LABOUR RELATIONS CODE
(Section 84 Appointment)
ARBITRATION AWARD

COMMUNICATION, ENERGY AND PAPERWORKERS UNION, LOCAL 444

UNION

BRITISH COLUMBIA NURSES' UNION

EMPLOYER

(Re: Medical, Extended Health and Dental Benefits for Dependents of Retirees)

Arbitration Board:	James E. Dorsey, Q.C.
Representing the Union:	Richard L. Edgar
Representing the Employer:	Donald J. Jordan, Q.C.
Dates of Hearing:	March 19 and 20, 2012
Date of Decision:	April 30, 2012

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1. Grievance and Jurisdiction

[1] New managers, especially if they are new to an organization, question and challenge ongoing expenditures within their budgetary responsibilities. The questioning may arise from a systemic audit review or as individual expenditures come to a new manager's attention. Is the expenditure necessary? Does it provide a cost effective benefit to the organization? Is it a contractual obligation or an ingrained practice?

[2] In 2007, Gayle Duteil, Director of Labour Relations since 2002, was Executive Director of Operations. Gary Fane, hired in 2005, was Executive Director, Strategic Development and Negotiations. Previously, there had been one Executive Director.

[3] Mr. Fane questioned employer payment of benefit coverage for spouses and dependents of retired bargaining unit employees. Ms Duteil wrote retired employees that effective March 1, 2007 the employer would discontinue paying for this coverage. A retiree could continue coverage for spousal and dependent benefits at the retiree's cost. Ms Duteil told retirees their monthly cost to maintain coverage, subject to annual adjustment, would be $202.27[1] for a spouse and "slightly higher" for family coverage.

2007 Monthly Retiree Benefit Costs

Benefit	Single	Couple	Family
MSP Premium	$54.00	$96.00	$108.00
Dental	$45.45	$93.10	$152.04
Extended Health	$138.85	$252.47	$252.47
Totals	**$238.30**	**$441.57**	**$512.51**

[4] The union grieved under the 2007-10 collective agreement. The grievance was resolved on terms that are in dispute. It is not necessary to recount the evidence on the resolution because it is peripheral to the central language interpretation issue in dispute.

[1] I calculate $203.27 per month ($441.57 - $238.30)

[5] In bargaining and renewal of the collective agreement in 2011, it was agreed to submit to arbitration the continuing and outstanding difference over benefit entitlement at the employer's cost for retirees' spouses and dependents. The union and employer agree I am properly appointed as an arbitrator under their collective agreement and the *Labour Relations Code* with jurisdiction to finally decide their difference.

2. Employer Paid Benefit Coverage for Retirees Negotiated in 1980's

[6] The Registered Nurses' Association of British Columbia Labour Relations Division and the Labour Relations Division Employees Union entered a first collective agreement for the period September 3, 1980 to December 31, 1981. Negotiated employee benefits included medical, extended health, dental and group life insurance (Articles 31.01 to 31.04).

[7] The second collective agreement (1982-83) was between the British Columbia Nurses' Union and the British Columbia Nurses' Staff Union. Articles 31.01 to 31.04 were amended and a new Article 31.05 was added:

> **Article 31: Medical, Extended Health, Dental and Group Life/AD&D Coverage**
>
> 31.05 Employees with five or more years of employment who retire at or beyond age sixty (60) shall continue to be insured if possible at the Employer's expense under the medical, extended health, and dental plans. Employees who meet the above qualifications shall also be insured, if possible, for ten thousand dollars ($10,000) under the group life insurance plan, the cost of which shall be borne by the Employer. The provisions of this Article shall not apply to former employees who subsequent to their retirement with the British Columbia Nurses' Union become employed elsewhere.

[8] Article 31 was subsequently renumbered Article 32. In 1986, among other Article 32 proposals, the union proposed two changes to Article 32.05: (1) reducing the retirement age eligibility from age 60 to 55 and (2) inserting as a second sentence: "The plans shall cover retired employees and their dependents."

