Federal Court  Cour fédérale

Date: 20131125

Docket: T-1785-12

Citation: 2013 FC 1183

Ottawa, Ontario, November 25, 2013

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

KLAUSE RIDKE

Applicant

and

COULSON AIRCRANE LTD.

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an action commenced by the Applicant under Part III of the *Canada Labour Code*, RSC 1985, c L-2 (Code) for judicial review of the decision dated 28 August 2012 (Decision) of a Human Resources and Skills Development Canada (HRSDC) inspector (Inspector) to inspect and order payment of overtime to the Applicant for a retroactive period limited to 12 months.

BACKGROUND

[2] The Applicant has been an employee of the Respondent since 1 June 2001. He is currently in receipt of long-term disability benefits and unable to work. The Respondent is a British Columbia company engaged in helicopter logging and aviation-based fire-fighting throughout North America.

[3] During his employment with the Respondent, the Applicant typically worked long hours: 60-100 hours per week while dispatched to remote locations. In many instances, the Respondent paid the Applicant at a regular rate for hours which constituted "overtime" as that term is defined in the Code. The Applicant has provided records of unpaid overtime dating back to 2008. However, the Applicant did not keep records for each and every pay period, and does not have records of many instances where he worked overtime hours.

[4] On 6 February 2012, the Applicant made a complaint to HRSDC claiming payment for unpaid overtime under Part III of the Code. The Applicant submitted payroll records showing unpaid overtime for various periods in 2008, 2009, 2010 and 2011, and requested that HRSDC investigate and order payment for a retroactive period of 72 months.

[5] On 3 May 2012, the Respondent wrote to the Inspector objecting to the complaint and alleging that the Applicant was excluded from certain provisions of the Code by the nature of his employment. On 31 May 2012, the Inspector corresponded with the Respondent, informing it that this was not the case. At this time, the Inspector also requested the Respondent's payroll records for 6 February 2011 – 6 February 2012. The records were again requested on 20 June 2012.

[6] On 13 June 2012, the Respondent provided records to the Inspector. These included records of payments made to the Applicant for "General Holidays" (as that term is defined in the Code). These records were supplemented at the Inspector's request on 31 July 2012.

[7] On 11 July 2012, the Applicant wrote to the Inspector requesting that the investigation be made retroactive for a period of 36 or 72 months. On 16 July 2012, the Inspector wrote to the Applicant stating that retroactivity of the investigation would be limited to 12 months pursuant to HRSDC policy. On 1 August 2012, the Inspector wrote to the Respondent informing it that she had made a "preliminary determination" that $11,747.45 was owed to the Applicant for overtime and vacation pay for the period of 26 July 2010 to 31 July 2011. The Respondent was given 15 days to make payment to the Applicant.

[8] On 14 August 2012, the Applicant wrote the Inspector requesting copies of the records provided by the Respondent, alleging that overtime had been calculated incorrectly for General Holidays in the preliminary determination, and again requesting that retroactivity of the investigation of the complaint be extended.

[9] On 23 August 2012, the Respondent wrote the Inspector objecting to any review of additional records.

[10] On 28 August 2012, the Inspector responded to the Applicant with her formal refusal to extend the investigation of the complaint beyond 12 months. This is the Decision under review in this application.

[11] As the Respondent voluntarily agreed to pay the amount from the preliminary determination, no "Payment Order" was issued. The only internal avenue of appeal under the Code is under section 251.11, which requires that a Payment Order have been issued. On 10 September 2012, the Applicant accepted payment from the Respondent of the amount determined by the Inspector in the preliminary determination, but on a without prejudice basis with respect to this application for judicial review. On 25 September 2012, the Applicant filed this application.

DECISION UNDER REVIEW

[12] The Decision was based upon an HRSDC Complaint Handling Directive (Policy), which is attached as Exhibit P to the Affidavit of the Applicant. The Inspector found that retroactivity for a 72 or 36 month period was "not warranted" because:

- The Respondent was not aware that it was not in compliance with the Code;
- The Respondent received no counselling with respect to the Code;
- The Respondent did not have a history of non-compliance with the Code;
- The Applicant accepted the terms/practice of employment during this period without taking any action to remedy it;
- The Respondent has cooperated with the investigation;

- The Respondent is in agreement to issue a voluntary payment of the preliminary determination.

[13] Subsection 7.7(k) of the Policy directs inspectors to limit the period of retroactivity of investigations to 12 months from the date of non-compliance. Subsection 7.7(l) states that investigations may be extended to an additional period of retroactivity based on a review of the "scope of the infraction(s), the length of time that the identified underpayment(s) has(ve) been occurring, and the compliance history of the employer." Subsection 7.7(m) says that retroactivity is not to extend past 36 months "unless clear documenting evidence is available to support the claim and approval has been obtained from regional management."

[14] The Inspector found that, based on the evidence presented by the parties, the Applicant's request for wages and other amounts owing for either a 72 month period or 36 month period was not warranted.

STATUTORY PROVISIONS

[15] The following provisions of the Code are applicable in this proceeding:

Definitions	**Définitions**
166. In this Part,	166. Les définitions qui suivent s'appliquent à la présente partie.
[…]	[…]
"standard hours of work"	« durée normale du travail »
"standard hours of work" means the hours of work	« durée normale du travail » La durée de travail fixée sous le

established pursuant to section 169 or 170 or in any regulations made pursuant to section 175;

régime des articles 169 ou 170, ou par les règlements d'application de l'article 175.

[…]

[…]

"overtime"

« heures supplémentaires »

"overtime" means hours of work in excess of standard hours of work;

Heures de travail effectuées au-delà de la durée normale du travail.

[…]

[…]

"general holiday"

« jours fériés »

"general holiday" means New Year's Day, Good Friday, Victoria Day, Canada Day, Labour Day, Thanksgiving Day, Remembrance Day, Christmas Day and Boxing Day and includes any day substituted for any such holiday pursuant to section 195;

« jours fériés » Le 1er janvier, le vendredi saint, la fête de Victoria, la fête du Canada, la fête du Travail, le jour de l'Action de grâces, le jour du Souvenir, le jour de Noël et le lendemain de Noël; s'entend également de tout jour de substitution fixé dans le cadre de l'article 195.

[…]

[…]

Saving more favourable benefits

Sauvegarde des dispositions plus favorables

168. (1) This Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement, but nothing in this Part shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part.

168. (1) La présente partie, règlements d'application compris, l'emporte sur les règles de droit, usages, contrats ou arrangements incompatibles mais n'a pas pour effet de porter atteinte aux droits ou avantages acquis par un employé sous leur régime et plus favorables que ceux que lui accorde la présente partie.

[…]

Standard hours of work

169. (1) Except as otherwise provided by or under this Division

(a) the standard hours of work of an employee shall not exceed eight hours in a day and forty hours in a week; and

(b) no employer shall cause or permit an employee to work longer hours than eight hours in any day or forty hours in any week.

