IN THE MATTER OF THE LABOUR RELATIONS CODE
OF BRITISH COLUMBIA 1996 c.266

AND

IN THE MATTER OF AN INTEREST ARBITRATION

BETWEEN:

FORTISBC INC.

(the "Employer")

AND

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 213

(the "Union")

Renewal of Collective Agreement
February 1, 2013 to January 31, 2018

ARBITRATOR:	Dalton L. Larson
REPRESENTING THE EMPLOYER:	Charles G. Harrison Stephanie Gutierrez
REPRESENTING THE UNION:	John MacTavish
DATE OF PRELIMINARY HEARING:	January 15, 2014
PLACE OF PRELIMINARY HEARING:	Vancouver, British Columbia
DATE OF PRELIMINARY AWARD	March 16, 2014
DATE OF COMMENCEMENT OF HEARINGS [MERITS]:	May 27, 2014
PLACE OF HEARINGS [MERITS]:	Kelowna, British Columbia
DATES OF HEARINGS [MERITS]:	May 27 & 28, 2014 June 10, 11, 12, 25, 26 & 27, 2014
DATE OF AWARD:	November 4, 2014

1. Background

[1] FortisBC Inc. is a vertically integrated electricity generation, transmission and distribution company directly serving over 160,000 customers primarily in south central British Columbia including such places as Kelowna, Osoyoos, Trail, Castlegar, Princeton and Rossland. It commenced business in 1897 as West Kootenay Power to provide electrical power to the Trail Smelter operations and for most of its existence was operated by Teck Cominco until 1987 when it was acquired by a United States utility, Aquila Networks with operations in both BC and Alberta. In 2003, Fortis Inc., a Newfoundland Company, agreed to buy the generation and distribution assets of Aquila including four storage dams: Corra Linn, Upper Bonnington, Lower Bonnington and South Slocan and in 2007 acquired the natural gas distribution assets of Terasen Inc. from Kinder Morgan. Each of the electrical and natural gas systems are structured as separate subsidiaries, the latter being FortisBC Energy Inc. although they have an integrated executive management team headed by John Walker, the President & Chief Executive Officer of both subsidiaries.

[2] Both the electrical and gas systems have continued to grow since the consolidation under Fortis Inc. The gas operations are relatively much larger and serve approximately 1 million customers over the entire Province. However, FortisBC Inc. continues to experience significant growth, albeit concentrated in the upstream capital intensive sector of generation and transmission. Its approved Capital Expenditure Plan for 2012-2013 was $140,218 million. It has also taken over the operation of two large generation facilities under contract in addition to its own facilities. These are the Waneta Dam owned by Teck Resources Ltd. and the Brilliant Dam owned by the Columbia Power Corporation.

[3] While the Fortis group constitutes the largest private sector energy conglomerate in the province, it is dwarfed by BC Hydro which is publicly owned by the provincial government. It would not be completely accurate to say that they are competitors in any direct sense because they each function essentially within prescribed geographical areas. However, both function within the same operational sectors and for that purpose employ the same classifications of employees. Indeed, as will be seen, there is a high level of labour mobility between the two organizations in which employees for their own reasons seek employment from time to time with the other. Similarly, there are other energy companies within BC and Alberta that may not be full scope integrated electrical companies but which employ some of the same classifications of employees and, in that limited sense also function within the same labour market.

[4] The British Columbia Utilities Commission closely regulates both FortisBC Inc. and FortisBC Energy Inc. which sets the electrical and gas rates which they are permitted to charge their customers based upon specified operating parameters. In effect, they are granted a monopoly in their service territories but upon conditions set by the Commission. The review process is typically complicated and protracted with extensive public scrutiny from various activist intervenors with a view to restricting any potential rate increases as low as possible. Labour costs and productivity are typically major issues, as was the case in its decision on the FortisBC 2012-2013 revenue requirements and its proposed integrated system plan dated August 15, 2012. While the Commission has never gone so far as to mandate the actual pay rates that the Company may pay its employees, what it does is determine whether the rates that it negotiates with its unions are reasonable. In that manner, its influence pervades the collective bargaining regimen within which the parties operate. While it is unlikely that the Commission could void a collective agreement that it determined to be unreasonable, what it could do is refuse to provide revenue increases to fund them, although that is not a result that I need to consider in this case. It is sufficient for me to note that there is a regulatory process in place which must be seen effectively to be a guardian of the public interest.

[5] Following that theme, the Company made a power point presentation to the Union bargaining committee at the outset of their negotiations in which it described the regulatory system and summarized some of the key points made by the Commission in its 2012 decision. The intention of the Company in making the presentation appears to have been to merely set an overall tone for the negotiations based on the prescriptions mandated by the BCUC without directing a resolution on any particular issue. Nor was there any evidence that the Union took it to be anything more than that.

[6] One particular issue dealt with by the Commission, identified as a demographic challenge, was that approximately half of the FortisBC workforce will be eligible to retire over the next few years. Of those, it said that 28% would be eligible to retire with an unreduced pension. It said that the Company had stated that it was difficult to predict the number of employees who would actually retire but that in the five year period beginning in 2006, 24% of those eligible to retire with an unreduced pension did so. It said that the most vulnerable departments were transmission and distribution with 33 of 72 employees eligible to retire in 2011. The problematic positions requiring attention would be Power Line Technicians [PLTs], where there is a market shortage, Meter Technicians (who are being made redundant by smart meter programs), Protection and Control Technicians and Power Dispatchers.

[7] Amongst the measures noted by the BCUC being taken by the Company to address the problem were:

- a PLT apprentice program
- sponsorship of the "Bright Futures" program to create interest in the industry within schools
- development and execution of succession and workforce plans
- investment in education
- offering scholarships and participating in co-op programs in conjunction with schools
- development of a supervisory skills program.

[8] The Commission did not choose to comment on the adequacy of those initiatives to address the problem but rather concluded that the issue was sufficiently important to warrant further analysis, including a comprehensive plan outlining the implications, activities and costs of dealing with the matter over the next five year period.

[9] On the issue of productivity the Commission noted that it had received a number of submissions regarding the need for productivity improvement but that the Company had represented that it had achieved operating and maintenance efficiencies of 10.4% as a result of negotiated productivity improvement factors in the Performance Based Regulation period. It said that while it was predicting increases in O&M expenditures in the forecast period for both 2012 and 2013 the O&M expense per customer, on a real basis, had declined over the previous period 2007 to 2010. Moreover, in his testimony, Mr. Walker spoke to the issue of productivity and stated that he believed that a continuous focus of the Company was on productivity and how to be more efficient and that this commitment to finding efficiencies was well demonstrated within the application.

[10] In the result, the Commission determined that since the increases in O&M expenditures were within a reasonable range it was not in agreement with the intervenors that it should impose a productivity improvement factor. Moreover, it noted that some efficiencies may continue to be realized through the integration of common functions between the Fortis group of companies including the senior management teams:

> "FortisBC indicates that it is now about to start the process of looking for efficiencies through alignment of operational elements of the business. As noted by Mr. Walker under cross examination, the Company

expects to see additional benefits by the latter part of 2013 and expects there to be filings to deal with integrated activities in 2014 and 2015."

[11] In particular, the Commission accepted the submission of the Company that while savings may be achieved at the higher level within the companies through the integration of management functions, it may not necessarily apply to lower levels of the two organizations for reasons relating to such things as the differences in commodities sold, different customers and embedded systems that work well for both organizations. In the result, it determined that it would be appropriate to allow FortisBC to proceed on the timeline that it had proposed but directed it to file a Productivity Improvement Plan with its next revenue requirements application no later than 2014.

[12] Finally, with respect to labour related costs the Company told the Commission that it targets a total compensation package for each separate employee group at the median level of its peer group of companies and that labour and benefits inflation are primarily non-discretionary cost increases. In that respect, I should say that I do not take that to mean that wages and benefits cannot be influenced through negotiations with its unions, since the Labour Relations Code imposes a duty on the parties to negotiate in good faith, but once concluded Section 49 requires that the terms of a collective agreement must be carried out. Therefore, it is accurate to say that labour costs are non-discretionary once a collective agreement is in place but it is also important to understand that they are not entirely within the control of the Company in any event, because of the duty to bargain. In that sense, the unions must be very much seen to be a type of joint venture partner in the enterprise who along with the employer prescribe the elements that contribute to the totality of the labour costs.

[13] In those proceedings one of the intervenors took the position that the collective agreement then in place that had been negotiated with the IBEW included percentage increases that were well beyond the norm and were not reflective of the downward pressure on wages which existed in 2010 when the agreement had been negotiated. It challenged the evidence of Jody Drope, the Chief HR Officer, in that respect who purported to support the contract.

[14] By way of a brief summary, the Company and the IBEW settled a 1 year "roll-over agreement" on December 5, 2007 with a commitment to engage in almost continuous bargaining throughout the term of the new agreement. In addition, there was a time-limited letter of understanding that provided an interim market adjustment of 8% for PLTs. Then after bargaining throughout most of 2008 a new agreement was ratified on February 6, 2009 for a term from February 1, 2009 to January 31, 2013. Through this bargaining, the Union had sought and obtained extensive language amendments throughout the agreement. In addition, the general wage increases for each year of the new 4 year agreement were 3%, 3%, 4% and 5%.

[15] It is important to note that the market adjustment was designed to bring the PLT wage rates up to the level of those paid by BC Hydro. Under the terms of LOU #12, unless the Company amended or renewed the adjustment it would cease on January 31, 2010 and the PLTs would revert to the rate in effect immediately prior to the adjustment. As it happened, the Company chose not to renew it with the result that the wage rates for the PLTs reverted to same rate as is paid to all journeymen tradesmen. Probably because of the relatively vigorous capital development program of the Company in effect at that time, they comprised a relatively high percentage of the IBEW bargaining unit, around 30%. The total bargaining unit is not large in any sense with around 200 regular full time members. There are also around 25 temporary employees, most of whom are employed in the generation division.

[16] The Company also negotiated a collective agreement with the Canadian Office and Professional Employees Union, Local 378 (COPE) covering its office, administrative and technical employees on October 18,

2012 with a term from February 1, 2011 to December 31, 2013. It provided for annual wage increases of 2.5%, 2% and 2%.

[17] By contrast, FortisBC Energy concluded an agreement with the IBEW on June 20, 2012 which provided for general wage increases of 2% in each year of its 4 year term commencing April 1, 2012 and ending on March 31, 2015.

[18] The BCUC generally examined both these internal relationships and certain external comparisons, which it summarized by reference to Ms. Drope's evidence as follows:

- recent research published by the Canadian Electricity Association in 2011 states that 45,000 workers will need to be recruited by utilities by the end of 2016 and utilities have gone on record stating that they intend to poach employees from other utilities for many critical positions
- the base hourly rate for FortisBC PLTs is $39.91
- the Line Contractor Association base hourly rate is $44.97
- BC Hydro's comparative rate is $37..96 for PLTs
- the base rate for PLTs at Altalink in Alberta is $45.12
- BC Hydro's compensation package for PLTs includes specific provisions not offered by FortisBC that make the rates comparable. These include 17 additional days off
- FortisBC was able to negotiate some productivity offsets as part of the package.

[19] Without going into the details of the comparisons at this point, a critical issue that was the subject of a great deal of evidence, which I will deal with at length later in this award, relates to a point made by Ms. Drope was that it is not appropriate for these purposes to compare isolated wage rates but rather one must look at total compensation:

> "… our compensation philosophy is to attract and retain qualified staff. And that's consistent with all our different employee groups. In order to be able to do that, we have to offer a total compensation package which includes not only base wages and base wage settlement figures such as those that Mr. Hobbs put in front of you yesterday, but it also includes other key components of the employment package like benefits, pension provisions, access to overtime, etc." BCUC Transcript
> FortisBC 2012-13 RR & 2012 ISP
> March 6, 2012 Volume 3

[20] This also became a central issue in these proceedings. In the end, while the Commission agreed that on the surface the percentage increases provided to the IBEW in the 2009 – 2013 collective agreement appeared to be on the higher side of what might ordinarily have been expected for that period, what it did not account for were the circumstances that were at play in those negotiations. In the result, it accepted the total compensation approach described by Jody Drope and concluded that the rates negotiated with the IBEW at that time were reasonable.

2. **Divergent Bargaining Strategies**

[21] It is remarkable that in spite of the fact that the parties had a good working relationship that permitted them to easily and effectively communicate with each other, their bargaining for a new collective agreement went off the tracks right at the outset. Doug Slater, the Manager Labour Relations for the Company, testified that he met with Rod Russell, the Assistant Business Manager of Local 213, on October 30 in advance of bargaining to

discuss the general approach that each party would take and to set aside a block of three weeks in December for the purpose.

[22] Interestingly it was the Employer that took the initiative to serve notice on the Union to commence bargaining. The notice, dated November 13, 2012 was issued pursuant to Section 46 of the Labour Relations Code which permits either party to a collective agreement to serve a notice within 4 months of the expiry of an agreement. As I indicated above, the subject agreement at that time had been in effect for a term of four years and was due to expire on January 31, 2013. As it turned out, however, the parties were not able to meet in December because Mr. Russell had indicated that he would not be available at that time. Nevertheless, he and Mr. Slater were able to meet informally around December 4 but they did not discuss any of the details relating to their respective agendas.

[23] For the cancelled time, they agreed to substitute three blocks of weeks in January. After that the Union responded on December 9, 2012 by sending the Employer a proposed protocol by which the bargaining would proceed. Without going into the details of the protocol, it included what can properly be called common sense terms such as a restriction on adding new topics once the agenda had been agreed, the computer software to be used by the parties including tracked changes, how proposals were to be withdrawn and a process for signing off agreed items subject to "ratification by the parties' respective principals." Also, it is worth noting that the terms of the protocol purported to commit the parties to keep the bargaining confidential from the news media subject to the Union reserving the right to keep its members fully informed.

[24] Mr. Russell testified that the Union had prepared for bargaining several months earlier by first establishing a steering committee. Its function was, as the name suggests, to solicit bargaining proposals from the members and then vet them for bargaining. The proposals that were accepted were assembled and organized in a form that could then be presented to the Employer. He said that every employee classification was represented on the steering committee to ensure that their individual interests were protected. Eventually the actual bargaining committee was selected from those persons belonging to the steering committee.

[25] Other than Mr. Russell, the designated spokesperson, and Rav Ghuman from the Union, they were appropriately all from the bargaining unit as follows:

- Mike Bartley, Electrician
- Albert Bortolussi, Operator
- Trevor MacMurray, PLT
- Dave McBlane, PLT
- Carey Hiebert, CPC
- Jason Earl, PLT.

[26] According to Doug Slater, the Company normally prepared for negotiations similarly to the Union. They would send a form to the managers for input on things they felt needed to be changed. The senior executives would then "scrub out" things they thought should not be bargaining and generally ended up with 30 to 40 issues. However, in this instance they decided to do it differently. They decided to take a straight forward simple approach with only 8 issues but with the objective of achieving one major goal, that being to change the job description language. Under that strategy, one may presume that the other seven issues were relatively less important, although that clearly changed as the bargaining evolved through the year. The entire agenda compiled by the Company can be easily summarized as follows:

1. Job descriptions: secure right to create;
2. Align benefits with core comparators;
3. Compressed work week: make assignable rather than voluntary;
4. Radius: commence pay by reporting to worksite instead of headquarters;
5. PLT banding: unband from journeymen classes and pay market rate;
6. Pension: eliminate solvency fees;
7. Apprentices grievances: apprentice pay, living out allowance and travel;
8. Miscellaneous

[27] They did a comprehensive comparison of the terms and conditions of employment being paid by other employers in the same market group. In particular, they noted that BC Hydro and the IBEW L.258 had just concluded a memorandum of agreement covering the company's electric utility operations. That agreement was for a two year term from 2012-2014 and provided for a 2% wage increase in each year. He said that they regarded BC Hydro as the "core" market for purposes of comparison because while they operate in different geographical areas within the province they are essentially in the same business; both are regulated by the BCUC; and they compete for the same types of employees. Indeed, FortisBC sources 20% of its electrical power that it sells to its own customers from BC Hydro. Other groups that include journeymen within the electrical trades include line contractors, municipal utilities, and major related industries. After that are comparators in Alberta which often attract tradespersons away from BC utilities. Mr. Slater admitted that these are not as vertically integrated and the regulatory regime is different but the oil & gas industry compels them to pay higher rates of pay and benefits than British Columbia.