[9] This second proposal was suggested to the BCNSU bargaining committee by Roy Richmond in a January 3, 1986 memorandum: "I – VERY SELFISHLY – propose the following revision of Article 32.05." There is no evidence whether his proposal was to cover future or previously retired employees and whether Mr. Richmond had any relationship to them about which he was being selfish.

[10] On July 18, 1986, the employer made an offer in response to union proposals on Article 32.04 and other collective agreement provisions contingent on the union accepting another package on several provisions that included retaining the language in Articles 32.02 and 32.05. The union's counter proposal accepted this trade-off within Article 32 and other items. Article 32.05 was renumbered 27.06 with no change in the language in the 1986-87 collective agreement.

[11] In 1988, a union proposal to amend Article 27.06 to eliminate the requirement for five years' service and to reduce the retirement eligibility age to 55 was withdrawn during negotiations.

[12] The article was not amended in subsequent rounds of collective bargaining and continued as Article 26.07 in the 2007-10 collective agreement.

3. Employer Paid Benefit Coverage for Retirees' Spouses and Dependents

[13] The evidence does not establish when the employer began paying for health and welfare benefit coverage for spouses and dependents of retirees that Mr. Fane questioned in 2007. The union says it has been a benefit paid by the employer since 1982. The employer says it paid the benefit in error, but adduced no evidence when or why the employer first began paying for benefit coverage for spouses and dependents of retirees.

[14] Under the 1982-83 collective agreement the employer paid the premium costs of medical coverage, extended health care coverage, dental plan for employees "and their dependents" (Articles 31.01 - 31.03).

[15] Group life insurance coverage was for "employees." In the 1986-87 collective agreement, it was agreed: "If possible, employees may purchase optional group life insurance for themselves and/or for their spouses. The Union agrees that the Employer shall not incur any costs at any time as a result of employees exercising this option." This is now Article 26.06.

[16] At some unidentified time, the medical coverage article (now Article 26.01) was amended to add: "'Dependent' shall include same sex and common law spouse." What is now Article 26.08 was added: "In the event that an employee dies and that employee

has dependents covered under any or all of the Medical, Extended Health and Dental plans, coverage for the dependents shall be continued for a maximum of three (3) months. The Employer will bear the cost of this coverage."

[17] Fiona Reid was a bargaining unit employee from 1987 until she retired in March 2008. At the time of her retirement, benefit coverage for her and her husband continued as it was prior to her retirement.

[18] In the absence of post-retirement employment elsewhere, retirement did not require any administrative or other employee action with respect to benefits. Employer paid benefit coverage for employees and their dependents continued after retirement as it had before retirement.

[19] Ms Reid participated in one round of collective bargaining in the early 1990's on behalf of the union. In her recollection, the issue of employer payment for continued post-retirement coverage of spouses and dependents was not raised as an issue in the workplace during her 21 years of employment before Mr. Fane raised it.

[20] Gail Craig testified that when she began employment with the employer in 1996, the employer was paying for medical, extended health and dental coverage for spouses and dependents of retirees. During her employment she was a union officer. This coverage issue did not arise in the rounds of collective bargaining in which she participated on behalf of the union. She accepted a severance package to leave the employer in February 2008.

[21] It was Ms Craig's practice to alert retiring union members that the continuance of benefits could be lost if they chose to be employed elsewhere after their retirement.

4. Mr. Fane Questions Coverage for Retirees' Spouses and Dependents (2007)

[22] Ms Reid recalls Mr. Fane was hired in mid-2005. At the time, she was a Coordinator and participated in meetings with him and others. She observed Mr. Fane and another employee, Jackie Larkin, responsible for education programs, develop a prickly but civilized relationship. Ms Larkin retired in July 2006.

[23] In early 2007, Mr. Fane learned the employer was paying for benefit coverage for Ms Larkin's adult daughter, who was in her 20's and attending university. He discussed

this in the office with Ms Reid and expressed the opinion that providing coverage in this circumstance was an excessive employer cost.