[…]

Weekly or monthly pay not to be reduced for holiday

196. (1) Where the wages for an employee are calculated on a weekly or monthly basis, the weekly or monthly wages of the employee shall not be reduced for a week or month in which a general holiday occurs by reason only that the employee did not work on the general holiday.

Pay at daily or hourly rate

(2) An employee whose wages are calculated on a daily or hourly basis shall, for a general holiday on which the employee does not work, be paid at least the equivalent of the wages the employee would have earned at his regular rate of wages for his

[…]

Règle générale

169. (1) Sauf disposition contraire prévue sous le régime de la présente section :

a) la durée normale du travail est de huit heures par jour et de quarante heures par semaine;

b) il est interdit à l'employeur de faire ou laisser travailler un employé au-delà de cette durée.

[…]

Interdiction

196. (1) Il est interdit de faire subir à l'employé rémunéré à la semaine ou au mois une quelconque réduction de salaire pour la seule raison qu'il n'a pas travaillé un jour férié durant une semaine ou un mois donné.

Rémunération journalière ou horaire

(2) L'employé rémunéré à la journée ou à l'heure reçoit, pour tout jour férié où il ne travaille pas, au moins l'équivalent du salaire qu'il aurait gagné, selon son taux horaire ou quotidien, pour une journée normale de travail.

normal hours of work.

[…]

Additional pay for holiday work

197. Except in the case of an employee employed in a continuous operation, an employee who is required to work on a day on which the employee is entitled under this Division to a holiday with pay shall be paid, in addition to his regular rate of wages for that day, at a rate at least equal to one and one-half times his regular rate of wages for the time that the employee worked on that day.

[…]

Appeal

251.11 (1) A person who is affected by a payment order or a notice of unfounded complaint may appeal the inspector's decision to the Minister, in writing, within fifteen days after service of the order, the copy of the order, or the notice.

Payment of amount

(2) An employer or a director of a corporation may not appeal from a payment order unless the employer or director pays to the Minister the amount indicated in the payment order, subject to, in the case of a director, the

[…]

Majoration pour travail effectué un jour de congé

197. Sauf s'il est occupé à un travail ininterrompu, l'employé qui est tenu de travailler un jour de congé payé touche son salaire normal pour ce jour et, pour les heures de travail fournies, une somme additionnelle correspondant à au moins une fois et demie son salaire normal.

[…]

Appel

251.11 (1) Toute personne concernée par un ordre de paiement ou un avis de plainte non fondée peut, par écrit, interjeter appel de la décision de l'inspecteur auprès du ministre dans les quinze jours suivant la signification de l'ordre ou de sa copie, ou de l'avis.

Consignation du montant visé

(2) L'employeur et l'administrateur de personne morale ne peuvent interjeter appel d'un ordre de paiement qu'à la condition de remettre au ministre la somme visée par l'ordre, sous réserve, dans le

maximum amount of the director's liability under section 251.18.	cas de l'administrateur, du montant maximal visé à l'article 251.18.
[…]	[…]
Order to pay arrears of wages	**Ordonnance de paiement**
258. (1) Where an employer has been convicted of an offence under this Part in respect of any employee, the convicting court shall, in addition to any other punishment, order the employer to pay to the employee any overtime pay, vacation pay, holiday pay or other wages or amounts to which the employee is entitled under this Part the non-payment or insufficient payment of which constituted the offence for which the employer was convicted.	258. (1) Sur déclaration de culpabilité pour infraction à la présente partie à l'endroit d'un employé, le tribunal, en sus de toute autre peine, doit ordonner à l'employeur en cause de verser à l'employé le salaire et les prestations — notamment heures supplémentaires, indemnité de congé annuel ou de jour férié — auxquels celui-ci a droit aux termes de la présente partie et dont le défaut de paiement a constitué l'infraction.
[…]	[…]

ISSUES

[16] The Applicant raises the following issues in this application:

a. Is the Policy contrary to the Code?

b. Are the Policy and the Decision *ultra vires* the statutory grant of power afforded to the HRSDC and its inspectors?

c. If the answer to the above two questions is negative, is the Decision unreasonable?

STANDARD OF REVIEW

[17] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48 [*Agraira*].

[18] The Applicant submits that the first two issues are reviewable on a correctness standard, as they relate to questions of law. The Respondent alleges that all of the issues involved in this application are matters of fact, and that a reasonableness standard applies. I agree with the Applicant that the first two issues raise questions of law. However, questions of law do not always attract review on a standard of correctness, and further analysis is required.

[19] I have not been referred to any authorities that directly address the standard of review applicable to decisions of inspectors under the Code on questions of law, or to policy directives issued by an Assistant Deputy Minister of HRSDC that relate to the implementation of the Code. However, there is a more general body of jurisprudence that, in my view, resolves the question of the standard of review in a satisfactory manner. Having reviewed the relevant precedents, I agree with the Applicant that a correctness standard applies to issues a. and b. above. This conclusion is confirmed if one looks to the four factors set out in *Dunsmuir* for a standard of review analysis.

[20] The case of *Miller v Canada (Minister of Labour)*, 2012 FC 136, cited by the Respondent, addresses review of determinations by an inspector on mixed questions of fact and law (see para 14). Similarly, in *Ocean Steel & Construction Ltd. v Arseneault*, 2011 FC 637, Justice O'Keefe applied a standard of reasonableness to factual and mixed fact and law determinations by an inspector, but did not resolve the question of the standard of review applicable to determinations of law by an inspector.

[21] The standards of review applicable to decisions of referees under the Code have received greater consideration by the Courts, but given the difference in roles and the fact that a privative clause applies to decisions of referees with respect to Part III of the Code, I hesitate to apply these cases directly to the current circumstances. As a point of reference, most cases have concluded that decisions of a referee under the Code are reviewable on a standard of correctness if they were questions of law, and on a standard of reasonableness if they are questions of fact or mixed fact and law: see *Delaware Nation*, above, at para 12, citing *Dynamex Canada Inc. v Mamona*, 2003 FCA 248 at para 45 [*Dynamex*]; see also *Crouse v Commissionaires Nova Scotia*, 2011 FC 125 at para 23, aff'd 2012 FCA 4. However, the Federal Court of Appeal has also stated that "referees generally have more expertise in matters of labour standards than this Court," and has suggested they should be entitled to deference "in a decision as to the specific entitlement of an employee to a remedy under Part III of the Canada Labour Code, even if the decision involves a question of statutory interpretation of the referee's home legislation": *Dynamex*, above at para 39.