[28] Earlier in the year the Company commissioned Towers Watson, a prominent management consulting firm, to conduct a review of the competitiveness of the company's benefit programs (the "Ben/Val Study") including:

- disability programs (LTD and STD)
- life insurance
- extended health care and dental programs
- vacation, holidays and other paid time-off.

[29] Mr. Slater testified that what they found was that their benefit package was 38% above the market average and that retiree benefits were "off the charts" being 350% above the average. When it comes to pensions, he said that the IBEW plan has the highest contribution rates. He estimated the total benefit cost per employee, including wages, averaged over $127,000/year. On that basis, assuming 200 regular full time employees and 25 temporary employees the annual total payroll cost is in excess of $27 million.

[30] Accordingly, management felt that the best thing to do would be to keep it simple and to try for another roll-over agreement as they had done two contracts earlier. The Company bargaining committee was balanced with that of the Union being comprised of the same number of people except it chose to appoint Jay Sharun, a labour relations consultant at Western Industrial Relations to lead the negotiations. He had apparently negotiated over 350 collective agreements in a wide range of industries over the previous period of 15 years. The names of the balance of the Company committee were:

- Doug Slater, Manager Labour Relations
- Barry Smithson, Director Operations
- Mike LeClerc, Director Generation
- Todd Romano, Manager Operations, South Okanagan

- Sean Conway, Manager Operations, Kootenays
- Donna McEachern, HR Advisor

[31] It is an unfortunate fact that the parties did not make any attempt to align their bargaining strategies in advance, which clearly set the stage for a whole series of mistakes by each of them resulting in a failure to reach agreement and a lengthy lock-out. When they finally met on the first day of negotiations on January 7, 2013 the Union tabled an agenda of 130 demands. To say that it was a shock to the Employer in the circumstances where they intended to negotiate a simple roll-over agreement would not be an exaggeration. Mr. Russell admitted that that the Union committee was aware that the Company was "perturbed" by the scope of the Union agenda but he felt that it was not inappropriate to continue to support it because, in his view, the effect of it was to give the members a "voice" in the negotiations.

[32] He said that they attempted to explain the scope of the Union agenda by describing how it was developed. The explanation, however, did not mollify the Company negotiators. They saw it as a serious lack of discipline. For them, it amounted to simply taking most of the demands that emanated from the membership and making them into formal proposals, without any real overall control being exercised by the committee over them.

[33] It almost immediately threw the parties into an impasse and became the cause of considerable acrimony. The Company committee saw it as a threat, the thrust of which was that the Union was determined to obtain some significant gains in this set of negotiations. As they said, it might have been quite understandable in 2009 following the last roll-over agreement but, as Doug Slater explained, in this instance the parties were coming off a four year agreement with increases of 3%, 3%, 4% and 5% for a total of 15% at a time when the rates for BC Hydro employees had been frozen. They felt that it was not the time for aggressive moves but rather for moderation.

3. **Early Impasse**

[34] There was pointed discussion about job action at precisely the time that negotiations were just starting, which ordinarily would be remarkable but in this case was perhaps understandable because of the failure of the parties to coordinate their bargaining strategies. The evidence was that Mr. Sharun stated that the Company was ready to take a strike if the Union wanted more than it was prepared to give. Mr. Russell said that the approach generated much concern amongst members of the Union committee. They wondered why the Company didn't come to them in advance to float the idea of another roll-over agreement, if that was what they truly wanted.

[35] Although the bargaining continued for several more days on January 8-9 and again on January 14-16, 2013 with the Union presenting detailed reasons for its proposals, it was not until January 21 that the Company presented its proposal for a one year agreement. It advised the Union committee that it would drop certain discussion items that it had introduced in the first session if it could get the one year agreement with a 1% wage increase and one substantive language proposal relating to job descriptions.

[36] However, even without the trauma relating to the process, it is unlikely that the Union would have accepted the Company package. It was determined to pursue its extensive agenda and was not prepared to enter into another rollover agreement. In addition to the many language changes, it proposed a two year agreement with 3% increases in each year in addition to upgrades for particular classifications.

[37] In fact, at that point the Union advised the Employer that it considered the negotiations to be at an impasse. In response, three days later on January 24, 2012 Doug Slater wrote to Rod Russell proposing mediation through the auspices of the Labour Relations Board.

[38] The proposal for mediation was not immediately accepted by the Union so the parties continued bargaining on their own, recommencing on March 5. In the meantime, it considered that it was time to demonstrate its resolve to secure its package by taking a strike vote. Because the bargaining unit is spread over a large geographic area, it typically takes several days to complete such a vote. The result, announced on February 21, 2013 was a strike mandate with 99.4% of participants voting in favour of the motion.

[39] The parties resumed bargaining for two more days, at which time the Employer properly came to the conclusion that a roll over agreement would not be accepted. It then decided that it had no other alternative than to expand its horizons with proposal for a 3 year agreement with successive general wage increases of 1% per year. While this had the effect of joining issue on the term of the agreement, it left a wide gap with the demands of the Union on wages at 3% per year. They did have some success, however. On March 7 the Parties signed off on the settlement of a grievance relating to apprentices. The Company agreed to reimburse 100% of expense claims made by Clayton Vermette, Kurt Thygesen and Curtis Kriese and to place a minimum of 4 PLT pre-apprentices into full apprenticeships. The parties also agreed to comprehensive language governing apprentices on a going forward basis including provisions on selection, layoffs & recall, termination and training expenses.

[40] Unfortunately, it was not enough. On March 13 the Union served a 72 hour strike notice and the Employer responded by applying to the Labour Relations Board under Part 6 of the Code to designate its facilities, productions and services as an essential service. Under those provisions an order may be sought if a dispute is considered, inter alia, to pose a threat to the health, safety or welfare of the residents of British Columbia. With that, the Employer postponed a major maintenance project and laid off the entire crew of temporary employees who were to have worked on the project.

[41] On March 19, 2013 the Employer presented the Union with what it described as a “near-final” offer. The package included a 3 year term, annual general wage increases of 2%, 1.5% and 1.5%, their job description language, statutory holiday status quo, crew leads and LOU 6.

[42] The following day they commenced three days of mediation at the BCLRB to deal with essential services. The mediation was then continued on March 25 for a further two days leading to a written “pause” agreement. The pause was to allow Grant McArthur, the Director of Mediation, to try his hand at getting an agreement starting March 27. It contemplated that if no agreement was reached by April 9, the Union would present a proposal to the Employer and the next day either party would be entitled to give notice to the other to resume the essential services process. In the event that neither party were to serve notice the Company agreed to proceed with the Brilliant Dam Project. It was designated as a 10 year project that would proceed to completion using whatever resources and personnel that were required to do the work including a staged recall of the temporary employees who had been laid off on March 13 when the Union served its notice to strike. Finally, it provided that there would be no lockout or job action of any kind until after May 31, 2013 and:

- an Essential Service Order had been issued, and
- any strike/lockout notice had expired.

[43] As it turned out, the mediation did not start until April 8, at which time the parties exchanged proposals: the Union for a 3 year agreement with wage increases of 3% in each year, the conversion of temporary employees to regular full time, certain language items including job descriptions, transportation & travel pay for temporary transfers, a crew leader pay rate and an additional statutory holiday. The Employer proposal was equally for a three year term but with wage increases of 2%, 1.5% and 1.5%. It also sought its job description language and certain housekeeping changes.

[44] By April 10 it was obvious to the parties that they were not going to get an agreement through that process. Accordingly, the Union requested the resumption of the essential services process as had been provided for in the pause agreement. That resulted in a process at the Labour Relations Board over a period of four days on April 18, 19, 22 and 23, 2013 involving negotiations relating to work required to be done by Union members to ensure that essential work would continue to be done in the event of job action. At that same time the Company increased its wage proposal to 2% in each year of a three year agreement.

[45] Following that process on April 24 the Labour Relations Board issued an interim Essential Services Order on terms that were agreed upon by the two parties.

[46] On May 10, 2013 the Employer applied to the Labour Relations Board under Section 78 of the Code for a supervised last offer vote and three days later the Union reissued its earlier 72 hour strike notice. That same day the Employer officially made its last offer to be voted upon by the employees. These actions triggered the events that ultimately resulted in a devastating work stoppage. On May 16, 2013 the Union commenced limited job action. Operations throughout the Company were to be struck except that the System Control Centre continued to be fully manned.

[47] The day before, Mr. Russell sent an email to Mr. Slater to tell him that employees working at the SCC would be directed to begin limited job action by refusing to do various forms of paperwork that the Union deemed non-essential and that “additional duties” might be withdrawn in the future. The evidence on this issue was that while the non-essential paperwork did not to cause a great deal of concern to the Employer, the potential escalation beyond it did. As a consequence, the Employer ended up locking out bargaining unit members on June 26, 2013 in order to bring the earlier interim Essential Services Order into full effect.

[48] The Order initially was that the Union would be required to provide coverage for both the Transmission and Generation desks 24-7 until managers could be trained sufficiently to replace them. Thus began an arduous and lengthy work stoppage that seemed to assume a life of its own. The parties were unable to bring an end to it in spite of their best efforts to do it. It is a classic example of the risks that are taken when a work stoppage is initiated, either in the form of a strike or a lockout, which is that it may not easily be able to be brought to an end. It was a point made by Doug Slater when he testified that everything changed including the consistent effort to negotiate. When the lockout began, the focus switched to litigation at the Labour Relations Board to resolve disputes under the Essential Services Order. Efforts to resolve the terms of a new collective agreement became increasingly sporadic as time wore on and, more importantly, the momentum of the bargaining dissipated.

4. **Efforts to Mediate**

[49] The first initiative taken was a proposal made by Rod Russell directly to Doug Slater on July 26, one month to the day after the lockout began, that they should attempt to solicit the services of Vince Ready to see if he could mediate an end to the dispute. Mr. Russell had prepared a draft agreement by which he proposed to suspend the work stoppage and have everyone return to work pending the conclusion of the process. While the Employer fully accepted that mediation would be appropriate, it did not accept the return to work proposal on the basis that the focus should be on achieving a negotiated settlement. The first problem that arose on that initiative, however, was that Mr. Ready was not immediately available.

[50] As a consequence the mediation was not able to be started until August 21. At that time, the Employer tabled a new increased wage offer of 2.5% per annum on a 3 year term but introduced several new issues that it felt would mitigate the higher cost: a compressed work week where it would be entitled to schedule employees to 10 hour shifts at its discretion, asymmetrical terms of employment for new hires and new radius language. It also

proposed the IBEW gas language for job descriptions. The Union, however, continued to push for such things as a 3% wage increase in each year of the term, an 8% premium for a voluntary compressed work week, amongst other things, none of which was acceptable to the Employer. As a result, the mediation collapsed without any prospects of resumption, and all further efforts to negotiate a new collective agreement were cancelled indefinitely.

[51] After that another month went by where the parties spent considerable time at the Labour Relations Board, primarily on issues relating to amendments to the essential services order. No point would be served into going into the details. It is sufficient for my present purposes to say that on September 19, 2013 the Union proposed that Vince Ready should again be invited to attempt to obtain a mediated settlement except this time negotiations should continue until he was able to get a new agreement or he would declare an impasse and elect to book out and in the latter event, he would make recommendations which the parties would submit to their principals for ratification.

[52] The Employer agreed with the proposal but only on the condition that Mr. Ready would not issue any recommendations without the approval and consent of both parties. Moreover, to facilitate the new approach each of them agreed to appoint new spokespersons with Gord Van Dyke being appointed for the Union and Jody Drope/Doug Slater for the Company. The mediation intervention occurred on September 25 and 26. This time, while the parties did not succeed in reaching a mediated agreement, what they did do was consent to Mr. Ready issuing recommendations for settlement which he did, in the form of a written report dated September 29, 2013.

[53] As one might expect from a mediator of his stature, he did something quite innovative. Of course, I was not involved in those proceedings and the evidence relating to them is properly confidential. All we have is the recommendations that he made without any reasons or explanation so we don't know whether what he recommended emerged from a consensus that was developed between the parties or if they were inventions of his own creative imagination. What can be said, however, is that he only dealt with the issues that the parties presented to him and, in that respect it is important that by this time the outstanding issues had been reduced to only a few.

[54] In his report, Mr. Ready makes recommendations on eleven issues and of those, two related to implementation. One was that terms that had already been agreed prior to mediation would be incorporated into the renewed collective agreement and the other involved terms for a return to work. The innovative part of the recommendations relates to the proposed term of the contract. As I have already observed, the parties started negotiations with demands for a relatively short term which was eventually expanded to 3 years and had that been a consensus focus for a considerable time over the period of the negotiations. In his recommendations, however, Mr. Ready proposed a 5 year agreement presumably with a view to bringing a degree of stability back into the relationship following what had already been a lengthy strike.

[55] Because his report assumed a considerable degree of importance in these proceedings, as will shortly appear, I think that it is appropriate at this point to summarize his recommendations which were as follow:

(1) Term: February 1, 2013 to January 31, 2018
(2) Wages:
  (a) Retroactivity: $1000 non-pensionable lump sum payment
  (b) Wage rates: 2% on ratification
    2% 2014
    2% 2015
    2.5% 2016
    2.5% 2017

(3) Job Descriptions: Union entitled to input
(4) Educational Reimbursement: Requests for LOA and expense reimbursement subject to approval
(5) Crew Leader Clarification: Bulletined crew leader to be replaced if absent for more than one day or crew is combined with another or consists of less than 3 members
(6) Compressed Work Week: Company may assign employees to this shift at its discretion but pay the employee a 5% premium
(7) SCC Service Commitment: In the event of a labour dispute the Union will continue to staff both the Generation and the Transmission/Distribution desks in the System Control Centre
(8) Temporary Transfers: Union may conduct a ratification vote to change Article 18.05 by which employees will be paid travel time when temporarily transferred to a new headquarters as follows:

0-10 km	no compensation
10-25km	½ hr. straight time
25-50 km	1 hr. straight time
>50 km	as per Article 19.02 (a-f)

(9) Statutory Holidays: Family day not observed in favour of maintaining 4 floaters.

[56] The Company ratified the recommendations the next day having satisfied itself, as Mr. Slater described it, that it was fair and balanced. However, when it was put to a vote of the members of the bargaining unit on October 4, they rejected it by a significant majority of 63%. No evidence was led relating to the ratification meeting or what recommendations were seen by them to be particularly objectionable. The only evidence on it was from Doug Slater who testified that they had some initial feedback prior to the meeting that the report was not being well-received and after the meeting that the bargaining committee had not supported it, but he did not say that he had any information on why they did not accept it.

5. **Tentative Agreement**

[57] It was most certainly a frustrating setback for the negotiators on both sides. Mr. Slater said that there had been a lot of optimism initially that this mediation would be successful. When it was rejected, he said that they had to take a big step back for a while to recover and, at the same time ongoing litigation at the Labour Relations Board relating to the work stoppage became a distraction. However, he said that in the meantime, the International Union took the initiative to reach out to the Company to explore whether anything could be done. Laird Cronk, the International Representative for B.C., N.W.T. & Yukon, proposed that the parties get together without publicity at the highest levels of their respective organizations to see if an agreement could be worked out. In the end, they agreed to return to the bargaining table on October 24 and 25 without the assistance of a mediator. They agreed between themselves that very few persons should know about it, on the Company's side, the President, John Walker, Michael Mulcahy, Executive Vice President, Sam Doyle, Vice President Engineering & Generation and Doug Slater. On the Union side the participation list was even more confined: Gord Van Dyke, an Assistant Business Manager and Mr. Cronk himself.