[24] On February 13, 2007, Ms Duteil, who did not testify, wrote Ms Larkin and other retirees that Article 26.07 did not provide coverage for dependents and effective March 1, 2007 the employer would be adjusting their benefit coverage. The employer would consider continuing the coverage for one year at the retiree's cost if the retiree pre-paid the cost of six months' coverage. Questions could be directed to Ms Duteil or Mr. Fane.

[25] Retired employee Heather Leighton sent a cheque to Ms Duteil with a letter dated February 15, 2007 in which she explained her benefits had been provided through her husband's employer during her employment with the employer. At the time of her retirement, she began coverage with the employer to ensure she would have benefit coverage in the event of her husband's death. She found the short-term notice "unconscionable", but luckily it was in time to allow her to maintain coverage for her husband who was undergoing costly dental work that had been delayed pending insurer approval.

[26] The union grieved and met with the employer, which denied the grievance on February 19th.

[27] Mr. Fane informed BCNU Council Members about the Article 26.07 issue in a March 12, 2007 memorandum. It begins: "As you know recently our new auditors pointed out that this article in the CEP collective agreement incurred a liability for the BCNU of over $2 million dollars with additional costs of over $175,000 each year." He did not know the history and intention of the article or the employer's legal obligations. He reported:

1. To find out what our exact liability is, we are attempting to understand exactly what the language means. Does Article 26.07 mean BCNU must always pay for:
   (1) Employees?
   (2) Employees and their spouses?
   (3) Employees and their spouses and dependants?
2. What does the follow term mean:
   (1) (60) shall continue to be insured if possible at the Employers expense?
   (2) Shall also be insured, if possible, for ten thousand ($10,000)?

3. Was the continuation of benefits for retiree's guaranteed regardless of costs or the union's financial position?
4. At the time of negotiations was it conceived that we would pay for a retiree's children and for how long do we pay?

From the employee's point of view, the changes in the language suggest that the benefit commitment for employers and retirees may not be the same.

(1)	**26.01**	The Employer shall pay 100% of the premium cost of medical coverage for employees and their dependants..... Dependants shall include same sex and common law spouse.
(2)	**26.02**	The Employer shall pay 100% of the premium costs of extended health coverage for employees and their dependants under the Blue Cross...
(3)	**26.03**	The employer shall pay 100% .... The plan shall cover all employees and their dependants under the Pacific Blue Cross.....
(4)	**26.04**	The employer shall pay (100%) .... to provide each employee with $100,000 group life and.....
(5)	**26.05**	The employee is responsible for any costs not covered by the plans.
(6)	**26.06**	If possible, employees may purchase.....
(7)	**26.07**	Article in debate
(8)	**26.08**	In the event that the employee dies ...., coverage for dependents shall be continued for a maximum of (3) months. The employer will bear the cost of the coverage.

CEP has filed a grievance on the issue in debate, and John Ricketts agreed on these issues:

1. The language is clear and 26.07 follows the benefits found in articles 25.01 to 26.06. There is no difference in the employer's obligation.
2. Past Practice: the employer, BCNU has paid for retiree's benefits for spouses and dependants and must continue to do so.
3. Article 26.08's obligation includes retiree's also, even if the person has retired.

Please find enclosed the reply that we have sent to John Ricketts. In the letter I ask John to provide any information that CEP might have, for example who was in the negotiations and what exactly do they remember about the discussion around article 26.07.

We do know that the clause was negotiated in 1981, and we are researching who was participating on behalf of the employer and what was the intent of 26.07.

To protect the interest of the BCNU, we have sent a letter to retirees, explaining that if they wish to continue benefits for their "dependants", they are requested to send us the appropriate cheques for the costs.

Finally, if we as the employer legally owe this benefit to the retirees (and their dependants) we should pay it and argue the issue in negotiations. If we do not owe this "cost" we should offer to CEP and retirees to pay for the cost up front. CEP will proceed to arbitration and we should ensure our position is legally sound.

At this time, I would like to suggest that we outline the case (both sides: union and employer) and the proper jurisprudence and send it to three established arbitrators to advise us on what they would rule if they were hearing this case. This way gives us guidance on what article 25.07 really means.