[22] Since these cases are not directly applicable, it is necessary to look to broader principles on the standard of review. In addition to setting out the factors for a standard of review analysis, *Dunsmuir*, above and subsequent cases have set out a series of presumptions to assist the Court in determining the appropriate standard of review. The following presumptions have specific relevance to questions of law:

- A standard of reasonableness will normally apply where a tribunal is interpreting its enabling (or "home") statute, or statutes closely connected to its function: *Dunsmuir*, above, at para 54; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 34 [*ATA*];

- Correctness is the appropriate standard where the question is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise": *Dunsmuir*, above, at para 60;

- Correctness is the standard of review for constitutional questions (*Dunsmuir*, above, at para 58), though a reasonableness standard applies when reviewing tribunal decisions on whether an exercise of discretion has violated the Charter (*Doré v Barreau du Québec*, 2012 SCC 12);

- A standard of correctness applies with respect to "true issues of jurisdiction or *vires*" (*Dunsmuir*, above, at para 59), and with respect to the jurisdictional lines between competing specialized tribunals (*Dunsmuir*, above, at para 61), though as discussed below the relevance of the former category is now questionable.

[23] The issues raised in the present case are not constitutional questions, nor do they raise questions of law of central importance to the legal system as a whole. While it might be argued that they raise "true questions of jurisdiction or *vires*," in my view they do not. The Supreme Court has narrowly construed this category of questions, and "reviewing judges must not brand as jurisdictional issues that are doubtfully so" (*Dunsmuir*, above, at para 59; *C.U.P.E., Local 963 v New Brunswick Liquor Corporation*, [1979] 2 SCR 227 at 233). Not every allegation of action in excess of jurisdiction raises a "true question of jurisdiction," as this would encompass many if not most of the legal questions that arise in judicial review applications. In fact, the Supreme Court has explicitly questioned the existence or usefulness of the category of "true questions of jurisdiction": see *ATA*, above, at para 34, per Justice Rothstein and para 80, per Justice Binnie.

[24] In my view, it is more accurate to characterize the issues stated here as matters of statutory interpretation, and specifically the interpretation by administrative decision makers of their own powers and obligations under their enabling statute: *ATA*, above; *Public Service Alliance of Canada v Canadian Federal Pilots Assn.*, 2009 FCA 223 [*Canadian Federal Pilots Assn.]*.

[25] It now appears settled that a standard of reasonableness will apply to interpretations by an administrative tribunal of "its own statute or statutes closely connected to its function," except perhaps in an exceptional situation: *ATA*, above at para 33-34; see also *Canadian Federal Pilots Assn.*, above, at paras 36-51. However, there is less clarity about the proper standard of review where the decision-maker interpreting its own or a closely related statute is not an administrative tribunal, but rather a Minister or their delegate.

[26] In *Canada (Fisheries and Oceans) v David Suzuki Foundation*, 2012 FCA 40 (*sub nom Georgia Strait Alliance v Canada (Minister of Fisheries and Oceans)*) [*David Suzuki*], the Federal Court of Appeal held that the principles of deference that have developed in relation to adjudicative tribunals should not be applied to administrative decision makers acting in a non-adjudicative capacity, unless Parliament has provided otherwise (see also *Public Mobile Inc. v Canada (Attorney General)*, 2011 FCA 194; *Toussaint v Canada (Attorney General)*, 2011 FCA 213). This was based on the Court's conclusion that the constitutional principles of the rule of law and Parliamentary supremacy apply differently in these two distinct contexts. Briefly, the rule of law requires that "all exercises of public authority must find their source in law," and "[j]udicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority": *Dunsmuir*, above, at para 28. This is "the constitutional foundation which explains the purpose of judicial review" (*Dunsmuir*, above, at para 27). With respect to adjudicative tribunals, courts have gradually come to the conclusion that by assigning tribunals the responsibility of adjudicating legal rights, and empowering them to decide questions of law in carrying out that responsibility, "Parliament is presumed to have restricted judicial review of that tribunal's interpretation… of statutes closely connected to its adjudicative function": *David Suzuki*, above, at para 96. Thus, the Court's role in preserving the rule of law is balanced with Parliamentary supremacy, through deference to Parliament's intentions about who is to have primary responsibility for deciding certain questions of law.

[27] In the view of Justice Mainville, however, this presumption about Parliament's intent does not apply to a non-adjudicative decision-maker, unless Parliament indicates otherwise (for example,

through a privative clause). Since they are not acting as adjudicators, such actors are not presumed to have authority to decide questions of law, with the consequence that no deference is owed on such questions: *David Suzuki*, above, at para 99; *Canadian Federal Pilots Assn.*, above, at para 51. As the Supreme Court has repeatedly stated, the purpose of the standard of review analysis is to uncover Parliament's intention regarding the degree of deference that should be afforded to an administrative decision-maker: *Dunsmuir*, above, at para 30; *Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557 at 589-90. Affording unintended deference to non-adjudicative decision-makers could have the effect of subverting Parliament's efforts to place careful limits on the powers of executive actors, to the detriment of both Parliamentary supremacy and the rule of law. In the view of Justice Mainville, in the circumstances of the *David Suzuki* case:

> The Minister… [sought] to establish a new constitutional paradigm under which the Executive's interpretation of Parliament's laws would prevail insofar as such interpretation is not unreasonable. This harks back to the time before the Bill of Rights of 1689 where the Crown reserved the right to interpret and apply Parliament's laws to suit its own policy objectives. It would take a very explicit grant of authority from Parliament in order for this Court to reach such a far-reaching conclusion.
>
> [*David Suzuki*, above, at para 98]

[28] The principle set out in *David Suzuki* has been applied both by this Court and the Federal Court of Appeal in subsequent cases, and in a wide range of contexts: *Takeda Canada Inc. v Canada (Minister of Health)*, 2013 FCA 13 [*Takeda*]; *Sheldon Inwentash and Lynn Factor Charitable Foundation v Canada*, 2012 FCA 136 at paras 20-23; *Bartlett v Canada (Attorney General)*, 2012 FCA 230 at para 46; *Attawapiskat First Nation v Canada*, 2012 FC 948 at paras 64-67; *Kandola v Canada (Citizenship and Immigration)*, 2013 FC 336 at para 21; *UHA Research Society v Canada (Attorney General)*, 2013 FC 169 at paras 6 and 8; see also *Prescient Foundation*

v Canada (National Revenue), 2013 FCA 120 at para 13; *Lau v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 788 at para 24.

[29] In *Takeda*, above, Justice Dawson (Justice Pelletier concurring) followed *David Suzuki*, above and found that no presumption of deference applied with respect to the Minister of Health's interpretation of certain provisions of the *Food and Drug Regulations*, CRC c 870. Justice Stratas (concurring) found that a presumption of reasonableness review did apply, citing the analysis in *ATA*, above, but that this presumption was overcome on the basis of a standard of review analysis, with all relevant factors leaning in favour of a correctness review. Specifically: the nature of the question was purely legal; no privative clause applied; the Minister had no expertise in legal interpretation; and there was nothing in the structure of the Act or regulatory regime that suggested that the Court should defer to the Minister's decision. Thus, the Court of Appeal was unanimous in finding that a standard of correctness applied.