[58] They met at Predator Ridge on October 24 where the Union took the position that whatever terms were worked out, to be successful it could not be less than the Ready recommendations. The Company representatives assured them that they wanted a deal. Both sides agreed that if an agreement could be reached between them they would present it to Rod Russell and the Union bargaining committee for their consideration and if they refused to sign it, they would tear it up and never talk about it again as if it had never existed. Unlike the earlier bargaining that had taken place, the Company negotiators wanted to communicate the message to the Union members that a great deal of effort had been put into the initiative and that the agreement that resulted should be given every chance of success. To that end, they insisted that that there should be a provision in any agreement

negotiated that both parties would recommend ratification to their respective principals. Mr. Slater testified that the Company felt that this would be a necessity because they had a lot of feedback on what had happened in the ratification meetings called to consider the Ready recommendations, which they understood had not been supported. He said that the Company did not want this to happen again so they insisted on getting an agreement that the Union would fully support and even enthusiastically recommend.

[59] On that understanding, they commenced their discussions. I use that terminology deliberately because it was not formal bargaining. It was rather intended to be something more in the nature of hallway discussions or subcommittee meetings, independently of the formal bargaining committees. They intended that the bargaining committees would continue to have the ultimate authority to determine whether the terms were sufficient to be likely to be accepted by their principals. This is important to understand because considerable consternation developed amongst some of the bargaining unit members when they initially heard about it. They called it a "sweetheart deal" because it had been negotiated in secret and, of course, they had not been involved.

[60] The truth is that it was anything but a sweetheart deal. It was never intended to be binding on anyone unless the respective bargaining committees endorsed it. It was not part of the deal to circumvent the bargaining committees. If either felt that it was insufficient, they could refuse to accept it and that would be the end of it. In particular, if either felt that it unduly benefitted one group over another they could veto it. The only thing that was mandatory about it was that if both sides signed it after having a chance to review it, then it had to be voted upon and ratified by their principals. It was a perfectly normal protocol that is routinely used by experienced negotiators to nudge along difficult negotiations towards a new agreement. And it is often the case that the bargaining committees are not always directly involved in every aspect of the negotiations. Some aspects may be assigned to subcommittees to work out while at other times it may be seen to be more appropriate that particular issues should be discussed by individuals who may be in a position to be more open about what may be feasible than if it were discussed in a plenary session. Certainly, it was not inappropriate for the senior executives of both organizations to explore whether there was anything that could be done to bring the work stoppage to an end, particularly in the circumstances here where any terms that were worked out would be vetted by the union bargaining committee.

[61] Ultimately the senior negotiators were able to come to an agreement on the terms that they thought would be acceptable to their respective bargaining committees. One might properly observe that they were largely based upon the Ready Report with certain modifications to fill in the gaps which they thought might have been the reason why they had been rejected by the rank and file in the first place:

- a 5 year term from February 1, 2013 to January 31, 2018
- a lump sum payment of $1250 upon ratification
- a general wage increase of 2.5% on ratification and 2%/year in the next two years followed by 2.5% in each of the last two years
- consultation on job descriptions before being bulletined
- requests for reimbursement of educational expenses to be approved in advance
- crew leader replacement unless absent for less than one day or crew is combined with another or the crew consists of less than three members
- company may assign employees to a compressed schedule if it pays a 5% premium and certain precise conditions are met
- union will continue to staff the SCC in the event of any labour dispute
- status quo for statutory holidays
- company will post at least 2 RFT positions in generation

6. **Adoption by Union Bargaining Committee**

[62] It is fair to say that when the Union bargaining committee was called to attend a meeting to review the potential agreement on October 25, 2013 it was not considered to be a model contract in any sense by the Union officers but it is clear to me that they thought it was the best agreement that they could get under the circumstances, as I will explain shortly. It signed the agreement that same day and the Employer one day later. As it turns out, however, the Employer ratified the agreement but the Union did not. While the margin was reduced in comparison to all previous ratification votes, 59% of those voting turned it down. In fact, the demographics of the voting pattern were interesting because there was apparently general support for the proposed contract in the Okanagan area but employees in the Kootenays were overwhelmingly against it.

[63] Graham Menzies reflected the deep concern shared by the members of the Union committee over the manner in which it was negotiated. His regular job is Corrosion Control Crew Leader and a Journeyman Painter but in the Union, in addition to being a Shop Steward and a member of the Steering Committee, he was an alternate bargaining committee member. He testified that he was given a copy of an email from Phil Kulbaba who had written to Tom Trubetskoff the day before the bargaining committee was summoned to assemble to consider whether to adopt the agreement. The email dated October 24, 2013 said that there was a rumour going around to the effect that, "There are some talks going on and some sweetheart deals being negotiated." Mr. Kulbaba explained that the sweetheart deal was that generation employees would get special benefits and that they would have to watch to see "who gets a job, a promotion or whatever after the lockout ends." Mr. Kulbaba is a generation electrician and Mr. Trubetskoff is an operator.

[64] The next day Mr. Menzies said that he was on the picket line early in the morning when Mr. Trubetskoff appeared and asked him if anything was going on. Mr. Menzies said that he told him that he knew nothing. Later on, however, he said that he got a call from Albert Bortoluzzi, a regular bargaining committee member who told him to pack a bag for Kelowna because he was needed to participate in bargaining. They drove to Kelowna together in the same car. He testified that during that time they got a call from Rod Russell who advised them that Laird Cronk would be at the meeting. Almost certainly, the intention of Mr. Russell was to communicate the importance of what was happening but all it did was feed the rumour of a sweetheart deal. Following the call, it prompted a conversation between Mr. Menzies and Mr. Bortoluzzi, as they drove towards the designated meeting place, about the incident the previous day which, in turn, led them to speculate whether Mr. Cronk was there somehow force a deal and, as Mr. Menzies described it, "to step on us".

[65] They decided to call Mr. Russell back to ask him why Mr. Cronk was there. All Mr. Russell would tell them was that they would have to wait until they got to Kelowna. Once the members of the negotiating committee had assembled at the Union office Mr. Cronk introduced himself and described the purpose of his visit. He told them that the Union and the Company officials had engaged in high level discussions to see if there was any way to get the employees back to work and advised them that they had been successful in arriving at an interim agreement. He explained, however, that the agreement was subject to their approval. He asked them to look it over and if they approved, to sign it but if they did not, he said their intention was that it would "disappear into thin air".

[66] I am unaware whether the members of the bargaining committee were disappointed or offended that they had not been able to participate in the negotiations but what can be said is that they were not happy with the deal. Mr. Bortoluzzi responded by telling Mr. Cronk that the members already knew that there was something going on because there were already rumours amongst the members of a "sweetheart deal" having been negotiated. Mr. Cronk replied that none of the three Union negotiators could have leaked it. Mr. Menzies said he then asked him if the deal was good for generation and was told, no. However, when the committee members

were shown the agreement he said some of them observed that the radius language, Article 18.05 had been deleted which they interpreted as an advantage for generation as well as the fact that it included a commitment to hire two temporary generation employees as regular full time.

[67] Nevertheless, in cross-examination Mr. Menzies conceded that was not really of any advantage to the generation employees. He said that when he looked at it, he dismissed the suggestion. Indeed, he agreed that it was to the opposite effect and that to take away their travel time would have a negative effect on the generation staff. At that point the bargaining committee members were left alone to decide what to do. They discussed what they thought would be the effect of the apparent leak on the members. The consensus was that what it demonstrated was that even if they were to reject the agreement, there would be no way to keep it a secret. On the other hand, Mr. Menzies, in particular, expressed the view that it wouldn't be accepted anyway because it was "exactly" what they had turned down earlier on and that there was "no way anyone would consider this." Mr. Russell, however, persuaded them that the rank & file members should be given an opportunity to vote on it. He said that he acknowledged that the deal was not there but they could not go back to the members and deny what had happened. Mr. Menzies asked if he could be shown to have signed under duress but in the end after a discussion of about two hours all of them decided to sign it unconditionally.

[68] Three ratification meetings were then held at each of Castlegar, Penticton and Kelowna. As one might expect, while each of them had the same agenda, to consider the tentative agreement, each was greeted with various degrees of skepticism. The evidence was that in spite of the agreement to recommend it to the members, it is fair to say that the bargaining committee had difficulty in expressing any significant enthusiasm for it.

[69] Laird Cronk presided over the meetings. He commenced by describing the essential terms of the agreement to the members and he concluding by saying that the Union recommended it. However when he was asked if he felt that the bargaining committee signed it under duress in one of the meetings, he responded by using a rather cryptic metaphor, that there may not have been a gun to their head but there was a "gun on the table".

[70] Graham Menzies testified that he did not speak publicly on the issue at all but when he was asked questions by individual members he said that his answer was consistently that he was neither for it nor against it. He added that he did not recall anyone speaking in real favour of it, probably reflecting that the primary motivation of the committee was only to permit the members to vote on it. Similarly Rod Russell said that he remained non-commital in the matter. He also testified that when Gord Van Dyke was asked by certain members what he thought of the deal, he replied that it was a "shitty deal but it is the deal you have in front of you."

[71] I interpret those collective responses to mean that it was the best deal that the negotiators thought they could get in the circumstances but that objectively it was not a good one. In fact, Mr. MacTavish took an even stronger position, that the October 26 Memorandum of Agreement was put to the membership by the Union's bargaining team, not as a "this is the best we can do" package but rather as one that was expected to be turned down. Moreover, he argued that the bargaining committee complied with the mandate to recommend the agreement by virtue of it being expressly stated in the written materials.

[72] However, it is my view that the neutral response of the bargaining committee could in no way be said to meet the requirement that they would recommend it to their principals. To leave it up to the members to decide is not a recommendation. Nonetheless, I am not prepared to find that it was the effective reason why 59% of the members refused to ratify it in the circumstances here. It was as Mr. Menzies said, not good enough. It did not meet their most basic bargaining objectives and it is doubtful in the circumstances that a positive recommendation would have changed the result in any significant respect.

[73] Nor do I accept that the members of the bargaining committee can be said to have signed the agreement under duress. They were under no threat of a personal nature if they had decided not to sign and they were not asked to keep it confidential. I do not interpret the representation of the negotiators that it would be as if it didn't happen to mean that the members of the bargaining committee would not be able to disclose it. It simply meant that it would have no force or effect and there would be nothing for the members to vote on. For the members of the bargaining committee to conclude, as they did, that they would not be able to keep it confidential if they did not sign it, was a problem that did not exist. Had they not been under that misapprehension it is quite possible that the bargaining committee would not have signed the interim agreement and there would have been no vote but, of course, those are not the facts.

[74] At that point it may be properly assumed that the negotiators on both sides must have been at their wits ends as to what it would take to resolve the impasse. Other comparator groups within the market segment seemed to be able reach agreements without job action. For example, on December 4, 2013 the Employer and the Canadian Office and Professional Employees Union ("COPE") were able to negotiate a new collective agreement before the expiry of the previous one for the office, administrative and technical employees for a term from January 1, 2014 through December 31, 2018 with annual general wage increases of 2%, 2%, 2% 2.25% and 2.5%.

7. **Agreement to Arbitrate**

[75] The confusion became palpable. Again, the Union took the initiative to get back to the bargaining table and yet again, without the main table bargaining committees. For this purpose, Rod Russell and Laird Cronk were joined by Mike Flynn. On the Company side, Michael Mulcahy continued as the spokesperson with Doug Slater. They met on December 4 and 5, 2013 at which time the Union decreased its wage demands to 2.5% in each year of a 5 year agreement. Other notable modifications from the previous tentative agreement were proposals to maintain the voluntary aspect of the compressed work week and to eliminate the System Control Centre commitment, none of which were acceptable to the Company.

[76] Negotiations broke off and it was then that the Employer concluded that there was no reasonable prospect for a settlement through continued negotiations. On December 6 it proposed binding interest arbitration to resolve the outstanding issues. Although the Union did not reject it outright, it sought to attach conditions. It initially proposed to confine the evidence admissible in the hearings, the details of which I dealt with in my Preliminary Award, but ultimately it accepted the offer without conditions. The employees returned to work and all further proceedings at the Labour Relations Board were withdrawn, including the essential services order which had become redundant.

[77] It is not unimportant that the terms of the agreement are that the expired agreement is renewed subject to any amendments made in the course of the earlier negotiations or through the arbitration processes. The term of the renewed agreement was agreed to be February 1, 2013 to January 31, 2018. Accordingly, it is not an issue in dispute and has not been referred to me to decide. All items agreed prior to the commencement of job action were set out in Appendix "A" and will become part of the final binding agreement upon receipt of the arbitrator's decision. Appendix "B" includes a Return to Work Agreement, and Appendix "C" sets out the issues that I am mandated to resolve over which I have jurisdiction. These are:

1. Wages
   (a) Lump Sum
   (b) General Wage Increase
2. Job Descriptions
3. Educational Reimbursement

4. Crew Leader Clarification
5. Compressed Work Week
6. SCC Service Commitment
7. Statutory Holidays
8. Generation Employees Hire
9. Letters between the Parties Regarding WorkSafeBC coverage and Contracting Estoppels

[78] After I had been appointed, the Union and the Company disagreed on the admissibility and relevance of the bargaining evidence that I referred to above. On March 16, 2014 I issued a decision in the matter in which I held that it was admissible, was not subject to settlement privilege and was directly relevant to the issues in dispute. In addition, Mr. Harrison argued that communications leading up to the Agreement to engage in interest arbitration were properly admissible and are necessary to interpret the terms of any agreements made in the course of the negotiations. He said that when the Employer made the proposal to refer the dispute to arbitration, Rod Russell expressed concerns on behalf of the Union to Doug Slater about submitting the past memoranda of agreement for the consideration of the arbitrator. Mr. Slater responded by saying that the Company would not agree to exclude such evidence because, in its view, the evidence of what happened in the negotiations provided important history and context that would be important for the arbitrator to consider.

[79] On December 10 the Union again advised the Company that it continued to have a problem with the admissibility of the memoranda and made a counter proposal on both the substantive issues and the interest arbitration. Part of the proposal was that "all prior reject Memorandum of Agreements shall not be admissible evidence in the interest arbitration process." On December 12, the Company made its final offer on interest arbitration and specifically rejected the Union's proposal to make the previous memoranda of agreement inadmissible, saying that such an exclusion was not acceptable to the Company. In a letter to Mike Flynn, Mr. Slater expressed the Company's view that it would "fundamentally alter the nature of interest arbitration by imposing conditions on what the Parties may present or reference, thereby artificially restricting the scope of the hearings."

[80] The following day, the Union proposed that instead of admitting the past memoranda of agreement and the Ready recommendations into evidence, the parties would be entitled to refer to the existence of them but not the content. The Company replied that it would not agree to any restrictions on the evidence. It said that it stood by its December 12 final offer, that it was not willing to compromise on the issue of admissibility and that it was up to the Union to decide whether or not they would agree to the Company's offer.

[81] Three days later, on December 16, 2013 the Union accepted the Company's December 12 offer of interest arbitration without conditions which then led to the arbitration agreement which is summarized above.

[82] What is important about my decision on the issue that negotiation history is admissible and is not subject to settlement privilege was primarily based upon the replication theory of collective bargaining formation. In that respect, I said the following:

> This approach requires the arbitrator to essentially prescribe terms of the collective agreement that mimic what the parties would have done for themselves had the negotiations not broken down. In order to do that, the arbitrator must necessarily take into account the negotiations that precede the arbitration in the absence of which the arbitrator would have no base from which to make the decision. It is an approach that is precisely the opposite of what the Union is arguing in this case, which would precude replication and would have me devise terms of the new collective agreement without reference to the negotiations as if they had never occurred.

8. **Parameters of the Replication Theory**

[83] The basic idea behind the replication theory is that the mandate of the interest arbitrator is to discover the shape of the contract that the parties themselves would have arrived at ordinarily as an outcome of free collective bargaining, including any recourse that might be had by them to a strike or lockout . The problem comes in the application of the theory. In some cases the bargaining does not result in an agreement at all before it is referred to arbitration and in other cases, as here, the negotiators are able to arrive at a tentative agreement but for some reason it is not ratified. From a strictly legal point of view, it is appropriate to observe that the status of the negotiations in both of those scenarios is exactly the same. In neither case does it result in a binding agreement.

