known and distinct type of payment, and had Parliament intended it to be covered by the Membership fees article, it could easily have said so. It did not.

[49] Justice Tremblay-Lamer succinctly addressed the Applicant's submissions based on the law dictionary definitions, she stated at para. 24, which I repeat:

> The first definition is not relevant in the context of this case: a benefit stipulated in a collective agreement is obviously not "unsought or unexpected." The second definition is also inapplicable here. The payment by the employer of an employee's professional membership fees has nothing to do with the employee's performance (all the more so when the professional

> membership is not seen as necessary to the employer), and yet is not a mere gift such as a "Christmas bonus."

[50] Justice Tremblay-Lamer concluded the Registration Fee Article in that case did not offend the *ERA* prohibitions against "additional remuneration"

[51] The Applicant submits that Justice Tremblay-Lamer's reasons are not binding on the basis that neither *stare decisis*, nor judicial comity apply given the wording of the arbitral awards are different. I agree. Nevertheless I find Justice Tremblay-Lamer's reasoning persuasive and I adopt Justice Tremblay-Lamer's reasoning as to the meaning of the term "additional remuneration" having regard to the following additional considerations.

[52] The modern principle of statutory interpretation is that "the proper approach to interpretation … is to read the words in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament" E. A. Driedger, Construction of Statutes (2nd e. 1983).

[53] "Remunerate" is defined in the *Canadian Oxford Dictionary* (2nd ed.). The essence of the definition is payment for services or work. The definition is:

> 1. reward; pay for services rendered. 2 serve as or provide recompense for (toil etc.) or to (a person).

In this respect, remuneration relates to the pay to employees in the NR Group. The "additional remuneration" relates to that public service employee pay as well as Justice Tremblay-Lamer's reasons.

[54] The *ERA* expressly provides:

> 6. Subject to the other provisions of this Act, the right to bargain collectively under the *Canada Labour Code*, the *Parliamentary Employment and Staff Relations Act*, or the *Public Service Labour Relations Act* is continued.
>
> (emphasis added)

[55] The Board is required by s. 148 of the PSLRA to consider, among other factors:

> 148. In the conduct of its proceedings and in making an arbitral award, the arbitration board must take into account the following factors, in addition to any other factors that it considers relevant:
>
> (a) the necessity of attracting competent persons to, and retaining them in, the public service in order to meet the needs of Canadians;
>
> …
>
> (d) the need to establish compensation and other terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered; and
>
> (e) the state of the Canadian economy and the Government of Canada's fiscal circumstances.
>
> (emphasis added)

[56] In response to questions put forth at the hearing of this matter, I was advised by the Respondent that the qualifications requirement referred to in Article 21.02 comes into play when an individual applies within the NR Group for a position of employment, transfers to a lateral position, relocates to another geographical location, or seeks promotion. The Applicant did not take issue with this advice.

[57] The thrust of the *ERA* legislation is concerned with rates of pay and "additional remuneration". It does not go so far as to address "conditions of employment … in relation to the qualifications required". If that was so, Parliament would have articulated *ERA*'s extension into the realm of the *PSLRA* by express statutory language.

[58] Article 21.02 is concerned with reimbursement of membership fees as they relate to the qualifications standard. It is not concerned with remuneration. In my view, the term and expanded definition of "additional remuneration" does not go so far as to prohibit reimbursement relating to qualification standards that the Board is required to consider under the *PSLRA*.

[59] If there is any ambiguity in the meaning of the phrase "additional remuneration", I would adopt Justice Hansen's observation in *Professional Institute of the Public Service of Canada v. Canada (Treasury Board)*, [1984] F.C. J. No. 523 (F.C.T.D) where she stated:

> In addition, I think this is a case where, if a statute is ambiguous, it should be interpreted in favour of the individuals governed thereby. p. 8

[60] Finally, while the Board did not give reasons for including Article 21.02, I do not find it is required to do so since no objection was raised at the hearing. To provide reasons for each finding would undermine the arbitration process' mandated goal of being "time- and cost-effective method of resolving employment disputes."

[61] Given the foregoing, I conclude that the Board's inclusion of Article 21.02 as an arbitral award concerning reimbursement of membership fees is reasonable.

**Conclusion**

[62] The application for judicial review is dismissed.

[63] Costs are awarded to the Respondent.

## JUDGMENT

**THIS COURT ORDERS AND ADJUDGES that:**

1. This application for judicial review is dismissed.

2. Costs are awarded to the Respondent.

"Leonard S. Mandamin"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-832-09 |
| **STYLE OF CAUSE:** | ATTORNEY GENERAL OF CANADA and THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | JANUARY 26, 2010 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | MANDAMIN, J. |
| **DATED:** | JULY 6, 2010 |

**APPEARANCES:**

| | |
|---|---|
| Caroline Engmann | FOR THE APPLICANT |
| Isabelle Roy | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| John H. Sims, Q.C.<br>Deputy Attorney General of Canada<br>Ottawa, Ontario | APPLICANT |
| Geoffrey Grenville-Wood<br>Ottawa, ON | FOR THE RESPONDENT |