[30] In my view, an analysis of the *Dunsmuir* factors in the present case yields a very similar result to that carried out by Justice Stratas in *Takeda*, above: no privative clause applies; the decision-maker functions an a narrowly circumscribed role under the Code which does not involve explicit or implicit powers to decide legal questions; the nature of the questions raised by issues a. and b. is purely legal in nature; and the decision-makers do not have any particular expertise in legal interpretation. In sum, there is nothing in the statutory scheme that would indicate an intention by Parliament that the Court should defer to legal interpretations by these actors.

[31] In sum, the precedent established in *David Suzuki*, above, indicates that correctness is the appropriate standard of review for issues a. and b. in this case, and this view is confirmed by an analysis of the standard of review factors from *Dunsmuir*, above.

[32] The third issue involves issues of fact and the Inspector's application of the Policy and the Code. These are matters that are reviewable on a reasonableness standard, and the Applicant agrees that reasonableness is the standard that ought to be applied. Reasonableness was also the standard applied in *Delaware Nation v Logan*, 2005 FC 1702 [*Delaware Nation*].

[33] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para47, and *Canada (Minister of Citizenship and Immigration) v Khosa* 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARGUMENTS

The Applicant

Factual Errors in the Decision

[34] The Applicant first points out that the Inspector based her conclusions on some factual errors, which render the Decision unsound. These are discussed in more detail below.

a) The Respondent was aware that it was not in compliance with the Code

[35] The fact that the Respondent was "not aware" that it was not in compliance with the Code was cited as a factor in the Decision. Presumably, this is based on the Respondent's assertion that it believed that Applicant fell under the *Motor Vehicle Operators Hours of Work Regulations*, CRC, c 990, whereby his "standard hours of work" would be 60 hours. However, even putting aside the fact that the Respondent is a sophisticated employer and this is not a reasonable assumption, the Applicant was paid at a regular rate for hours in excess of the 60-hour standard for 20 weeks even within the 12 month period for which the Inspector limited the investigation.

[36] Furthermore, the Inspector herself commented on this irregularity in correspondence with the Respondent (see page 12 of the Certified Record). Not only was it not reasonable to conclude that the Respondent was not aware that it was in contravention of the Code in these circumstances, it is clear that the Inspector was aware that a contravention of the Code was occurring, even on the standard alleged to be appropriate by the Respondent itself.

b) The Inspector's calculations erred with respect to general holidays

[37] The Inspector's calculation of overtime is attached as Exhibit L to the Applicant's Affidavit. In calculating overtime, the Inspector appears to have reduced the "standard hours of work" by 8 hours for each week in which a General Holiday fell. The amount of overtime was then calculated at 1.5 of the Applicant's wage.

[38] The records provided by the Respondent (pages 33-100, Certified Record) indicate that the Applicant was paid for the following hours on "General Holidays":

- 10 hours on 6 September 2010;
- 20 hours (double time) on 11 November 2010;
- 8 hours on each of 27 & 28 December 2010 and 3 January 2011;
- 22 hours (double time plus 2) on 22 April 2011;
- 20 hours (double time) on 23 May 2011;
- 10 hours on 1 July 2011.

[39] The records also indicate that the Applicant attended work on at least 11 November 2010, 22 April 2011, and 23 May 2011.

[40] Section 192 of the Code requires that employees be granted a holiday with pay on each general holiday. Under section 197, employees are to be paid at least 2.5 times their wages for general holidays on which they are working. On the basis of the above, and on even a conservative estimate, the preliminary determination failed to recognize a further $1,500 in overtime wages owed to the Applicant. The Applicant submits that this is plainly unreasonable.

[41] It should also be noted that the fact that the Respondent voluntarily paid the amount in the preliminary determination means that there are no avenues of appeal left open to the Applicant if the

Decision is left to stand. Thus, it is the Applicant's submission that this error of fact should be given special consideration in the review of the Decision. In the alterative, the Applicant submits that the Court's review should be extended to the preliminary determination, as there would be no prejudice to the parties, and the Court has the wide jurisdiction to do so (*Nunavut Tunngavik Inc. v Canada Attorney General)*, 2004 FC 85 at paras 8-9).

Errors of Law in the Decision

c) Ignorance of the law is not an excuse for relief from it

[42] The Applicant points out that the principle that ignorance of the law is no excuse for a breach thereof is long-established (*Bilbie v Lumley*, (1802) 102 ER 448 at 472). The Federal Court of Appeal reaffirmed this principle in *Makhija v Canada (Attorney General)*, 2010 FCA 342 [*Makhija*] at paras 6-7, stating that "errors of law" are not an acceptable excuse for a breach thereof. At para 8 of *Makhija* the Court said "…the evidence shows that at best the applicant was negligent in not enquiring, and at worst wilfully blind, as to the scope of the [*Lobbyists' Code of Conduct*] and his obligations under it."

[43] It cannot be the Respondent's position that it was unaware it would have to pay overtime to employees in certain circumstances. Nor can it be maintained that the Respondent was unaware its employment practices were subject to regulation under the Code (or otherwise). In any event, even if the Respondent was ignorant in either respect, such a lack of knowledge is not a valid excuse at law for the failure to meet its statutory obligations.

[44] On this basis, the Applicant submits it was an error of law and clearly incorrect for the Inspector to consider the Respondent's assertion that it was unaware of its non-compliance and had not yet been counselled as a reason for relief from its obligations under the Code.

d) Parties cannot agree or contract out of the minimum standards of the Code

[45] A factor considered in the Inspector's Decision was that the Applicant had "accepted the practice/terms of employment." The Applicant points out that the standards contained in Part III of the Code are absolute minimums and are expressly restrained from modification to less favourable terms under section 168. Furthermore, the Code contains no limitation period for a claim of unpaid overtime (*Delaware Nation*, above, at paras 24-27).

[46] The Applicant has a right to payment of overtime under the Code, particularly in circumstances where the Applicant has shown actual entitlement to wages beyond the 12 month period. The reasoning in the Decision effectively permitted an arrangement wholly contrary to the Code.

[47] On this basis, the Applicant submits it was an error of law and clearly incorrect for the Inspector to consider the Applicant's "acceptance" of payment in violation of the minimum standards of the Code as a reason for restricting the inspector to 12 months.

e) The Policy is invalid

[48] As discussed above, the Code creates a right to payment of overtime wages, with no limitation period for a claim to such. Parliament did not restrict an employee's right to overtime in any temporal way. Section 264 of the Code allows the Governor in Council to make regulations for carrying out Part II of the Code; that is, calculating and determining wages. No regulations exist limiting the time period over which an employee is entitled to overtime.

[49] By virtue of section 24 and subsection 252(2) of the Code, employers are required to keep records for a period of a minimum of 36 months. However, nothing about this requirement suggests that employees are disentitled to payment for amounts of overtime worked further in the past. In addition, the powers afforded to Inspectors under sections 249-251 of the Code relate only to calculation and process, not the ability to defeat substantive rights afforded by Parliament.