[84] In that context, could it then be said that the situation where the parties have been able to reach a tentative agreement should be seen to have more relevance in the determination of what agreement the parties ought to have reached themselves than where they have not been able to reach any agreement at all? Based on the established jurisprudence, the answer to that question is that it does. A tentative agreement that has been rejected may logically be seen to be one closer to what the parties should have made for themselves than where no agreement is reached by them at all. On the other hand, is it logical that if a tentative agreement is rejected by one of the parties that it should nonetheless be adopted by the arbitrator as their collective agreement? And it is primarily those questions upon which the jurisprudence turns. The leading case on this issue, to which I referred with approval in the Preliminary Award, is a decision of Paul Weiler in *Toronto Transit Commission and Amalgamated Transit Union, Local 113* (1985) 17 LAC (3d) 385 in which he held @p.389 that:

> "There is a broad consensus among labour arbitrators that a settlement voluntarily arrived at by competent negotiators is a much better index of the appropriate award than the opinion of an outside arbitrator whose involvement in the dispute is inherently limited. I had occasion to consider this issue in my Sixty-five Participating Hospitals award, 1981 (Weiler)[unreported]. There I did say that the preference for the agreed-to settlement should only be a general presumption, not an automatic unyielding rule: otherwise the democratic participation of union members in the ratification or rejection of their contracts would be eroded. However, I went on to state that: "If seasoned representatives produce a comprehensive package out of the give and take at the bargaining table … the product of their work must be treated as strong prima facie evidence of an economically sound bargain. … The arbitrator … should treat the settlement as fixing the ballpark figures for a new contract."

[85] By contrast, in *Re Salvation Army Windsor Community and Rehabilitation Centre and Recycling Unit and Service Employees International Union Local 2* (2009) 183 LAC (4th) 127 @ p.135 Michel Picher put the test in the form of a presumption. He said that it is extremely rare for boards of interest arbitration to depart from the terms of a tentative memorandum of agreement which has not been ratified by the rank and file employees and that absent extraordinary evidence it is the best evidence of what the parties would have agreed to. Moreover, he said that the fact that a tentative agreement is not ratified "cannot itself be seen as sufficient to necessarily displace the presumptive persuasiveness of the terms of settlement reached by the parties respective committees at the bargaining table, particularly where both parties expressly recommend ratification to their principals, as occurred in the case at hand."

[86] What both of those cases reflect, taken together, is that the replication theory is somewhat artificial, as was noted in *Re University of Toronto and University of Toronto Faculty Association* (2006) 148 LAC (4th) 193 (Winkler) where a number of disagreements developed in the negotiation of a fairly straight forward list of issues: compensation, progress through the ranks, pension plan, professional expense reimbursement, extended health

care and research and study days for librarians. While the arbitration board accepted the principle to be an appropriate criterion, it did not accept it to be an exclusive one. The second criterion that it used, probably more important than replication in that case, was what it identified as a mandate to ensure that the university continued to be a leader among the world's best teaching and research institutions of higher learning.

[87] While I accept that it is appropriate to attribute a high degree of integrity to a tentative agreement that has been negotiated by highly experienced representatives, even one that has been rejected on ratification, to purport to automatically adopt it runs up against the most fundamental criterion of the replication model that it is an agreement that the parties would have reached. As I said in *Health Employers Association of BC (Canadian Blood Services) and HEU* (2011) 207 LAC (4th) 217 at para.42, "… how can one say what the parties would have agreed to when they were not able to reach the very agreement that they say ought to have been reached?" It is also the reason why an adjudication model is typically also used in conjunction with the replication model by which to derive the appropriate terms of the new collective agreement.

[88] It is this approach that was adopted by the Labour Relations Board in *Health Employers Association of British Columbia and Hospital Employees Union* BCLRB No. B96/2000. In that case Arbitrator Hope had ordered that hospital employees must receive "comparable" benefits and wages to those paid to government workers but he did not say what those were. He rejected "parity" as the proper test for the same reason used by Jody Drope when she was asked by the BCUC how the wages paid by the Company compared with those of BC Hydro, which was that not every condition of work would be the same but that measured across the board, both groups should receive the equivalent value. Jody Drope referred to it as total compensation. Arbitrator Hope expressed his desire that the parties would be able to develop an appropriate mechanism for costing the benefits and working conditions based upon the "comparable" criterion that he mandated through further negotiations but held that if they did not succeed it would be referred back to arbitration -- and it was for that reason that HEABC considered the award to be deficient.

[89] I discussed how the Labour Relations Board dealt with the issue in the Canadian Blood Services case, supra @ pp.232-233 as follows:

> In his own inimitable way, the Vice Chair, M.S. Hickling, being loath to state the obvious, that comparability had not worked, preferred to use a rather colourful metaphor to describe the outcome of the process as follows:
>
> > The pursuit of comparability has proved a little like the quest for the holy grail, a matter of legend, visible only to those of perfect purity, and with the disturbing tendency to disappear when approached.
>
> In dealing with the proper principles to be followed the Labour Relations Board related that in the period of the dispute there had been two contending theories of the role of arbitrators in the resolution of interest disputes. The one, the replication theory, was that the arbitrator was expected to replicate the award that the parties would have reached had they bargained to a settlement, and the other, the adjudication theory, that the arbitration board should reach a fair and equitable solution by taking into account the evidence and arguments and applying any of the accepted criteria or standards. The board also set out the arguments against each theory, that any attempt to replicate the agreement was artificial at best, that one could not say what the parties would have agreed to while the latter amounted to the arbitrator purporting to impose his own version of social justice. Mr. Hickling concluded by saying that more recently commentators, arbitrators and the labour relations board had tended to combine both

> approaches. Indeed, he said that the labour relations board uses the combined approach in dealing with the imposition of first collective agreements….
>
> He referred to a comment by Paul Weiler in his book, Reconcilable Differences (1980) Carswell @p.227 where he said that, particularly when it comes to wages and fringe benefits, arbitrators have been quick to recognize that they do not have the wisdom of Solomon. But he concluded that if Solomon were acting as an interest arbitrator in British Columbia today, the authorities would require that he furnish reasons.

[90] In the end, the appeal failed. The LRB refused to direct the arbitrator to reopen the hearings to provide the parties with an additional opportunity to call evidence and make further submissions. It is in that context that we may usefully return the Toronto Transit Commission case decided by Paul Weiler and the Salvation Army case decided by Michel Picher. While it is arguable that the tests propounded by them are in conflict, on analysis I am of the view that they are simply two sides of the same coin. Neither should be taken as saying that a tentative agreement must be taken to be conclusive evidence of the agreement that the parties would ordinarily have made. While I accept that the bargaining committees at the table are invariably in a better position to judge what may practically be acceptable in the particular circumstances that then exist, to say that an arbitrator must adopt a tentative agreement that has not been ratified, in the first place attributes more legal authority to the negotiators than they actually have. They are agents of the parties who are tasked with a responsibility to negotiate a collective agreement that is mutually acceptable to them. They are not authorized to simply conclude an agreement on behalf of their principals, otherwise there would be no point to the ratification. In the second place, it is not logical to conclude that it is the agreement that the parties would ordinarily have arrived at where one or both of them reject it in the ratification process, particularly in circumstances, as was argued by Mr. MacTavish, where job action continues for a considerable time after the ratification vote.

[91] Indeed, the evidence in this case, as I suspect in most cases, was that both parties prepared for the negotiations in essentially the same way by first consulting their principals on what proposals they wanted their negotiators to advance. That became their mandate from the union rank and file on the one hand and from the management team on the other. In neither case were the bargaining committees given authority as agents to conclude a binding agreement. In fact, they entered into a bargaining protocol at the outset of negotiations in January 2013 that all agreements would be "subject to ratification by the parties' respective principals." Following that mandate, the same term was made a condition of each of the two tentative agreements negotiated in this case as implicit recognition that the negotiators did not have the legal capacity to bind the parties.

[92] In the Mount Sinai Hospital and Building Services Union case, referred to in *Air Canada and Canadian Union of Public Employees* November 7, 2011 [unreported] (MacPherson) @ para 11, Paul Weiler described it as a prima facie test, one that has only apparent validity precisely for the reason that I have already discussed which is that the negotiators are only agents of the parties, not the principals to the dispute. However, he went on to say a very substantial onus rests on the principals which has repudiated the tentative agreement to demonstrate why it should not be followed, which was then used by Arbitrator Picher as the test in the Salvation Army case.

[93] In my view, if arbitrators were taken to be under an unconditional mandate to adopt rejected tentative agreements, there would be no point to the arbitration, even if there is an exception for extraordinary circumstances. The matter would be resolved by reference to a simple preliminary hearing whether the circumstances were extraordinary in any sense, to overcome the presumption that the terms of the tentative agreement should be adopted. There would be no need to take evidence on the actual merits of what the collective agreement ought to contain because that would be predetermined by reference to the presumption. In the Air Canada case that was precisely the approach taken by Arbitrator MacPherson.

[94] Similarly, using the Picher test that such agreements are presumptively valid, the presumption should be seen to operate on the base tentative agreement but does not preclude the arbitrator from making the modifications the arbitrator thinks would otherwise have been sufficient to persuade the parties to ratify it. This approach is the one used by Kevin Burkett in *Thames Medical Services Inc. and OPSEU (2004) 129 LAC (4th) 192* where he dealt with the inherent contradiction of adopting a rejected tentative agreement @ p. 199 by saying:

> "… the rejection of a memorandum of settlement under free collective bargaining is not viewed as a signal to recommence bargaining afresh. Rather, the bargaining that follows a rejection of a memorandum of settlement is in the nature of a problem-solving exercise designed to "tweak" the terms of settlement in a manner that preserves the essential bargain while at the same time facilitating a reconsideration by the principals. … The reality is that in free collective bargaining, the rejected memorandum remains front and centre. Although it does not constitute a legally binding document, the memorandum establishes the parameters for the bargaining that follows the rejection, notwithstanding the fact that it was entered into by the bargaining committees acting as agents for the principals."

[95] In my view, that is the proper approach to be taken by an interest arbitrator in the quest to replicate the agreement that the parties might have made in other circumstances. A tentative agreement that is not ratified is by definition not one that could be taken to be one that the parties would ordinarily have adopted. However, it can properly be taken to form a substantial basis of such agreement that with modifications could be expected to make it entirely acceptable to the parties.

[96] Having said that, I recognize that the reports are replete with cases where the arbitrator adopted a rejected tentative agreement without modification but I prefer to treat such cases as matters that were each decided on their own peculiar facts: *Re All-Way Transportation Corp and Amalgamated Transit Union, Local 113* (1986) 25 LAC (3d) 32 (Brown); *Jazz Aviation LP and National Automobile, Aerospace, Transportation and General Workers of Canada*2012 CanLII 97117 (AB CAA – T. Hodges). Nevertheless, it is my view that the weight of the jurisprudence is less towards mechanically accepting a rejected memorandum of settlement as conclusive of what the collective agreement should be and more in favour of treating it as Arbitrator Burkett termed it in *Peel Regional Paramedic Services of the Regional Municipality of Peel and Ontario Public Service Employees Union Local* 277 (unreported) January 11, 2013 as "the essential bargain" but one nonetheless that can be tweaked to convert it into the agreement that parties would likely have ratified. In *Amherstburg Police Association and Amherstburg Police Services Board* (unreported) April 28, 2008 Arbitrator Kirkwood preferred to treat the task of replication as one in which the arbitration board must give "considerable weight" to a rejected agreement. She correctly said that not to do so would permit a party to move for an agreement at the table and then use the interest arbitration process to get another chance to improve upon it.

[97] The argument against that approach is that the replication model is not fact based. On that theory it would not depend on what actually happened or what the arbitrator thinks could have been changed to make the tentative agreement acceptable but rather would be an artificial concept that would require that the arbitral decision be made based on what the arbitrator thinks would be fair and reasonable, or as was done in the Air Canada case by reference to a conclusive or unrebuttable presumption. A tentative agreement could be adopted as the replication model because on that theory explanations could be advanced for why it was rejected other than that the terms were not acceptable but that does not, in my respectful view, make sense. It would mean that the arbitrator would effectively have to conclude that the terms of the tentative agreement really were acceptable to the parties but for some extraneous reason were rejected, including as was argued in this case, such things as that the negotiators for the Union agreed to recommend it but failed to do so.

[98] I am not prepared to go that far. Interest arbitration is not a conceptual exercise. It requires arbitrators to attempt to determine terms that in reality would be mutually acceptable to the parties to govern their relationship in the future based on objective criteria and while a tentative agreement may properly be a factor in that determination, it is only one of many such criteria that ought to be considered.

[99] For example, in *Re K Mart Canada Ltd. and United Food & Commercial Workers, Local 1518* [1993] 37 LAC (4th) 412 the only outstanding issue was union security. Arbitrator Ready, who was one of the mediators in this case, concluded that if the parties had continued to freely negotiate, they most likely would have agreed to the inclusion of a union security provision given the tenacity with which the union pursued the demand.

[100] As I have already observed, the Labour Relations Board has also endorsed such an approach, dealing with first collective agreements, as in *Yarrow Lodge Ltd. and HEU* BCBLR No. B444/93 (Lanyon) @ pp.35-36. In that case, it held firstly that where a mediator issues a report the policy must be to give the recommended terms of settlement sufficient statutory weight that the parties do not simply use it as either a floor or ceiling for negotiating up or down, an issue that I discussed earlier. Secondly, the acceptance by one party of a neutral third party's recommendations moves the bargaining dispute to a stage where they are close to replicating what would have been the settlement. It went on to hold that while an interest arbitrator is not required to "rubber stamp" recommendations they must be given careful consideration and any interference with them will only be justified where:

1. The decision (recommendation) is inconsistent with the principles expressed or implied in the Code; and in particular the policy established in Yarrow Lodge;
2. There is a clear error or mistake of fact in the recommendation; and
3. New circumstances have arisen since the issuance of the mediator's recommendations, and they have had a material impact on one of the parties.

[101] In the circumstances, what should be obvious in the application of those rules is that the sooner the parties agree to arbitration following the issuance of the mediator's recommendations, the greater the impact. However, if the arbitration is not agreed until a considerable time after the recommendations, the more likely new circumstances will arise, which may include circumstances accepted by Arbitrator Ready in the K Mart case, a demonstration of resolve to achieve a different result.

[102] In *St. Clements (Rural Municipality) and IUOE Local 987* 2012 CLB 20 (Graham) the parties reached a tentative agreement after the matter had been referred to arbitration but it was not ratified by the rank and file union members. The memorandum of agreement required the negotiators to recommend it to their principals but when the Union negotiators failed to do so the employer took the position that it was a factor that should properly be taken into account in the determination of whether the rejected tentative agreement should be accepted. In effect, the argument was that had the union not failed in its contractual commitment to recommend the tentative agreement the likelihood is that it would have been accepted and that the union, therefore, bears the onus of proving otherwise.

[103] The arbitrator did not accept the argument, based upon the approach taken by Arbitrator Burkett in the Thames Emergency Medical Services case that a rejected tentative agreement was not determinative in any event and that even if one accepts that there is a presumption that it be accepted, most presumptions are rebuttable. He then went on to consider each of the proposals that continued to be in dispute and made his decision based upon the objective evidence available on each of them.

[104] As I have already said, I do not accept that there is a rule of law that a tentative agreement must be accepted as the replication model. However, such an agreement may be taken to reveal the "effective" bargain between the parties on which the parties reached consensus, the test used by Arbitrator Burkett in the Thames Medical case. Notwithstanding that the tentative agreement is rejected by one or both parties, where a consensus can be discerned it can properly be taken to form the base of the collective agreement that the parties would ordinarily have negotiated leaving only minor modifications to make it complete. It is only in this way that legal effect may be given to the act of rejection, without which as Arbitrator Weiler observed in the Toronto Transit Commission case it would erode the "democratic participation of union members in the ratification or rejection of their contracts."

[105] This was the approach taken by Arbitrator Kelleher in *Construction Labour Relations Association of British Columbia and Plasterer's Section of the Operative Plasterers' and Cement Masons' International Association Local 919* [2002] BCCAAA No. 438 where he said @ para 7 that, "… taking the replication approach does not mean the imposition of the defeated tentative agreement…" But he said that the tentative agreement must be a factor and went on to identify other factors that he considered would be compelling such as:

- the ability of the company to compete in an environment increasingly dominated by non-union contractors, and
- the relationship between the union and other building trades affiliates.

[106] In that case the parties negotiated a tentative agreement but it was rejected by the union members. As in this case when the matter came on for arbitration, CLRA argued that it represented the compromises that should be imposed on the parties. At para 6 Arbitrator Kelleher did homage to the replication doctrine in what I consider to be a very practical manner:

> "The task of an arbitrator in circumstances like the present is to replicate to the extent possible what would have been achieved in collective bargaining had it continued to a negotiated settlement. This involves considering the terms and conditions of employment of other employees and of what is fair and reasonable in all the circumstances."

[107] In *Beacon Hill Lodges of Canada and Hospital Employees Union* [1985] 19 LAC (3d) 288 Arbitrator Hope described the replication process as a goal where the arbitrator must objectively replicate the result that would have occurred if the collective bargaining process had not been interrupted by arbitration. What is important to understand in that case is that the arbitration occurred during a period of legislated wage controls under the Compensation Stabilization Act.

[108] In addition, it was a time prior to the current essential services system that is found in Part 6 of the Labour Relations Code and which played such a prominent part in regulating the work stoppage in this case. In that era, the Essential Services Disputes Act permitted firefighter, police and healthcare unions once they had bargained collectively in good faith to elect to have the dispute resolved by interest arbitration. [The legislation continues in existence to this day but only applies to fire and police services, as the title suggests, in the Fire and Police Services Collective Bargaining Act.] One of the salient features of the legislation was that it prescribed certain factors that an arbitrator had to take into account to make the decision, which is to say:

- the interests of the public
- the terms and conditions of employment in similar occupations outside the employer's employment, including such geographic, industrial or other variations as the single arbitrator or arbitration board shall consider relevant,

- the need to maintain appropriate relationships in the terms and conditions of employment as between different classification levels within an occupation and as between occupations in the employer's employment
- the need to establish 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
- any other factor that the single arbitrator or the arbitration board considers relevant to the matter in dispute.

[109] Interestingly, the arbitration board found that the Compensation Stabilization Act did not require it to apply compensation guidelines, the reason being that it was premature and that the commissioner might be expected to review the compensation award after it was put into place to determine if it fell within the guidelines. However, in the meantime the board held that to subordinate the process mandated by the Essential Services Disputes Act to rulings of the commissioner made at large would amount to a decline of jurisdiction. In the result, it held that arbitrators were expected to achieve replication through an analysis of objective data from which conclusions are drawn with respect to the terms and conditions of employment prevailing in the relevant labour market for work similar to the work in issue and the best evidence of this hypothetical agreement was the pattern of development in comparable hospitals in the community, especially those agreements voluntarily concluded. It is essentially a market test which involves the identification of a "prevailing standard" or the "prevailing rate" which may then be properly used to objectively determine the terms and conditions of an agreement in dispute.

[110] Using that approach, Arbitrator Hope held that the master agreement governing the acute hospitals was the prevailing standard and that the collective agreement for the employer in that case should duplicate that standard.

[111] More recently, Arbitrator Korbin in *Skidegate Band Council and Hospital Employees Union* [2002] CLAD No. 642 said @ para 45 referring to the Beacon Hill Lodges case:

> Put another way, an interest arbitration board must put itself in the position of the respective parties and seek to arrive at the bargain the parties would have reached on their own. Necessarily, this includes due consideration to matters such as the parties' historical bargaining pattern, the use of comparators, the prevailing economic context, etcetera. At different times in a collective bargaining relationship, different factors will be prominent in shaping an outcome. It remains the task of an interest arbitrator to be sensitive to the prevailing bargaining reality of the parties and make a decision consistent with what they themselves would have bargained.

[112] Finally, I would be remiss if I were not recognize the more recent analysis of Arbitrator Hall in *Thomson Rivers University and Thompson Rivers University Open Learning Faculty Association* [2012] BCCAAA No. 71 where he reviews the jurisprudence on replication and sets out a protocol to be followed for that purpose based on *Nelson (City) and Nelson Professional Fire Fighters Association* [2010] BCCAAA No. (174 McPhillips) @ para 10:

> "First, replication is the desired outcome and that refers to the notion that an interest arbitration board should attempt to duplicate what the parties themselves would have arrived at if they had reached an agreement on their own. …In Board of School Trustees, School District No. 1 (Fernie) and Fernie District Teachers Association, 8 LAC (3d) 157 Arbitrator Dorsey stated at p. 159 that "… the task of an interest arbitrator is to simulate or attempt to replicate what might have been agreed to by the parties in a free collective bargaining environment where there may be the threat and the resort to a work stoppage in an

> effort to obtain demands … and arbitrator's notions of social justice or fairness are not to be substituted for market and economic realities".
>
> A second principle is the requirement to be "fair and reasonable" in the sense that the award must fall within a "reasonable range of comparators" even if one party could have imposed more extreme terms. …
>
> Third, the exercise of interest arbitration has been described as a "conservative process" and that it "ought to supplement and assist the parties' collective bargaining relationship and not unravel or depart from it. … Interest arbitrators are enjoined to replicate the collective bargaining process. Thus, it is predictable, and perhaps inevitable, that they will follow bargaining trends, not set them.
>
> Fourth, as a result of this reluctance to innovate, historical patterns of negotiated settlements between the parties will carry significant weight."

[113] In this case, the Union does not take issue with the replication doctrine but differs from the Employer on precisely how one determines what agreement the parties would have arrived at ordinarily through collective bargaining. Its thesis was that the reason why the bargaining had not been successful was that the Employer tried to extract a series of concessions from the employees by subjecting them to a lengthy lockout. Counsel took the position that the Employer made a mistake at the outset by deviating from the traditional way of preparing and seeking a short term deal with a very small monetary offer and one major concession. He says that over the long period that bargaining occurred it attempted to get yet other concessions and when it finally realized that it would not be able to get them through bargaining it invited the Union to submit the outstanding issues to interest arbitration. In other words, he argues, as I said earlier, that the Company lost the lockout and based on that premise, he says that the arbitration board should not adopt the October tentative agreement and give the Employer what it failed to obtain at the bargaining table.

[114] The problem with that argument is that it does not provide any basis for determining what agreement the parties would have negotiated. Although the replication theory requires that the goal of an interest arbitrator must be to discover a collective agreement that the parties would have arrived at including where they may have resorted to a work stoppage, the derivation of the actual terms is fundamentally an objective exercise. The rule is that the tentative agreement is an important factor to be taken into account but one that is subject to a degree of modification measured by reference to what the arbitrator thinks would have been necessary to make it acceptable to the parties based on factors consistently set out in the jurisprudence.

[115] The issue is not the goal but how to achieve it and in that respect the essential bargain within the tentative agreement arrived at by the parties must be the starting point, it being comprised of matters upon which the negotiators achieved consensus. The role of the arbitrator is to determine what changes should then be made to the essential bargain which one might expect would have been sufficient to achieve ratification. I am not persuaded that in the circumstances here that the failure of the bargaining committee to properly recommend a negotiated settlement had a significant effect on the result. There was no evidence that it did.

[116] In addition, whether one party or the other may be seen to have surrendered to the job action of the other is irrelevant to that analysis or worse, is an impediment to deriving the very agreement being sought. If the proposal to arbitrate was a capitulation of sorts, as was argued by the Union, it was certainly not one where the Company conceded its substantive demands. The nature of the agreement to arbitrate was effectively a strategic manoeuvre which merely prescribed a methodology by which the substantive issues would be settled. For the Union to demonstrate, as it did, that it continued to withstand a lockout does not prove that it won the fight. Unquestionably, both parties are losers in such a dispute.

[117] What modifications may be required to complete the agreement must be determined objectively based on factors extraneous to the actual negotiations between the parties primarily by reference to the prevailing standards in the industry or sector in which they find themselves, to use the terminology of the Beacon Hill Lodges case, or that the award must fall within a reasonable range of comparators, the test adopted by Arbitrator Hall from the City of Nelson case.

[118] Following the ratification vote, the Union and the Employer did not return to the bargaining table until December 4, 2013. The lockout continued unabated, the major difference being that the System Control Centre came to be manned exclusively by managers who by that time had been trained and were fully qualified. Gord Van Dyck stepped aside as a negotiator and Rod Russell returned. He was joined by Laird Cronk and Mike Flynn. The Employer was represented by Doug Slater, Michael Mulcahy and Doyle Sam.

[119] They met for two days at which time there was an exchange of formal proposals. At this point they achieved essential agreement on some of the issues that had separated them earlier but not all. When that attempt was not successful, it became plainly obvious to everyone that the parties were so entrenched that something other than what had been done to that time would have to be done to put a new collective agreement into place within a reasonable period of time. Moreover, it would have to be a mechanism that would bring an end to the economic hardship being experienced by both parties in the meantime.

[120] Of course, that is the essential nature of interest arbitration where the parties trust the arbitrator to be sufficiently discerning that he or she will be able to identify any general consensus that may have emerged between the parties in their negotiations and to prescribe an agreement that is not inconsistent with prevailing conditions in the relevant industrial sector. In that process, the manner of resolution changes from one involving raw economic power to an adjudicative exercise involving a determination of the standard working conditions that predominate the sector. The arbitrator is not expected to blaze new trails in prescribing a new agreement except perhaps in what would have to be the most dire and extraordinary circumstances.

[121] Such considerations most certainly would have been paramount in the mind of the Employer when it proposed to resolve the outstanding issues through interest arbitration on December 6, 2013. The Union did not immediately respond but on December 10 it made three substantive proposals on the outstanding issues and one proposal with different terms of reference for arbitration.

[122] In the end, however, on December 16 the parties agreed to the terms by which the arbitration would be conducted which are as follows:

1. The terms and conditions of the expired February 1, 2009 – January 31, 2013 collective agreement are renewed subject to amendments provided for through the process set out below.
2. The term of the renewed collective agreement is February 1, 2013 to January 31, 2018.
3. All items agreed prior to the commencement of job action, as set out in Appendix A will become part of the final binding agreement upon completion of the process below and receipt of the Arbitrator's decision.
4. Upon execution of the Memorandum of Agreement, employees will be invited back to work on the terms of the expired collective agreement subject to the attached Return to Work Agreement (Appendix B).
5. Also upon execution, the outstanding bargaining items listed in Appendix C will be referred to final and binding interest arbitration.

6. If the Parties are unable to agree on an arbitrator within 5 days of execution, the Parties will notify Mark Clark, Deputy Registrar of the Labour Relations Board and Director of the Arbitration Bureau, who will appoint a single independent arbitrator.
7. The Arbitrator, in consultation with the Parties, will determine the submission and hearing process to be followed. The arbitrator may exercise any powers granted by Section 92 of the Labour Relations Code. After providing the Parties with a fair hearing, the Arbitrator will issue a decision determining all terms and conditions of employment required to resolve the outstanding bargaining items listed in Appendix C.
8. The Arbitrator's decision with respect to all of the outstanding bargaining items in Appendix C will be binding on the Parties and, together with Appendix A, will be incorporated into the renewed collective agreement. Unless otherwise specified, all revised terms and conditions will become effective on the third working day following receipt of the Arbitrator's decision.

[123] One rather novel argument made by Counsel for the Union was that so much time went by after the tentative agreement was rejected including two days of formal bargaining that it could no longer be said to have any effect. The way he put it was that by the time the parties entered into the agreement for interest arbitration the tentative agreement had faded into insignificance and had no further relevance. He suggested that the Employer had essentially acknowledged that it made the proposal for arbitration because it did not think that it would be able to achieve the concessions that it sought through further bargaining. He submits that there are many such cases where arbitrators have found that tentative agreements are not relevant such as *City of Halifax and International Association of Firefighters Local 28* [1980] 27 LAC (2d) 309 in which Innis Christie held that once the City Council had rejected an agreement for a 22% wage increase it ceased to have any meaning for the collective agreement. He accepted that the number became irrelevant to the proceedings that the City's negotiating team had agreed to the increase.

[124] He argues that, in any event, there was extraordinary evidence available to establish an exception to the normal rule comprised of the events following October 26, a period of almost two months, additional negotiations that failed and the agreement to arbitrate. He argues that those events should be seen to be the last word and the point at which this arbitration board ought to consider replication but, as I have already held, my view of the jurisprudence on this issue is that arbitrators are mandated to treat a rejected tentative agreement as including the essential bargain that the parties could have expected to reach in ordinary collective bargaining, the precise scope of which must be determined. Subject to the peculiar facts in any particular case, the arbitrator might conclude that the tentative agreement was the whole bargain that they would have made without any modifications, as happened in the Air Canada case. On the other end of the spectrum the arbitrator may properly conclude, as Mr. MacTavish argues, that so much time or other circumstances have transpired as to make the tentative agreement no longer relevant but I am not prepared to go that far in this case.

[125] While I accept that a considerable amount of time went by following the October 26 tentative agreement, I am not prepared to find that the Employer effectively agreed to start over in the arbitration or to otherwise concede that it had lost the battle. In my view, the agreement to arbitrate was a mutual recognition that the cost of continuing the work stoppage was not justified by the differences that remained outstanding between them. The parties must be presumed to know the jurisprudence on the issue at the time that they entered into the agreement which, as I have already held, preserves the relevance of the negotiations preceding the agreement. My task in the circumstances is, as I have discussed above to determine only those issues that remain in dispute including whether any of them were effectively resolved by the tentative agreement, the issues to which I now turn.

9. **Specific Issues in Dispute**

(1) Wages

[126] The offer of the Employer for a general wage increase in each year over the life of the collective agreement is as follows: 2.5%, 2%, 2%, 2.5% and 2.5%. The Union proposal is for 2.5% in each year of the agreement retroactive to December 16, 2013.

[127] Mr. Harrison argues that the Company proposal is not out of line with other settlements in the province. He concedes that as Jody Drope testified before the BCUC that the base pay of Fortis employees in 2011 lagged the general market by 11% on average. The Union argues that this disparity has grown significantly over the intervening period and that the extant wage tables demonstrate that they are either the lowest paid or close to the lowest paid of all their peers. It should be noted, however, that BC Hydro, its closest comparator over the last few years, in 2013 paid the lowest rates for power electricians of $36.40/hour compared to Fortis of $39.91. In that same year Enmax paid power station electricians as much as $48.04/hour. The lowest in the comparison group, SaskPower paid its plant electricians $43.08/hour.

[128] The Company does not dispute those numbers but takes the position, as did Jody Drope in hearings at the BCUC, that their total compensation package of base wages plus benefits such as pensions, health & welfare, access to overtime etc. puts them very much into a competitive position. Using that prescription, the average total compensation cost of employees employed by the Company is $127,000/year. It says that their benefit package is significantly better than the average in the comparator group. Indeed, Mr. Harrison argued that the comparator group selected by the Union was heavily skewed to Alberta companies which generally pay higher wages in industries affected by developments in the oil sands. Even at the base rate level, other classifications than power electrician compare more favourably. For example, in 2012 Power System Dispatchers employed by FortisBC were the highest paid except for the Alberta companies; nor were there any Communication, Protection & Control Technologists paid any higher by any other company in BC. Power Linemen is another matter, however, with FortisBC paying the lowest rates except for BC Hydro. Mr. Harrison argues that on that evidence the Company compares favourably even on base rates with other companies in BC and that it suffers only in the comparison with Alberta companies.

[129] It should also be recalled that on December 4, 2013 the Company and COPE were able to negotiate a new collective agreement for the office, administrative and technical employees with annual general wage increases of 2%, 2%, 2%, 2.5% and 2.5%. Interestingly, these were precisely the general wage increases that had been recommended for the IBEW by Vince Ready in his report to the parties on September 29, 2013 while the proposal by the Company in these proceedings imitates the subsequent agreement reached by the two bargaining committees on October 26. The proposal made by the Union of 2.5% in each year is a position that it took earlier in the negotiations.