[50] As Justice Michael Phelan pointed out at paras 24-25 of *Delaware Nation*, above:

> The [Employer] argued that [the referee] erred in not limiting the period for which overtime is due to the last three years. The [Employer's] position is that since the Code imposes a three-year limitation period in respect of penalties and the Standards regulations requires employers to retain employment records for three years, Parliament must have intended a three-year limitation period on other claims. The [Employer] further argues that it is only just and fair to impose a three-year limitation since the [Employer] was not culpable in failing to pay overtime.
>
> In the face of the limitation period for specific matters such as penalties and document retention, the fact that Parliament has not seen fit to establish a more general limitation period suggests that it deliberately refrained from doing so. It is not the Court's function to create a limitation period.

[51] The Applicant submits that there is no legal authority within the Code or the applicable regulations enabling the HRSDC or the Inspector to restrict the Applicant's right to payment of unpaid overtime where that right has accrued.

[52] This principle was explained by the Alberta Court of Queen's Bench in *Skyline Roofing Ltd v Alberta (Workers' Compensation Board)*, 2001 ABQB 624 [*Skyline Roofing*] at paras 77-78:

> 77 Administrative tribunals cannot rigidly apply informal policies without running into the argument that they have "fettered their discretion". An administrative tribunal must always be open-minded about the issues that come before it, and must be prepared to hear arguments as to why the policy should or should not be applied in a particular factual situation: *S.(M.) v. Alberta (Crimes Compensation Board)* (1998), 65 Alta. L.R. (3d) 339, 216 A.R. 156, 160 D.L.R. (4th) 567 (C.A.).
>
> 78 *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, [1994] 7 W.W.R. 1, 114 D.L.R. (4th) 385 concerned certain policies of the British Columbia Securities Commission. Iacobucci, J. recognized the right of the Commission to adopt policies, even absent statutory authority, but stated at p. 596:
>
> > However, it is important to note that the Commission's policy-making role is limited. By that I mean that their policies cannot be elevated to the status of law; they are not to be treated as legal pronouncements absent legal authority mandating such treatment.
>
> The same point was made in *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2, 137 D.L.R. (3d) 558. In this case the Applicant was denied a permit to import chickens, even though it complied with a Ministerial guideline on the subject. McIntyre, J. commented at pp. 6-7 in dismissing the appeal:
>
> > The discretion is given by the Statute and the formulation and adoption of general policy guidelines cannot confine it. There is nothing improper or unlawful for the Minister charged with responsibility for the administration of the general scheme provided for in the Act and Regulations to formulate and to

> > state general requirements for the granting of import permits. It will be helpful to applicants for permits to know in general terms what the policy and practice of the Minister will be. To give the guidelines the effect contended for by the appellant would be to elevate ministerial directions to the level of law and fetter the Minister in the exercise of his discretion. Le Dain J. [in the Federal Court of Appeal] dealt with this question at some length and said, at [[1981] 1 F.C. 500] p. 513:
> >
> > The Minister may validly and properly indicate the kind of considerations by which he will be guided as a general rule in the exercise of his discretion (see *British Oxygen Co. Ltd. v. Minister of Technology*, [1971] A.C. 610; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission* [1978] 2 S.C.R. 141, at pp. 169-171), but he cannot fetter his discretion by treating the guidelines as binding upon him and excluding other valid or relevant reasons for the exercise of his discretion (see *Re Hopedale Developments Ltd. and Town of Oakville*, [1965] 1 O.R. 259).
>
> Thus, an informal policy can neither be used to fetter a discretion, nor to create legally enforceable rights.

[53] A policy cannot be used to defeat a legally enforceable right, particularly in the situation where the statute does not grant discretion to do so. Additionally, *Skyline Roofing*, above, stands for the principle that a policy cannot conflict with the statute from which it purports to derive its authority.

[54] The British Columbia Court of Appeal dealt with a similar situation in *Jozipovic v British Columbia (Workers' Compensation Board)*, 2012 BCCA 174 [*Jozipovic*]. In that case, the provincial *Workers Compensation Act*¸ RSBC 1996, c 492 set out a method for payment of lost

wages, and a policy modified these circumstances. The Court found the policy invalid to the extent that it conflicted with the *Workers Compensation Act*, and said at paras 94-100:

> Policy #40.00 prevents the Board from making a key determination that it is required to make under s. 23(3). It prohibits the Board from considering the appropriateness of the amount of compensation in any case where the worker retains the essential skills of his or her pre-injury occupation, or those of another occupation which is similar to it. Nothing in s. 23 authorizes the Board to ignore the inadequacy of compensation simply because the worker is able, at some level, to continue in an occupation, or adapt to an occupation that is, in some respects, similar to it.
>
> […]
>
> Policy #40.00 does not, in fact, leave the Board with any discretion to apply the Loss of Earnings Method where an exceptional shortfall of compensation stands "on its own". It purports to eliminate discretion in those situations where a worker is able to return to his or her former occupation, or a similar one, even if he or she suffers an exceptional loss of earnings.
>
> The language of ss. 23(3.1) and (3.2) does not allow the Board to make a finding that the amount of compensation assessed under the Functional Impairment Method is "appropriate" simply because a worker has the ability to retrain so as to work in an occupation that is, in some respects, similar to that which he or she performed at the time of the accident. It is not reasonable, in determining the appropriateness of the amount of compensation, to ignore the financial detriment that a worker will suffer as a result of such an adaptation.

[55] The Applicant submits that the reasoning in *Jozipovic*, above, applies to this case. The Policy eliminates the Applicant's entitlement under the Code, and is unsupported by the enabling legislation or its regulations. Similar conclusions were reached in two other British Columbia cases: *Federated Anti-Poverty Groups of British Columbia v British Columbia (Minister of Social Services)*, (1996) 41 Admin LR (2d) 158 (BCSC); *Grace v British Columbia (Lieutenant Governor in Council)*, 2000 BCSC 923).

[56] In summary, the Applicant submits that the principles from the cases discussed above are apposite to the current situation because:

- The Policy eliminates a right granted by the Code and is thus contrary to its enabling statute;

- No statutory authority exists granting the HRSDC the power to create the limit imposed by the Policy, or to defeat the right to overtime in the Code;

Therefore:

- The Policy is *ultra vires* the HRSDC and the Inspector's power to apply it; and

- As the Decision is based on the application of an unlawful Policy, it cannot stand.

The Reasonableness of the Decision

[57] In the alternative, if the Policy is considered valid, the Applicant submits that the Inspector's reasoning in the Decision is deficient and illogical, and ignores the facts and evidence presented.

f) The Inspector failed to consider that the Applicant's situation merited further retroactivity based on the considerations enumerated in the policy itself

[58] As stated in the Decision, subsection 7.7(l) of the Policy stipulates that investigations can extend to an additional period of retroactivity based on the review of the "scope of the infraction(s), the length of time that the identified underpayment(s) has(ve) been occurring, and the compliance

history of the employer." At 7.7(m), the Policy directs that retroactivity is not to extend past 36 months "unless clear documentary evidence is available to support the claim and approval has been obtained from regional management."

[59] In terms of the "scope of the infraction," both the Applicant's and the Respondent's records show that the Applicant was underpaid significant amounts of overtime in the period where the Inspector conducted her investigation. In some weeks, the Applicant worked more than twice his "standard hours of work." In the preliminary determination, the Inspector found underpayment in the amount of $11,747.45 for one year. Going by the Applicant's T4 for 2010, that amount constitutes approximately 18% of the Applicant's annual salary.

[60] The Applicant provided records showing that the "length of time" the underpayment had been occurring extended to at least May, 2008, and that significant amounts of hours accumulated in this time period. The records submitted by the Applicant cannot be characterized other than as "clear documentary evidence" in support of his complaint. Further, on the face of the record, there is no evidence that the Inspector did anything to investigate the "compliance history of the [Respondent]" other than determining that no similar complaints had been made.

[61] In determining that further retroactivity was "not warranted," the Inspector does not appear to have considered the "scope of the infraction" at all, nor does she appear to have considered the "length of time that the identified underpayment(s) has(ve) been occurring," nor was there any comment about the Applicant's "clear documentary evidence" or approval from "regional management."

[62] As regards the Respondent's compliance history, the Inspector found that the Respondent did not have a history of non-compliance and had received no counselling with regard to the Code; the Applicant submits that this is not evidence that the Respondent was in compliance with the Code, but only that no other employees have filed a complaint.

[63] Even applying the terms of the Policy itself, the Inspector's reasoning is flawed. Even on the Policy's standards, further retroactivity was required, and to conclude otherwise was clearly unreasonable.

g) The Inspector considered irrelevant and inappropriate criteria in making the Decision

[64] The Applicant submits that the culpability of a party for failure to pay overtime is irrelevant to determinations under the Code. As stated at para 26 of *Delaware Nation*, above, "the purpose of the legislation in this regard is to ensure that workers are paid what they are owed. It is not a fault based analysis."

[65] Most of the factors cited in the Decision relate to the culpability, or lack thereof, of the Respondent. For example, the Inspector found that the Respondent was "not aware they were not in compliance," "received no counselling" and did not have a "history of complaints" with respect to the Code. None of these factors has anything to do with the Applicant's entitlement to payment of overtime or his employment with the Respondent.

[66] Even more egregious examples of irrelevant and inappropriate factors considered by the Inspector are that the Respondent "cooperated with the investigation" and was in agreement to issue a voluntary payment of the preliminary determination. Essentially, the Inspector's reasoning was that because the Respondent was willing to pay less, they should not be required to pay more. The Applicant submits that this is clearly unreasonable and is an affront to the purposes of the Code itself.

The Respondent

[67] The Respondent provided written submissions but then, at the Court hearing and without notice to the Applicant, provided additional and in some instances different oral argument.

Preliminary Issue

[68] As a preliminary issue, the Respondent submits that the Court should refuse to hear this application for judicial review because the Applicant has not exhausted all the internal remedies available to him under the Code.

[69] First, there is an adequate alternative remedy available to the Applicant: pursuant to subsection 251.11 the Applicant may appeal to a referee. The Court has consistently affirmed that an employee must pursue a statutory appeal before seeking judicial review (*Miller v Canada (Minister of Labour)*, 2012 FC 136 at para 28). The requirement that a complainant appeal decisions of inspectors internally, to referees, is well recognized in the case law (see *Bellefleur v Diffusion*

Laval Inc., 2012 FC 172; *Autocar Connaisseur Inc. v Canada (Minister of Labour)*, [1997] FCJ No 1363 (TD) [*Autocar Connaisseur*]; *Delaware Nation*, above).

[70] The failure of an appellant to pursue an alternative remedy within a limitation period does not make that remedy inadequate (*Milne v Engleheim Charter*, [2003] CLAD No 298 [*Milne*]). In this case, the Applicant failed to exercise his right to an internal appeal, despite being specifically advised of this right by the Inspector in her correspondence dated 11 September 2012.

[71] The Respondent also submits that there are strong policy reasons why the Court should refrain from hearing this application. Specifically, an applicant should not be able to circumvent an expert appeal body specifically created to deal with matters requiring expertise because it creates or has the potential to create duplication and inconsistency (*R. v Consolidated Maybrun Mines Ltd.*, [1998] 1 SCR 706 at paras 42-43). Decisions with respect to matters such as payment of wages and overtime are matters requiring expertise, and a high degree of deference is due (*Autocar Connaisseur*). A referee under the Code is an expert on the matters arising in this application, and for this reason the Federal Court of Appeal has upheld the requirement that an appellant appeal the decision before seeking judicial review (*Rudowski v Canada (Human Resource Development)*, [2000] FCJ No 1715).

[72] Further, by virtue of her invitation to the Applicant to object to the Decision within 30 days of her 11 September 2012 letter, it is clear that the Inspector was not *functus officio* of the matter of the Applicant's claim for overtime. Given the legislative scheme of the Code, specifically the privative clauses in subsections 251.12(6) and (7), it is clear that the intention of Parliament was to

have labour and employment matters, including specifically claims for overtime, dealt with at first instance pursuant to the provisions and mechanisms of the Code.

[73] The Respondent submits that to grant judicial review in this case would be inconsistent with the case law discussed above and would undermine the legislative scheme put forth in the Code. The Decision was not final, and the Applicant had an internal appeal mechanism available which he ought to have pursued.

The Reasonableness of the Decision

[74] The Respondent points out that the Applicant must prove, on a balance of probabilities, that he worked the excess hours claimed (*RJ Lacroix Transportation & Equipment Sales Inc. v Beatty*, [1998] CLAD No 456).

[75] The Applicant brought a claim for overtime wages over a 72-month period. At no time prior to 6 February 2012 did the Applicant raise a complaint about his wages or file an application for overtime. A delay on the part of an applicant bringing a claim for back-payment of wages may be fatal to such a claim on the equitable doctrines of laches and acquiescence (*Skyward Aviation Ltd. v Walker*, [2005] CLAD No 176 at para 4). Even if a delay is not fatal to a claim, it has been considered to "cast suspicion" on the credibility of a claim (*Lac La Ronge Indian Band v Bird*, [2001] CLAD No 491 at para 20).

[76] The Inspector applied a twelve-month limitation period to the Decision in accordance with well-established Ministerial policy and practice. This has been found to be reasonable, particularly

in circumstances where an applicant has delayed bringing forward a complaint (*Milne*, above, at para 11). The Respondent submits that the Decision was reasonable.

ANALYSIS

Should the Court hear this Application?

[77] The Respondent says that the Court should refuse to hear this application for judicial review because the Applicant has an adequate remedy under subsection 251.11 of the Code.