[130] Of course, what should not be contentious is that wages is typically a core item of bargaining and should be seen to be governed by the principle that I discussed earlier that the terms of the agreement reached by the parties on October 26 should be adopted consistently with the replication principle subject only to minor alterations. On that basis I adopt the proposal of the Company for a general wage increase as follows:

	Effective Dates	Amount of increase
(a)	February 1, 2013 to January 31, 2014	2.5%
(b)	February 1, 2014 to January 31, 2015	2.0%

(c)	February 1, 2015 to January 31, 2016	2.0%
(d)	February 1, 2016 to January 31, 2017	2.5%
(e)	February 1, 2017 to January 31, 2018	2.5%

[131] On that prescription I would ordinarily award full retroactivity consistently with the agreement of the parties in this case to make the term of the agreement commence from the date of expiry of the old agreement on February 1, 2013. However, it is important in that respect, that neither party advocated for full retroactivity. Nor is there any evidence available to me that it was a significant topic of discussion in the negotiations, which ultimately was the approach adopted by Mediator Ready in his recommendations. Similarly, in the October tentative agreement itself, the parties agreed to a non-pensionable lump sum payment of $1250 payable upon ratification. In these proceedings the Company takes the position that I should adopt the outcome of the tentative agreement on this issue while the Union argues that $2500 would be more appropriate.

[132] Full retroactivity is a consist practice in collective bargaining and the fact that the parties were engaged in job action for part of that time is ordinarily no reason to deviate from it on the principle that I accepted earlier that there is no merit in attempting to identify a winner in such circumstances or, one might add, to attribute fault for the dispute. Both parties indulged in the same rhetoric. It is true that Mr. Harrison argued that a lump sum of whatever amount should not be seen to be a partial substitute for retroactivity which, he said, was supported by the evidence of Mr. Slater who testified that it was rather a recognition that employees had been out of work for a long period during which they had paid for their own benefits and that it was seen to be a "necessary component to help the Union sell the deal." But Mr. Slater also took the position that the Union failed to deliver the ratification of the tentative agreement, primarily because it failed to make the recommendation that it had agreed to make and that the Company should not have to pay for the default of the Union. He said that the Company was deprived of the benefit of the bargain that it achieved in the October settlement which it would not be able to recoup retroactively and that the employees equally should not benefit from their rejection of it.

[133] While I do not wish in any way to disparage the evidence of Mr. Slater on this issue, that the proposal for a lump sum payment was intended for some purpose other than a substitute for retroactivity, there is no evidence that the amount offered correlated in any way to the amount paid by employees for their benefits during the time they were off work. Certainly, it was an incentive offered to the employees to induce them to accept the tentative agreement. The evidence, however, was that it did not have the intended result. Nor have I accepted the argument that the failure of the Union to enthusiastically recommend it was the reason it failed. I think it failed quite simply because the employees did not think it was fair.

[134] In the result, I am not prepared to adopt full retroactivity in the circumstances because it was not argued and I have no evidence on how the cost would compare to the proposals of the parties on a lump sum payment. Nevertheless, I prefer the proposal of the Union on this issue as being more closely aligned to all the available internal and external comparables. I direct that each regular full time employee should be paid a non-pensionable lump sum payment of $2500 effective upon implementation of the award.

(2) Job Descriptions

[135] This issue emerged from a relatively recent dispute between the parties where the Employer sought to increase the qualifications for a Meter Technician job that had been in existence for some considerable time. Meter Technicians test and repair meters and are also responsible for installations. They are required to hold trades qualifications. The job description recognizes two such qualifications acceptable to the Company: a Canadian I.P. Journeyman Electrician Certificate and a Meter Technician Trades Qualification Certificate. Included

in those certifications is an expectation that candidates would be familiar with and have experience in electric utility systems, equipment, apparatus and protection devices and their clearance and isolations procedures.

[136] In 2011 there were four such positions, two in the Kootenays and two in the Okanagan. In that period a new metering technology was being introduced to the industry in the form of "smart meters" which were effectively meters with a wider capacity to measure electrical consumption but were wireless and could be read remotely. At that point in time these meters were being considered by BC Hydro for installation system wide but had yet to be approved by the BC Utility Commission. It is not controversial that the installation of them would involve a considerable capital cost, would displace the existing meter readers, and would involve a new more sophisticated technology.

[137] In order to prepare for their introduction into the FortisBC network, the Company sought to upgrade the qualifications of the Meter Technicians so that they would be able to function effectively with the new technology. Accordingly, the Director of Network Operations sought to amend the job description to increase the qualifications for new candidates to a diploma in Electrical, Electronics or Instrumentation Technology. The problem was that under the language of section 9.01 of the existing collective agreement, once a new job description is created the Union is entitled to discuss it with the Employer and no position can be filled until the job description has been agreed to by both parties. In this case, the Union questioned the need for the upgraded qualifications and, in particular to eliminate the need for trades qualifications.

[138] In the end, when the Employer failed to supply the Union with the information it requested, it notified the Employer that it would not be able to consent to the job description. In turn, the Employer replied that it was withdrawing its request for the Union to approve the changes and that it would get the work done in other ways. The Union then filed a grievance to have an arbitrator determine whether the diploma sought by the Employer was the only reasonably necessary qualification to perform the duties of the Meter Technician job. When the matter came on for hearing, however, the Employer argued that the issue was moot, or at least premature, because it was no longer pursuing any changes to the job description, a position that was ultimately accepted by the arbitrator.

[139] Based on the difficulty of getting the change that it felt it needed, the Employer concluded that the best way to approach the issue would be in negotiations. Accordingly, when these negotiations began its initial proposal was to delete the existing language in Article 9.01 that permitted the Union to provide "input" on the job description and to preclude filling any position until the job description has been agreed to by both parties or to arbitrate the content of the job description. The Union's position was that the existing language should be continued. Nevertheless, the positions of both parties changed, as might be expected, as the negotiations progressed. It is also appropriate to add that it became clear that this was a major issue between them and that it would not be dropped by either of them.

[140] When it came to the "Mediators Recommendations for Settlement" on September 29, 2013 Mr. Ready recommended the language of the Gas Agreement which provided for a one month period of consultation during which the Union would be entitled to attempt to persuade the Company on precisely how the job description should be structured but otherwise it would have a discretion to prescribe the duties, responsibilities and qualifications of new and changed jobs. Under the proposal, only the assigned wage rate would be subject to arbitration, if the parties could not agree. Of course, as has already been noted the recommendations were not ratified and while this issue was only one of many in the package, one may properly conclude that it was an important factor in the rejection. Further, when it came to the subsequent tentative agreement of October 26, 2013 virtually identical language was adopted for Article 9.01 but it also was rejected by the Union members.

[141] In these proceedings the Union takes the position that no change to the existing job description language should be ordered. That would mean that the language that the Employer has considered to be so troublesome would continue to be in place and would be inconsistent with commitments made by the Union negotiators during the critical periods of bargaining that the gas language would be acceptable. However, as Mr. MacTavish argued, the concern expressed by Company officials about the difficulty it had in changing job descriptions is not borne out by the facts. During the life of the last collective agreement, the Employer sought changes to 10 job descriptions. Of those the parties were successful in reaching agreement on 9 of them with one agreed to on an interim basis just before negotiations started. The one remaining was withdrawn by the Employer when the Union opposed the change, which I presume was not the one involving the Meter Technicians. He argued that insofar as that change was defensible, the Employer could have pursued it to arbitration had it considered it to be important.

[142] Nevertheless, the one thing that was absolutely clear on the evidence was that both parties considered this issue to be critical to a successful outcome of the bargaining. The Company did not take the position that the existing language was effectively unworkable but that it was unwieldy and inhibited their ability to structure the work efficiently within the mandate that it already has to manage the work. Moreover, based on the evidence available to me I do not see this issue as one that requires adjustment. Therefore, I adopt the language that was agreed by the negotiators of the tentative agreement on October 26, 2013 as being the prevailing standard in the sector.

(3) Educational Reimbursement

[143] This matter involves a proposal by the Employer for a new provision in the collective agreement for the management of leaves of absence for educational purposes without pay and, in particular, the reimbursement of expenses incurred by employees in the course of such programs. The proposal simply refers to the existing Company policy with the additional requirement to make all such applications in writing to Human Resources for approval.

[144] While the Union does not object to the substance of the proposal, it says that the issue is rather one of form. It takes the position that there is no value in incorporating the Company's education policy into the collective agreement because it would leave the matter entirely within its unilateral control. It may also be properly observed that the proposed provision refers to requests made as per Article 24.03 which similarly provides for leaves of absence without pay for certain enumerated purposes, one of which is to "attend an educational institution".

[145] One of my concerns is that the reference to an educational institution could be applied in a very limited fashion and would not permit an educational leave of absence at a place that was not a recognized educational facility. However, it was not an issue raised by either of the parties. Moreover, since it was a provision recommended in the Ready Report and was contained in the October 26 agreement there is no reason to exclude it. Therefore, I order the adoption of the following provision:

> In accordance with Company Policy, requests for leave of absence without pay for educational purposes (as per Article 24.03) and education expense reimbursements must be provided in writing to Human Resources for approval. Successful completion of external education programs will be reimbursed as per the Company education guidelines.

(4) Crew Leader Clarification

[146] The issue on this matter arises out of Article 27.01 which reads as follows:

> 27.01 Crew Leader Relief
>
> When a bulletined Crew Leader is absent, an employee in the same occupational stream from the same headquarters shall provide relief and will be paid as a Crew Leader while acting in this capacity. If a Crew Leader is absent for less than one day, this provision shall not apply.

[147] While this was a matter initially raised by the Union, over the course of the negotiations it went back and forth with both sides making proposals. In the end, an agreement was ultimately made between the parties which prescribed several notable exceptions to the normal rule that a crew leader will be replaced where:

- the crew leader is absent for less than one day;
- the crew is combined with another crew containing a crew leader; and
- the crew consists of less than three members inclusive of the crew leader (except Princeton, Creston and Grand Forks).

[148] The issue of combining crews was problematic for the Union because it saw that as an easy way to circumvent the requirement to replace the crew leader in ordinary circumstances. This is one of the instances where it is probably accurate to say that while the Union bargaining committee accepted the deal that had been negotiated by the senior negotiators, it did it reluctantly. Ultimately, it was rejected in the course of the ratification procedure although it is impossible to say that the vote turned on this issue to any degree.

[149] And when it came to the arbitration proceedings, the Union sought to withdraw the entire matter from the jurisdiction of the arbitration board on the grounds that it had become clear that no clarification was necessary or warranted. Mr. MacTavish explained that the language that it had originally proposed did not affect the parties' obligations under the Article and that everything changed on March 18, 2013 when the Employer proposed to change the essential meaning by reducing the circumstances in which it would have to replace the crew leader. He asserted that the Union would file a grievance if any crews were combined to avoid replacing a crew leader.

[150] One problem that he has in claiming that the withdrawal was effective is that it is a specific dispute that was agreed to be referred to me to be adjudicated as part of a list of outstanding bargaining items in the arbitration agreement between the parties dated December 16, 2013. In point of fact, it is clear to me that what happened is that the issue morphed into something well beyond mere clarification to a substantive proposal to amend Article 27.01 of the agreement which, of course, is acknowledged by Mr. MacTavish. The consequence, however, is that while the Union may have been legally capable of withdrawing its own proposal for clarification, it could not withdraw the proposal of the Employer to amend the provision. He argued that as a matter of clarification the proper way for me to handle it would be to refer it to grievance arbitration which is the way Arbitrator McPhillips handled a similar interpretive issue in *City of Richmond and Richmond Fire Fighters' Association , International Association of Fire Fighters, Local 1286* [2009] BCCAAA No. 106 para. 92. The problem is, as I have said, that the proposal put by the Employer does not involve a simple clarification but is a substantive proposal to amend Article 27.01. A grievance arbitrator would not have jurisdiction to determine whether the amendment should be made.

[151] Nor do I accept his argument that I would exceed my mandate if I were to impose a change to the language that did more than clarify the existing language. It would mean that once the positions of the parties

were defined by their initial offers, no counter offers could be made in the course of bargaining but if that were the case it would effectively preclude all creative interchange between the parties in the course of negotiations. There are no such rules governing collective bargaining. The better argument made by Mr. MacTavish in that respect is that when the Union withdrew its proposal, under the terms of the Bargaining Protocol adopted by the parties to govern the bargaining, Section 6 requires that counter proposals be withdrawn if and when the proposals they counter are withdrawn.

[152] Quite apart from whether those bargaining protocols have any force in law, as a pure matter of interpretation it would not apply to the circumstances here. The proposal of the Employer to amend Article 27.01 was not a counter proposal to the clarification originally sought by the Union. Had it been offered as an alternate interpretation of the existing language or an extension of what the Union had proposed it would arguably have been covered by the protocol. However, the effect of what happened was that the Employer may well have made a counter proposal in form only but the substance of it was an entirely new and unrelated proposal.

[153] Mr. Harrison took the position that it remained part of my jurisdiction to decide whether the matter continued to be in dispute and, if so, whether the agreement of October 26 should be accepted, a proposition with which I agree. Consistently with my view that I have jurisdiction, it is my decision that it should be taken to be part of the basic package that had been agreed by the negotiators on October 26 and that there has been no change in circumstances sufficient to compel a modification of the terms of their agreement. Accordingly, I adopt following language to substitute for the existing Article 27.01:

> When a bulletined crew leader is absent, he shall be replaced by an employee in the same occupational stream from the same headquarters who shall provide relief and who will be paid as a crew leader while acting in this capacity except this provision shall not apply in the following circumstances:
>
> (a) if the crew leader is absent for less than 1 day,
> (b) the crew is combined with another crew containing a crew leader, or
> (c) the crew consists of less than three members inclusive of the crew leader (except for Princeton, Creston and Grand Forks).

(5) Compressed Work Week

[154] The underlying premise of this issue was settled some considerable time ago, on February 1, 2001 with Letter of Understanding No. 9 by which the parties agreed to implement a four day work week. The actual issue that has now emerged, however, is highly controversial because it would convert the existing arrangement for a four day work week from a voluntary system to one where the Employer would be entitled to assign employees to a compressed schedule at its discretion. It is not the existence of the right to schedule that the Union objects to but only that employees would be denied the right to choose the schedule, as they do now because, as Mr. MacTavish explained, it would cause hardship to some employees including but not limited to conflicts with family and other social obligations.

[155] It was not an issue that was raised in the initial stages of the negotiations. Nor was it an issue as late as when the work stoppage began. It only became an issue when the parties started to negotiate a longer term agreement with related increased costs. At that point the Employer negotiators felt compelled to seek productivity offsets to bring itself into compliance with the mandate prescribed by the BCUC.

[156] Vince Ready concluded that a case had been made by the Employer for the change, which he recommended in his report to the parties but only on certain conditions:

- employees on a compressed schedule would be paid a 5% non-pensionable premium for all straight hours worked
- assignments to either a standard five days schedule or a four day schedule would be made once per year
- a change thereafter would require 3 months of notice except that if less notice is given, the employee would be paid at overtime rates for the first month.

[157] As has already been noted, the entire package of recommendations was not ratified by the bargaining unit members, including the proposal for a compressed work week and was also included in the tentative agreement negotiated by the senior bargaining committees which was also rejected in a separate vote.

[158] Quite apart from the problem of assessing why this proposal was rejected, given that it was part of a larger package, I must admit to a certain sense of quandary as to precisely why the Union treated it as such an emotional issue since shift changes have always been handled in exactly the same way with just as much potential for social disruption to employees. Article 16.01 prescribes four different shifts to which employees can be assigned: day shift, afternoon shift, night shift and continuous operations. The hours that employees may be worked as part of each shift are also set out. There are also modified shifts for certain crews or employees who are required to work different hours such as fleet operations employees and customer service employees. Employees are entitled to "propose" shift assignments and these must be approved by their supervisor who must post their schedules in each headquarters showing the hours and days of work for each group of employees.

[159] There are also provisions for changing the starting times of shifts under Article 16.06 but the point is that the Employer has been accorded a contractual discretion to schedule employees to their shifts which is entirely typical of virtually every employer of which I am aware as a matter of managerial exigency. In fact, it must be seen to be the sole legal mechanism available to employers by which to obligate employees to work upon which the managerial authority to organize the work is based. If an employee is not properly scheduled to work under the terms of the collective agreement, he or she could not be disciplined for failing to come to work. In this case, while the Employer is restricted to certain shifts that it is permitted to work employees, it decides which employees should work which shifts.

[160] A compressed work week is just another shift, no different in its basic nature from any other and a change, for example, of an employee from a day shift to a night shift has as much or more potential for social disruption to the employee as a change to a compressed schedule. In no case can an employee be regularly scheduled to work more than 37 ½ hours per week. A compressed schedule requires the employee to work an extra 1 ½ hours on three days and one extra hour on a fourth day giving the employee a three day weekend for every four days worked.

[161] The Union called the proposal a concession, which it may be technically but only because it involves a change to the way all shifts are scheduled. In reality, it is a melding of the two processes. Mr. MacTavish argued that to give the Employer the unilateral right to move people on and off a compressed work week would cause hardship to some employees but no more than moving them off any other shift and, in any event, provision can be made to accommodate them. If the hardship relates to a disability the parties are obligated to accommodate the employee to a point of undue hardship under the terms of the Human Rights Code. Similarly, the Employer is prohibited from discriminating against employees based on any of the specified conditions in the Code including family status.

[162] He argued that conversely, the Employer would benefit from the change only marginally. He said that Doug Slater was clear in cross-examination that the cost savings to the Employer would be minimal at best and, in

any event, would be offset by having to pay a 5% premium to the approximately 15% of employees currently working a compressed work week voluntarily. In fact, that was not the evidence. Mr. MacTavish put it to Mr. Slater that the Company assessed the value to approximate a productivity improvement of about 21%. Mr. Slater replied that he had never seen that estimate and that he valued it at around 8%. He said the guaranteed savings would be from the morning paper work, breaks, mobilization and demobilization of trucks and equipment and loading and unloading vehicles. He admitted that most of the compressed work involved linemen or power line technicians and that not all of them had duties that would produce savings and that 8% is a gross estimate that is subject to net deductions based on other work classes. It derives from the savings that would be realized in a week of more productive work. He agreed that the net savings would be offset by the 5% premium paid to employees working a compressed schedule but when it was suggested to him by Mr. MacTavish that the savings to the Company would be negligible his response was that 2% to 2 ½% would not be considered negligible. He explained his point further by saying that if it resulted in a loss to the Company they would not do it.

[163] Mr. MacTavish continued his argument with a comprehensive review of the law on family status and religious discrimination but I have decided that there is no point in considering it because there is no disagreement between the parties that the Human Rights Code governs the application of the provisions of the collective agreement that relate to the compressed work week. He added words of caution to the effect that when the Union had raised the issue of employees unable to work a compressed work week in the past, the Employer responded by saying that they would have to look for work elsewhere and that to facilitate any further erosion of the bargaining unit would not be appropriate but that risk exists for all employees that their family and social obligations may not always correlate with their shifting arrangements. In that event a balance must be drawn between the family obligations weighed against the operational requirements of the employer. It is not inevitable that operational requirements will be seen to be more important than an employee's family obligations.

[164] What I shall do to ensure that those matters are taken into account when a change to or from a compressed work week is being considered is to require that each affected employee be interviewed to determine their personal circumstances and then take those into account in deciding who should be assigned to the new shift. For that purpose, I adopt the language tentatively agreed by the negotiators on October 26, 2013 relating to LOU 9 with the following amendments to paragraph 1. Included in the amendments is a change to the shift premium from non-pensionable to pensionable payable on all time worked to make it consistent with other shift worker premiums under Section 27.04:

> In addition to the shifts set out in Article 16, the Employer may assign employees to a compressed work week from time to time comprised of a four day work week to improve efficiencies, provided that within the three month notice period under subparagraph (c) herein and prior to any change in shift, each employee affected will be interviewed to determine their personal circumstances. Every reasonable attempt will be made by the Company to accommodate the employee, which may include a decision not to change the employee's shift in the circumstances. The Company shall pay each employee a premium of 5% for all time worked while working this compressed schedule.

(6) System Control Centre Service Commitment

[165] The issue here is whether the Union should be contractually compelled to continue to staff the System Control Centre should a legal work stoppage occur in the future, similarly to what happened in this case. There can be no real issue that the SCC is the heart of the entire electrical transmission, generation and distribution system so it is understandable that the Company would want to ensure that there will always be sufficient employees on staff to ensure that the system continues to operate under all contingencies. Electrical power is not only critical to

residential customers but is particularly so to some of the major industrial businesses that operate within the FortisBC system. To them, an interruption to the supply of electrical power would not just be inconvenient but a disaster of considerable consequence.

[166] The legal issue, however, turns on an underlying implication that if there were a legal work stoppage the affected employees would be entitled to refuse to work subject to the Labour Relations Board issuing an essential service order under Section 72 of the Labour Relations Code. Under that provision the chair may investigate whether a dispute arising after collective bargaining has commenced poses a threat to the health, safety or welfare of the residents of British Columbia and make a report to the minister that the dispute does pose such a threat. In that event, the minister may then direct the board to designate as essential services those facilities, productions and services that the board considers necessary or essential to prevent immediate and serious disruption of those services.

[167] In the circumstances, the Union argues that not only would a collective agreement requirement to staff the SCC during a legal strike be unnecessary but that I do not have jurisdiction to make such an order. Mr. MacTavish argues that it would be unnecessary because the Labour Relations Board is already charged with the responsibility to ensure the continuation of essential services, as it did in this case. In addition, he says that firstly, it would have effect beyond the 5 year mandate agreed by the parties and secondly, it would contravene the Labour Relations Code because it would restrain the right of employees to engage in a lawful strike contrary to Section 6(3)(c). Thirdly, he says that the proposal, if I should adopt it, would constitute a radical departure from the conservative replication principles prescribed by the authorities and would allow the Employer to achieve a breakthrough provision. Nor, he says, are there any similar provisions in collective agreements covering workers in comparable electrical utilities. He acknowledges that there is a similar provision covering the Gas Call Centre but the provision does not extend beyond the life of the agreement.

[168] As he points out, Section 6(3)(c) of the Code prohibits an employer from imposing a condition in a contract of employment that seeks to restrain an employee from exercising his or her rights under the Code. One of those rights is that employees have a right to engage in legal strike activity as was discussed in *Beachwood Construction* BCLRB No. 32/77; [1977] BCLRB No. 30 where the employer sought to ensure that any employees hired would be prepared to cross a picket line and wanted a release from the union to the effect that employees would not be ordered off the job. At pp.9-10 the Board held:

> "… an employer is not entitled to insist that a prospective employee obtain a 'release' from a union ensuring that the union's future conduct will not involve a work stoppage; nor is a company entitled to insist on hiring that its employees will refrain from observing any and all picket lines. Both participation in a work stoppage and participation in picking are legitimate trade-union activities under the Code and an employer cannot make it a condition of employment that an employee refrain from exercising those rights.

[169] As I discussed earlier, what happened in this case was that following a failure of mediation at the Labour Relations Board, the Union requested a resumption of the essential services process that had been started earlier resulting in an interim order on terms that were agreed by the parties. Amongst other things the following facilities, productions and services were acknowledged to be essential:

(a) emergency response
(b) operation of electrical system
(c) restoration of services.

[170] The order went on to require that to ensure that the facilities and services were provided in full measure, it would come into effect in the event of a general work stoppage or job action of a scope potentially affecting the delivery of essential services. In other words, it said that the Union would be entitled to engage in partial job action without engaging the terms of the order provided that it did not affect essential services and that in the event of a dispute whether job action had such an effect it would be open to the Company to declare a lockout for the purpose of bringing it into full force and effect.

[171] Of particular relevance to this issue was a provision that required the parties to staff the System Control Centre by using a combination of managers to the extent possible supplemented by employees with an added requirement to train management and excluded staff to do the work:

> The Employer shall utilize the services of all of its management and excluded personnel who are qualified to the best extent possible. Management and excluded personnel shall work sixty hours total per week and be placed on standby for 24 hours a day, seven days per week to respond to essential service requirements. The Employer shall, if requested by one of the unions, record the daily number of hours and locations worked to the unions every three days. As many as possible qualified management and excluded staff, or management and excluded staff who can reasonably be trained, will either train or work full time in the SCC.

[172] On May 10, 2013 the Employer applied to the Board for a supervised last offer vote which was rejected by the employees by a large margin. That was followed on May 16 by limited job action initiated by the Union except for the System Control Centre. However, Mr. Russell had sent an earlier email to Mr. Slater to advise him that employees working at the SCC would be directed to refuse to do various kinds of paper work that was deemed non-essential. He was also advised that additional duties could be withdrawn in the future. This ultimately led to the Company locking out all bargaining unit employees on June 26 in order to bring the interim ESO in full effect but prior to that the managers took over the generation desk, leaving only the transmission/distribution desk to be staffed with employees.

[173] When the lockout began, the focus switched to litigation at the LRB to resolve disputes under the ESO, one of which related to the kind of paperwork at the SCC which was regarded to be non-essential. Another was the amount of time that it would take to train the managers and excluded personnel to fully take over the operation of the SCC.

[174] On August 9 the LRB issued a comprehensive order which set out the number of employees who would be required to provide services and various designated locations. Doug Slater testified that only the SCC desks were regularly scheduled but there were 36 stand by employees scheduled with others on call if required. By September 7 it appeared that the training would be completed by October 27. The parties entered into a settlement agreement which included a penalty of $10,000/day for each day thereafter that the Employer required a bargaining unit member to work at the SCC, but that did not happen. By that time the managers had completely taken over the entire operation of the SCC and the number of employees on standby was reduced to 20.

[175] The problem as Mr. Slater explained was that even though the SCC had been designated as an essential service, the Union had clearly adopted a strategy to defeat it, a risk that the Company did not want to assume in the future. Accordingly, he said that management determined that it would be mandatory to devise a plan to ensure that it would be properly manned during any dispute and he described the options that they considered were available to them for that purpose:

(1) the hard way where the Company would maintain the training provided to SCC managers so that they could run it fully at any time. This would eliminate the need for bargaining unit personnel inside the SCC during a dispute but would be very expensive, which was estimated at between $500,000 and $800,000 over the course of the current collective agreement based upon 4 managers who would each be given 436 hours of training;

(2) the easy way, which was the option adopted, which was to obtain a commitment from the Union that the managers would only be trained if a dispute were to occur. In that case, managers would not be trained in anticipation of a dispute and no costs would be incurred for that purpose; or

(3) contract out the operation of the SCC.

[176] He said that these options were put to Mediator Ready who essentially adopted Option No. (2) in his recommendations issued on September 29, 2013. The precise terms of the option were as follow:

> To ensure the continuation of essential services, the Company and the Union agree that, in the event of any labour dispute, including any dispute between them, as well as any dispute or picketing involving other parties, the Union will continue to fully staff both the Generation and Transmission/Distribution desks in the System Control Centre and its members will perform the full scope of their jobs. It is expressly agreed that this clause will continue in effect notwithstanding the termination of the collective agreement under Article 3.01 and will apply in addition to any other essential service levels set pursuant to any Labour Relations Order.

[177] The problem, as we have seen, is that Mr. Ready's recommendations were not accepted when it was put to a ratification vote by the members, by a majority of 63%. It is true that the Union bargaining committee subsequently accepted the identical provision just one month later on October 26 but it was also rejected on ratification.

[178] Mr. Harrison argues that quite apart from the fact of the rejection, the law does not support the Union that the effect of a term of a collective agreement cannot be made to survive its expiration: *International Forest Products Limited (Fraser Mills Operations) and IWA-Canada, Local Union Number 1-3567* BCLRB No. B363/94; Leave for Reconsideration of BCLRB No. B362/94. Moreover, he said that it was important that the proposed clause was included in the Mediator's Recommendations of September 29, 2013 and that Gord Van Dyke accepted that it could go in the tentative agreement. Nor did any member of the Union bargaining committee object to it going in.

[179] It is notable that the panel in the Fraser Mills case was composed of three respected members of the Labour Relations Board at the time, Stan Lanyon, John Hall and Keith Oleksiuk. The evidence was that the parties had been negotiating on an industry basis with a single union bargaining committee, on the one hand, and the Forest Industrial Relations on the other, representing 65 member companies. The system was that the parties would first negotiate a coast master agreement and that following ratification, each individual division and IWA local certified to that division would negotiate a local agreement which would incorporate the master agreement with some changes reflecting local conditions. The Coast Master Agreement contained a provision that required an additional step beyond what was required by the Labour Code for a strike to occur. It said that if no agreement was reached at the expiration of the contract and negotiations were continued, the agreement would remain in force up to the time an agreement was reached or until negotiations were discontinued by either party.

[180] What happened was that the maintenance crew at Fraser Mills became agitated with the progress of negotiations and stopped work. The issue then became whether the strike was legal because the main table negotiations had not been discontinued. On that issue the Board held that the union's primary argument that the IWA locals were entitled to engage in a strike based solely on the requirements of the Code could not be accepted. It referenced the fact that the parties had negotiated the Coast Master Agreement with a provision that it would remain in force until an agreement was reached or the negotiations were discontinued, which it described as an agreement to extend the term of the master agreement. It then concluded by saying that,

> "Such agreements are permissible, as they are not inconsistent with the law and policy of the Code."

In the end, it held that the strike was illegal because the master agreement had not been properly discontinued.

[181] The principle was then applied 10 years later in *Forest Industrial Relations and Provincial Negotiating Committee of Industrial Wood and Allied Workers of Canada (IWA Canada) on behalf of IWA Locals 1-80, 1-85, 2171, 1-3567, Council of IWA Locals* BCLRB No. B332/2004 based on similar facts.

[182] Further, in an arbitration award between *British Columbia Hydro & Power Authority and Office & Technical Employees Union Local 378* [1994] BCCAAA No. 259 the union had negotiated a check-off clause in the collective agreement which required the employer to deduct union dues and assessments from employees' pay and remit them to the union. When the union then purported to pass an assessment to support employees engaged in strike action, the company refused to deduct and remit the funds arguing that the collective agreement was no longer in force because it was terminated by the job action. The collective agreement contained a provision that it would remain in full force and effect until a new and/or revised collective agreement is signed by the parties. The evidence was that the intention of the parties had been to preserve the collective agreement during bargaining and job action to circumvent a decision of the Supreme Court of Canada between *Paccar of Canada Ltd. v. CAIMAW, Local 14* (1989) 40 BCLR (2d) 1. In Paccar the court had held that once a collective agreement expires an employer was entitled to unilaterally alter the employees' terms of employment.

[183] Following an earlier decision of the Labour Relations Board in *Board of School Trustees, School District No. 75 (Mission) and Mission Teachers Union* (1993) 18 CLRBR (2d) 1 Arbitrator Kelleher accepted that just because a collective agreement expires for purposes of the Code, it does not mean that it cannot have a continuing effect during a strike and lockout. An example of that is precisely something that happened in this case where employees were continued on the Company's health & welfare plan provided that the Union paid the premiums. This same issue was the focus of the dispute in the Mission case. See also: *Vancouver Native Housing Society and United Food and Commercial Workers International Union, Local 1518* BCLRB No. B34/2008.

[184] I accept that this issue relating to the staffing of the System Control Centre was discussed in the course of collective bargaining but it did not become part of either party's formal proposals until after job action was initiated. In the early stages of the negotiations it was not seen by the Company to be a risk that needed to be specifically addressed. Nor is there any evidence that it has been something that other utility companies have considered to be critical to build into their collective agreements. There can be no doubt that to shut down the System Control Centre would be disastrous on almost every level but, of course, that is likely the reason that no other utility companies have sought a similar risk mitigation strategy, because they are comfortable that they will be able to secure an Essential Services Order from the Labour Relations Board in that event. That is because the risk in every instance will meet the criteria of Section 72 of the Code that the dispute poses a threat to the health, safety or welfare of the residents of British Columbia.