[78] Subsection 251.11 of the Code reads as follows:

(1) A person who is affected by a payment order or a notice of unfounded complaint may appeal the inspector's decision to the Minister, in writing, within fifteen days after service of the order, the copy of the order, or the notice.	(1) Toute personne concernée par un ordre de paiement ou un avis de plainte non fondée peut, par écrit, interjeter appel de la décision de l'inspecteur auprès du ministre dans les quinze jours suivant la signification de l'ordre ou de sa copie, ou de l'avis.
[…]	[…]

[79] It is clear that, in the present case, the Applicant is neither a person affected by a payment order or by a notice of unfounded complaint. Hence, on a plain reading of this provision, the Applicant cannot access the appeal system under the Code, and does not have an adequate alternative remedy. The Respondent argues this is not the case for three reasons.

[80] First of all, the Respondent says that

> The inspector's subsequent decision to accept the Respondent's agreement to pay the full amount found to be owing is tantamount to a payment order, especially considering that neither party disputed the payment determination and agreement, within the following 30 days provided by the Inspection. The Applicant was not precluded from appealing the Inspector's ultimate determination to a Referee under s. 251.11 simply because no "payment order" form was presented to the parties.

[81] It is not without significance that the Inspector herself took a totally contrary view to the one now taken by the Respondent. By letter dated July 11, 2012, Applicant's counsel requested the following:

> In the event that your decision remains to only extend the retroactive period 12 months, we would ask you kindly inform us of an internal or external appeal procedure we may take to formally seek that this time be extended.

[82] The Investigator's reply of July 16, 2012 was a categorical "There is no right of appeal as retroactivity is not covered under legislation." This is the position which the Applicant now takes before the Court. The Investigator's own notes for September 7, 2012 confirm that she spoke to Applicant's counsel and "Advised again that no right of appeal exists" because

> ER is paying voluntarily — no payment order will be issued and no NUC will be issued since employment beyond retroactivity will not be investigated, therefore, no determination of founded or unfounded can be made.

[83] So someone who the Respondent calls an expert under the Code took the position that the Applicant had no alternative remedy under the Code.

[84] The only possible relevant authority which the Respondent offers to support its position is *Milne v Englehein Charter*, [2003] CLAD No 298, in which an adjudicator heard an appeal from HRDC to the preliminary decision of an HRDC inspector to determine an appellant's entitlement to unpaid overtime and vacation pay. The adjudicator in *Milne* refers to the case of *R.J. Lacroix Transportation and Equipment Sales Inc. v David Beatty* (1998), 40 CCEL (2d) 234, by the Canada Arbitration Board, which deals with the powers granted under subsection 251.12(4) of the Code to rescind or vary, in whole or in part, a payment order, or notice of unfounded complaint.

[85] I can find nothing in *Milne*, above, to suggest that the issue before me was even raised in that case.

[86] The Applicant is, in effect, inviting the Court to read subsection 251.11 as granting a right of appeal on any decision made by an Inspector, irrespective of whether it results in a payment order or notice of unfounded complaint. That may be convenient for the Respondent on the facts of this case, but if Parliament had intended such a result, it would have said so. In my view, there is no rule of statutory interpretation and no authority to suggest that I should disregard the plain wording of subsection 251.11 — and the stated position of the Inspector herself — in order to find that the Applicant had an alternative right of appeal in this case.

[87] The Respondent also says that the Court should refuse to hear this application on policy grounds in that it allows an appellant "to circumvent an expert appeal body specifically created to deal with matters requiring expertise because it creates or has the potential to create duplication and inconsistency."

[88] Quite apart from the wording of the Code and the position of the Investigator that no such appeal exists under the Code, the Court cannot avoid the wording of the statute simply because one of the parties to a dispute believes it would be better to do things in a different way. The Respondent's reasoning, in any event, is fallacious. The Court is not deciding the Applicant's entitlement. It is simply deciding whether a reviewable error has occurred in the present case that requires reconsideration by the expert system set up under the Code.

[89] The Respondent also refers to the Inspector's letter of September 11, 2012, which said that

> We now consider your complaint to be resolved. Unless you advise me, within the next 30 days, that the matter has not been resolved, your file will be closed.

[90] This letter is neither a payment order or a notice of unfounded complaint and there was no legal compulsion upon the Applicant, who had been refused on at least four occasions by the Inspector to extend the period of retroactivity, to go on making the same request. The Applicant is given specific rights to seek judicial review under the *Federal Courts Act*. He had no obligation to go on attempting to persuade the Inspector in a situation where she had obviously made up her mind on the basis of everything he could present, and in which she had told him that the system offered no rights of appeal. The Inspector may not have been legally *functus officio*, but she had already made any decision she was going to make on the basis of the facts and evidence and argument that the Applicant could muster.

[91] All in all then, the Court must hear this application. There is nothing in the Code to prevent the Applicant from exercising his rights to judicial review under the *Federal Courts Act*, and there is

nothing to suggest that the Applicant had any other recourse available to him under the Code. Indeed, the very people who the Respondent says are the experts in applying the Code told him he had no rights of appeal.

Is the Policy Relied Upon by the Inspector, and Upon Which the Decision is Based, Contrary to the Code and, Hence, Invalid?

[92] In my view, the short answer on this issue is that, in so far as the policy purports to abrogate or curtail the substantive rights bestowed upon employees by the Code, it is *ultra vires* and invalid. This is because those substantive rights are granted by Parliament, and they can only be taken away or modified to the extent, and in the way, that Parliament itself has authorized.

[93] In *Dunsmuir*, above, the Supreme Court of Canada made it very clear what this means in the context of administrative law:

> 28 By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.
>
> 29 Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, [page212] the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject

> matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at p. 234; also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 21.

[94] On this issue, I am in agreement with the Applicant that the Code contains no limitation for a claim of unpaid overtime. Put another way, Parliament did not restrict an employee's right to overtime in any temporal way. This means that the Applicant is entitled, as a substantive right created by the provisions of the Code, to payment of amounts of overtime he worked at any time for any federally regulated employer.

[95] The Code contains a provision allowing the Governor in Council the power to make regulations for carrying out the purposes of Part II of the Code with respect to (at (d), *inter alia*): "calculating and determining wages received by an employee in respect of his [or her] employment…" This section refers in substance only to "calculation" of wages owing; no regulations exist limiting the time period over which an employee is entitled to overtime.

[96] By virtue of the Code and the regulations, employers are required to keep records for a period of a minimum of 36 months. However, nothing about this requirement suggests that employees are disentitled to payment for amounts of overtime worked further in the past. While it may be difficult to prove entitlement of overtime beyond 36 months — as an employer may not have and need not keep records beyond that time — nothing in this section suggests or limits such overtime from being payable where entitlement can be proven.

[97] The Code also grants the Minister of Labour the power to designate inspectors. Inspectors may "require employers to make or furnish full and correct statements…" regarding an employee's wages and hours of work. Inspectors have further powers, including the power to order payments and "determine the differences between the wages or other amounts actually paid to the employee under this Part, and the wages or other amounts to which the employee is entitled under this Part."