[185] I do not agree with the position taken by Mr. MacTavish that I do not have jurisdiction to adopt the proposal, should I otherwise consider it to be appropriate to do so. While the proposed clause cannot be construed to extend the effect of the entire agreement beyond the specified term, as was the case in the authorities cited by Counsel for the Company, there is no law of which I am aware that a singular provision in a contract cannot be continued in full force and effect after the contract has expired. It is routinely done in commercial contracts of all kinds. For example in Non –Disclosure Agreements there is typically a clause that requires the recipient of the information not to exploit or take advantage of the information or to use the information to compete against the discloser and further that the clause will survive the termination of the agreement. It is important in those kinds of cases that the commitment not to compete will survive the expiry of the agreement. It is not seen to be inconsistent with the expiry of the contractual term that one or more of the provisions of the contract will continue to have legal effect. Effectively the clause that is continued is considered to be independent of the agreement upon which it is based.

[186] Turning to the substantive issue, I do not think it would be controversial to say that ordinarily it makes sense to operate the System Control Centre with employees who are under the direct management of the Company. To contract it out to some other company, such as BC Hydro, which was one of the three options identified by Mr. Slater, would not resolve the risk and arguably would increase it considerably. It potentially could double the risk of interruption because the employees of BC Hydro are organized in precisely the same way as those employed by the Company with the same Union. If the employees of BC Hydro were to assume operations of the SCC and were to go on strike it would affect the SCC just as if it were operated by employees of the Company. And if the employees of Fortis were to go on strike, they would seek to picket the SCC even though they were not operating it. Moreover, the Company would lose direct managerial control over the operation of the SCC. It would also have all kinds of adverse competitive implications to ensconce BC Hydro into the heart of the entire system.

[187] The truth is that none of the three options is really viable. As for the first option, to maintain the proficiency and qualifications of the managers so that they could take over the operation of the SCC on short notice, quite apart from the prohibitive cost, it would potentially involve them doing bargaining unit work during the term of the collective agreement in order to maintain their proficiency. It would not likely be sufficient for the managers to merely continue their academic qualifications. Further, the proposal itself, to require the Union to fully staff the SCC, while comprehensively drafted would be potentially unworkable in practice if for no other reason than that there would be no way to enforce it. There would be no access to the grievance and arbitration procedure because the entire collective agreement will have expired except for the subject clause.

[188] Nor is the third option particularly attractive. Mr. Slater described this one as the “easy way”, involving the training of managers after a strike commences, as was done in this case pursuant to the Essential Services Order. I accept that while this may be the easy solution, the Company found the entire experience frustrating, certainly during the time that the SCC was being operated by employees including the training protocols established for the managers. I suspect that once the managers took over operations disputes about what kind of work should be done by them completely disappeared but it took many months for them to become qualified. In the meantime, many issues were raised relating to the scope of the ESO and the problem is that there is no reason to think that the same thing would not happen under the current proposal but without access, as I said above, to any dispute resolution protocol. What can be said in defense of the ESO system is that while there were many disputes, the Labour Relations Board was available to deal with them relatively expeditiously as they arose.

[189] In my view, the current proposal is residually provocative with no real advantage gained by it for the Company. Even if I were to adopt the clause, the Company would not be able to confidently rely upon it as the sole means of providing the security it requires to operate the SCC without risk. In my view, the only truly effective

mechanism available to the Company that will yield the mitigation required to operate the SCC during a labour dispute is an essential services order. Even with all its warts, it remains the best option. Assuming that the clause were adopted and the Company were to engage a dual strategy of seeking an essential service order, the Labour Relations Board would not have jurisdiction to enforce the clause itself since there is nothing in the current Labour Relations Code that permits it to adjudicate collective agreement disputes. The Board would rely entirely upon its own order for that purpose with the consequence that the Company would end up in the same place as it would without the clause.

[190] Mr. Harrison argued that as a result of the Ready Report followed by the tentative agreement, the Union should be seen to have made representations to the Company that it would maintain staffing in the SCC and that the Company relied upon that commitment. He says that its ability to exercise other options that were available to it at one time are now gone. In effect, he argues that the Union should effectively be estopped from taking a position contrary to the language that was accepted in the tentative agreement. In any event, he says that the principle of replication would compel acceptance and there are no limits on my jurisdiction for that purpose. The parties agreed to refer that issue to me for determination.

[191] I do not agree that anything like an estoppel has been established. Nor do I think that Mr. Harrison expected me to take his point that far. The tentative agreement did not constitute a representation by the Union that the contents would be ratified by the rank and file members. While the Union negotiators agreed to recommend it for acceptance, it was made subject to ratification. Nor am I persuaded that it should be accepted on any other grounds. It would not serve the purpose for which it was proposed. Therefore, for all of the above reasons, I reject the proposal to introduce a clause into the collective agreement to require the Union to man the SCC during a strike, should any occur in the future. I agree with Mr. Harrison that there is no law that would preclude an arbitrator from prescribing a term in the collective agreement should survive its termination but I do not agree with him that the merits of the case support the proposal. It would not provide the kind of effective risk management to the Company that it requires. Only an essential services order can do that.

(7) Statutory Holidays

[192] Ten statutory holidays are currently recognized by the parties in Article 30.01 of the collective agreement. They are:

New Years Day	Labour Day
Good Friday	Thanksgiving Day
Victoria Day	Remembrance Day
Canada Day	Christmas Day
British Columbia Day	Boxing Day

[193] In addition, Article 30.05 makes provision for four “floating” statutory holidays which are not fixed but which can be taken at a time that is suitable to both the Company and the employee. Any such holidays that are not scheduled off by the year end are required to be paid out at straight time rates.

[194] Finally, Article 30.06 provides for the exact circumstance that occurred in this case, which is what is to happen if a new statutory holiday is introduced. Since this issue is the focus of attention, I think it would be appropriate to quote the provision verbatim:

30.06 New Statutory Holiday Proclamations

In the event the Federal or Provincial Government proclaims a new Statutory Holiday, the proclaimed day shall replace one of the Floating Statutory Holidays herein provided in the year of proclamation. Thereafter such new Statutory Holiday shall be deemed to be included in the holidays enumerated in Marginal Paragraph 30.01 in the place of a Floating Statutory Holiday.

[195] Family Day did not become a statutory holiday in British Columbia until 2013. It is designated to be observed on the second Monday in each February to celebrate the importance of families and family life to people and their communities. I think it is not inappropriate to take judicial notice of the fact that while it has been designated as a public holiday in many provinces, it is not universally celebrated throughout Canada. Workers who come within federal jurisdiction do not get the holiday. Alberta, Ontario and Saskatchewan celebrate Family Day under the same rubric while Prince Edward Island celebrates “Islander Day” and Manitoba “Louis Riel Day” all in February generally to address the lengthy period between New Years Day to Easter when there were no statutory holidays.

[196] British Columbia was the last of the four provinces to adopt Family Day. It was first introduced in Alberta in 1990 followed first by Saskatchewan and then Ontario. This February will be only the third time it will have been observed in this Province.

[197] Under Section 3 of the Employment Standards Act, which designates those statutory holidays generally required to be celebrated by employers within the province, subsection (2) makes an exception for collective agreements that contain provisions dealing with the same subject matter. Since statutory holidays are dealt with in this collective agreement, the legal effect is to exempt all statutory control over them and to give full jurisdiction to the parties. In other words, the parties are entitled to designate as many statutory holidays as they wish even though they may not be recognized by the Employment Standards Act or even to restrict them and otherwise establish independent conditions relating to entitlement and compensation.

[198] As it happens, the parties in this case have agreed to celebrate the same statutory holidays as those designated under the Act including the addition of Family Day for a total of eleven such holidays. The dispute is not whether Family Day should be added to bring it into conformity with what workers throughout the province are generally receiving but rather whether it should be in addition to the four Floating Statutory Holidays under Section 30.06. Not surprisingly, the Union seeks an additional day off based on its analysis that Fortis employees enjoy far fewer days off than is the norm in the industry. Mr. MacTavish makes the point that internally employees who work under the Gas agreement get far more days off than do “electric” employees.

[199] The problem that it has, of course, is that it is contrary to Article 30.06 of the agreement which contemplates this precise situation. It requires that if the government proclaims a new Statutory Holiday it will replace one of the four statutory holidays and that is effectively what happened in this case. The parties did not seek to amend the provision in these negotiations with the result that the adoption of Family Day must be treated as an automatic outcome of the application of the clause. It did not require any negotiations to bring it about, the difference being that it reduced the number of floating statutory holidays to three. The effect of the substitution, however, is to preserve the same number of statutory holidays as existed prior to the introduction of Family Day.

[200] It is not unimportant, however, that it increased the number of designated statutory holidays, called the “enumerated” statutory holidays under Article 30.06. What that does is restrict the time when the holiday must be taken. The employees cannot choose when to take a designated statutory holiday. That is controlled by practice, which is to say, when other employees generally take them throughout the province, including the time prescribed

by statute. By contrast, the floating statutory holidays available to employees that can be scheduled on a discretionary basis will have been reduced.

[201] The Union did not say which of those two types of statutory holidays that it was seeking to add to although I think it is logical on the above analysis to assume that it expected that Article 30.06 would operate according to its terms to first adopt the new Family Day and substitute one of the floating holidays and that if a supplemental day off were agreed to be added, it would be to reinstate the number of floating holidays to four. Interestingly, however, that is not how Mr. Ready approached the issue or the negotiators of the tentative agreement. In both of those instances, they recommended that the status quo should be maintained where Family Day would not be observed in favour of maintaining the four statutory holidays.

[202] In my view, that would be a serious mistake because it ignores the application of Article 30.06 which mandates the exact opposite. It requires that any new statutory holiday be deemed to be included in the enumerated category of statutory holidays and reduce the number of floating statutory holidays. I don't see any reason why that protocol should not be applied in this case. Nor do I agree that the substituted floating statutory holiday should be replaced. As I said earlier, it seems to me that it would be spectacularly inconsistent with the basic thrust of Article 30.06 that at the first moment that it is applied that it would be amended to avoid the very result that it prescribes. In all events, I am not persuaded that Fortis employees have fewer holidays than other employees. It is true that they may have more days off but that can be accounted for by different scheduling strategies where some employees work longer shift time which is subsequently taken as earned time off. They don't actually work less time because they have more vacation time off. The time that they work is simply on a different schedule with most employees in the industry working the equivalent of 37 ½ hours per week.

(8) Generation Temporary Employees

[203] This issue is no longer in dispute. If it has not already done so, the Employer shall forthwith post at least two regular full time positions in Generation for the purpose of converting the equivalent number of temporary positions into regular full time positions.

(9) Estoppel Letters

(a) WCB Top-up

[204] This refers to the prescribed means by which an established estoppel may be brought to an end. Without referring to the case law in this area, what the authorities require is a timely and adequate notice by the party that made the commitment that is the subject of the estoppel that it intends to discontinue it. An estoppel is effectively an explicit or implicit promise by one party to another that it will do something upon which the other party relies. It is not a contractual commitment and does not involve the normal elements of an offer and acceptance which are typical requirements of contractual formation. Nevertheless, the promise is enforceable according to its terms but because it does not meet the formal requirements of a contract and is based in equity, it is seen to be vulnerable to termination on notice. In the context of a collective bargaining relationship, it has typically been held that such a notice ought to be served at the time of bargaining so that the other party has an opportunity to negotiate new contractual terms to substitute for the estoppel if it wishes to do so.

[205] The issue arose in this case as a result of a letter sent by Doug Slater to the Union dated January 22, 2013 as follows:

> FortisBC Inc. hereby provides notice of estoppel on current practices in regards to payment of WorkSafeBC lost wages. The Company has been paying employees directly while receiving lost wage payments from WorkSafeBC. Starting in 2013 the Company will transition to a process whereby employees are paid directly by WorkSafeBC and will not top-up wages while on claim. The transition dates will be confirmed in advance of the change.

[206] The Union did not respond to the letter until just before Vince Ready issued his recommendations on September 29, 2013. On September 16 Rod Russell replied to the effect that the practice referred to by Mr. Slater was a not matter of estoppel. He asserted that it was required by the collective agreement and that the Company did not have a right to implement the changes referred to in his letter.

[207] Ten days later Doug Slater wrote to Gord Van Dyke referring to discussions they had on the issue. He said that the purpose of the letter was to provide an interpretation of Addendum "A" Section 2(d) of the collective agreement which is that a top-up of wages is limited under subsection (b) to employees with "full regular earnings" and is not payable to employees on 2/3 earnings.

[208] While I do not understand the etiology of that interpretation, I accept that it was intended to constitute a binding agreement between the Company and the Union to settle the issue. Gord Van Dyke initialed the letter to signal his acceptance of the interpretive guidance. That result was confirmed by the closing sentence that confirmed their agreement to "withdraw all letters related to estoppel on this matter".

(b) Contracting Out

[209] This refers to a separate estoppel notice, this time by the Union. On September 20, 2013 Rod Russell sent a letter to Doug Slater stipulating that the Union would not be estopped by any current practice regarding the interpretation and application of Article 20 after the renewal of the collective agreement. More particularly, he said that the Union would expect the Company to comply with the terms of the agreement regarding the requirement to utilize unionized contractors for electrical locates, meter reading, arborist and substation testing work.

[210] Article 20 is entitled Work Done by Contractors and Others. What it does is require that all "electrical work" done for the Company will be performed on a closed shop basis utilizing unionized contractors whose unions are recognized by the British Columbia Federation of Labour unless otherwise agreed. The term electrical work is specifically defined with the consequence that while the Union is considered to have implicitly conceded that the contracting out of bargaining unit work is permitted, it can only be done with contractors whose employees are certified to recognized unions.

[211] In the settlement agreement dated September 26, 2013 referred to above, not only did the parties address the WCB top-up issue but also contracting out. They agreed that all letters related to an estoppel on Article 20 would also be withdrawn. Nevertheless, in these proceedings the Union takes the position firstly, that the WorkSafeBC letters are irrelevant. Mr. MacTavish argues that the letter from the Company on this issue did not amount to a notice to end an estoppel but rather it was a notice that it no longer intended to comply with the collective agreement. Secondly, with respect to the Union letter, Mr. MacTavish argues that it was issued effectively out of an abundance of caution as notice to the Company that it could not take any comfort from the Union failure to grieve breaches of Article 20 in the collective agreement which were discovered in the course of the negotiations. He said that the Employer in seeking to have this letter rescinded must be seen to be seeking an amendment to the contracting out provision giving it more latitude to contract out electrical work. On the

evidence, the Company most certainly has taken advantage of the provision but the Union takes the position that it has resulted in a dramatic reduction in the size of the bargaining unit.

[212] The problem for the Union is that whatever may be the ultimate effect of withdrawing the letter, what cannot be avoided is that it was the Union that chose to do it. It may, however, be supposed that it was done as part of a larger negotiating strategy to ultimately conclude a new collective agreement. It is to be remembered that the Ready mediation intervention was then in process and the parties were expecting that his recommendations would be the catalyst for a settlement. For my purposes, however, the agreement to withdraw the estoppel letters was not part of that process. It was done independently of them. Mr. Ready did not address the issue in his report. Nor was it addressed in the subsequent tentative agreement, either as an issue that remained in dispute or as an agreed item.

[213] I do not accept, as Mr. MacTavish argues, that the Employer is seeking in these proceedings to have the estoppel letter sent by Mr. Russell on September 20, 2013 rescinded. What it is seeking to do is enforce the agreement made by the parties on September 26 that each of them would back off their positions that they had taken with each other on estoppel. I suppose that potentially in mutually agreeing to withdraw their estoppel notices, the effect would be to maintain the status quo. Based on the evidence available to me, I am unable to say whether the alleged practice in either case would support a claim for estoppel but I do not see that as the point of the matter.

[214] There is simply no basis for me to conclude that the agreement between the Parties dated September 26, 2013 to withdraw their respective estoppel notices is not effective. It was obviously made by the two principals who had knowledge of the legal effect of the notices, which was that if an estoppel had been established by practice each of them waived their notice to end them, the intention being, in each case, to continue the existing practice.

10. **Conclusion**

[215] I reserve jurisdiction to make any clerical or mechanical corrections to this award and to resolve any disputes relating to the interpretation or implementation of the award.

DATED this 4th day of November, 2014 at Vancouver, British Columbia.

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Dalton L. Larson
Arbitrator