[98] None of the provisions of the Code which grant powers to inspectors grant the authority to limit the amounts payable to an employee who has otherwise shown entitlement. The empowering provisions of the Code relate only to calculation and process, not the ability to defeat substantive rights afforded by Parliament.

[99] Justice Michael Phelan has already endorsed this position in *Delaware*, above:

> 24 The Applicant argued that Barton erred in not limiting the period for which overtime is due to the last three years. The Applicant's position is that since the Code imposes a three-year limitation period in respect of penalties and the Standards regulations requires employers to retain employment records for three years, Parliament must have intended a three-year limitation period on other claims. The Applicant further argues that it is only just and fair to impose a three-year limitation since the Band was not culpable in failing to pay overtime.
>
> 25 In the face of the limitation period for specific matters such as penalties and document retention, the fact that Parliament has not seen fit to establish a more general limitation period suggests that it deliberately refrained from doing so. It is not the Court's function to create a limitation period.
>
> 26 Even though the Band is not deliberately culpable in not paying overtime, the purpose of the legislation in this regard is to ensure that workers are paid what they are owed. It is not a fault based analysis.

[100] Justice Phelan's decision in *Delaware* was upheld by the Federal Court of Appeal.

[101] Justice Phelan has also made it clear that common law principles, such as estoppel, waiver and timeliness are not applicable. The Code is a complete code. In *942260 Ontario Ltd. (c.o.b. Allanport Truck Lines) v Misty Press*, [2004] FCJ No 1689, he found as follows:

> 16 The right to overtime is a statutory right. Any limitation on the exercise of that right ought to be found in the legislation. The principles of estoppel and waiver relied on by Allanport arise at common law.
>
> 17 In *Gendron v. Supply and Service Union of the Public Service Alliance of Canada*, [1990] 1 S.C.R. 1298, the Supreme Court concluded in dealing with the Code that resort to the common law would add nothing to the content or effect of that statute. The rationale is that the legislation was generally designed to be a fairly complete code and in some regards (duty of fair representation) it was to be a complete code.
>
> 18 The Code is a complete code with respect to overtime rights. Any limitations on the exercise of the right, such as timeliness, are specified in the Code. There is nothing in the Code about estoppel, a matter somewhat related to timeliness.

[102] In the present case, this means that attempts in the Policy to place time limitations upon the Applicant's right to be paid overtime are *ultra vires* and void. This does not mean that an applicant will not have difficulty in establishing those rights if he or she cannot provide adequate evidence.

[103] The Respondent says that the Code does not set out a limitation period on claims and that, if this is the case, then the Policy does not contravene the law as stated by Justice Phelan. However, paragraphs 7.7(k) to (n) of the Policy read as follows:

k. in assessing underpayments during employment, the	k. normalement, la période pour réclamer le salaire ou

period of retroactivity shall not normally exceed twelve (12) months from the date of non-compliance;

d'autres indemnités ne doit pas dépasser douze (12) mois de la date de non-conformité;

l. upon approval from the inspector's supervisor, the inspector has the authority to assess additional retroactivity. In assessing whether to increase the period of retroactivity, the inspector will review the scope of the infraction(s), the length of time that the identified underpayment(s) has(ve) been occurring, and the compliance history of the employer;

l. dès qu'autorisé par le superviseur de l'inspecteur, l'inspecteur est habilité à fixer une rétroactivité supplémentaire. Pour déterminer s'il doit étendre la période de rétroactivité, l'inspecteur examine la portée de l'infraction, la période pendant laquelle les sommes étant dues ont eu lieu et les antécédents de l'employeur pour ce qui est du respect du Code;

m. in no case will the retroactivity exceed thirty-six (36) months from the date of the filing of the complaint unless clear documenting evidence is available to support the claim and approval has been obtained from regional management;

m. la période de rétroactivité ne doit en aucun cas dépasser trente six (36) mois de la date que la plainte a été reçue par le Programme à moins qu'une preuve documentaire claire existe pour appuyer la demande et que cette demande a reçu l'approbation de la gestion régionale;

n. should the inspector conclude that retroactivity is not warranted, the inspector will notify the complainant (Appendix M). Under no circumstances should a Notice of Unfounded Complaint be used to decline retroactivity;

n. si l'inspecteur arrive à la conclusion qu'une rétroactivité n'est pas justifiée, l'inspecteur en avisera le plaignant (annexe M). En aucun cas l'inspecteur utilisera l'Avis de plainte non-fondée pour refuser la rétroactivité;

[104] It seems to me that, even though these provisions do allow for extensions beyond 12 months in certain circumstances, the conditions for extension are a clear attempt to confine claims in a way that abrogates the entitlement to overtime payment granted by the Code. As Justice Phelan has made clear, there are no time limitations that can be applied. An inspector must look at the evidence available to support the claim without restrictions on time. For example, the compliance history of an employer has nothing to do with whether a claim for unpaid overtime can be asserted beyond 12 months, unless the history of compliance is in some way related to the weighing of evidence produced to support or deny the claim.

[105] As the record shows, the Inspector in this case clearly did not do this. The Inspector felt she was bound by timing restraints in the Policy and restricted the period of the Applicant's claim to 12 months. In so far as the Policy eliminates or curtails the right to unpaid overtime, or restricts the retroactive period for which a claim for overtime can be made, it is contrary to the Code. No statutory authority exists for HRSDC to create and impose time limits on claims for unpaid overtime. The Inspector's decision to apply unlawful restrictions cannot stand.

[106] The evidence adduced by the Applicant and the Respondent shows that the Applicant was underpaid significant amounts for both the time period for which the Inspector conducted her investigation and for a retroactive period extending well beyond. This evidence should have been assessed, and the Applicant paid unpaid overtime in accordance with his rights under the Code.

[107] In addition, the Decision shows that the Inspector considered and applied irrelevant and inappropriate factors in making the Decision. Culpability and awareness of non-compliance by the

employer, lack of counselling, history of complaints and non-compliance, acceptance of practice by the employee, cooperation with the investigation, and voluntary payment have nothing to do with entitlement to unpaid overtime under the Code. As Justice Phelan made clear in *Delaware*, above "the purpose of the legislation in this regard is to ensure that workers are paid what they are owed. It is not a fault based system."

[108] There are number of other reviewable errors that can be raised with the Decision. For example, it appears to me that the Inspector's calculations even for the 12 month period that was considered are wrong in ways suggested by the Applicant and will need to be re-determined. However, it is not necessary to elaborate further. The Decision is fundamentally flawed because it is based upon limitations and considerations that are contrary to the Code, and that are applied in an unreasonable way.

[109] The matter must be returned for reconsideration in accordance with these reasons and the prevailing jurisprudence.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a different HRSDC inspector in accordance with these reasons.

2. The Respondent shall pay the Applicant the costs of this application.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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