5. Initial Grievance Resolution, Second Grievance and Collective Bargaining

[28] Ms Craig was local union President in 2007. She testified she and Ms Duteil had an informal hallway discussion about the grievance in late October or early November 2007. Ms Duteil proposed the employer continue paying for benefit coverage during the term of the current collective agreement and the issue would be discussed in the next round of collective agreement. Ms Craig heard what was to happen, but did not understand the employer would discontinue paying for coverage at the end of the term of the current collective agreement.

[29] Ms Duteil wrote Ms Craig a letter dated November 20, 2007 stating their agreement was the employer would maintain coverage until December 31, 2010 for retirees and spouses. Further: "The BCNU will formally serve notice as required by the Labour Relations Code, however, so there is no misunderstanding, please be advised this Article will be subject to negotiations at the next round of collective bargaining, December 2010."

[30] Ms Craig replied on November 24th that Ms Duteil had overlooked their discussion about reimbursing retirees who submitted payment in accordance with the employer's letter of February 13th. Ms Craig understood employer paid coverage would continue during collective bargaining, but did not state this in her reply.

[31] By letter dated March 14, 2008, the employer notified retirees employer paid coverage would continue until December 31, 2010 and reimbursed them.

[32] The employer gave notice to the union on November 19, 2010 that it would not pay for spousal retiree benefits after December 31st. By this time, the employer's position was the benefit had been paid in error and was not a collective agreement obligation because the union withdrew its 1986 proposal that the employer pay for coverage of retirees' dependents.

[33] The employer wrote retirees on December 1, 2010 that it would not pay for coverage for spousal retiree benefits after December. The retiree could pay to have the benefit continue. The cost for Ms Leighton was $2,078.04 per year. The cost might increase in March 2011. The union's grievance of this decision was denied by the employer on January 24th. The employer grieved February 14, 2011 to advance its

position that the benefit was not negotiated and is not contained in the current collective agreement.

[34] Cheryl King, a local union Vice-President since 2010, was the union's Chief Negotiator in the 2011 round of collective bargaining and inherited the fallout from the 2007 grievance resolution. She has been employed by the employer since 1998 and knows several retirees for whom the employer paid for benefit coverage for their spouses and dependents.

[35] The union and employer maintained their respective positions in collective bargaining. The union's position was the language and intent of Article 26.07 required the employer to provide benefit coverage for retirees' spouses and dependents. The employer's position was that this was not agreed and the coverage had been paid by the employer for twenty-five years because of employer inattentiveness. Employees retired and benefits for their spouses and dependents simply continued.

[36] The employer's cost to continue or grant the coverage and the cost to extend any new benefits to retirees were discussed. Without a resolution of the grievances there were future cost uncertainties. The employer pressed to have the grievance arbitrated and resolved.

[37] The memorandum concluding a collective agreement for the term 2011-15 provides for increased benefit coverage for employees and existing and future retirees, but not expressly to retirees' spouses or dependents. There are agreed formulae for allocating the final cost of the benefit increases. The memorandum includes the following:

> 7) BCNU and CEP agree to resolve the outstanding grievance between the parties on Retiree Spousal benefits at Arbitration as soon as possible and will make every effort to do so before March 30, 2011.
> 8) If the outcome of the arbitration is in the Employer's favour, there will be no coverage for retiree spouses.
> 9) If the outcome is in CEP 444's favour, CEP 444 agrees to fund the increase to the spouse's benefits in the same manner as the increase to retiree benefits.

6. Union and Employer Submissions

[38] The union submits the employer precipitously discontinued a collective agreement benefit in 2007 out of pique. It did so without knowledge of the application

and operation of Article 26.07. This is reflected in Mr. Fane's memorandum of March 12, 2007 to the BCNU Council Members. It was a hasty decision investigated after the fact that was intended to promote a bargain in the employer's advantage and led to brinkmanship in 2011 collective bargaining.

[39] The union submits the right to the retiree benefit is found in the collective agreement. It does not argue the benefit arises separate from the collective agreement or because of the application of the doctrine of estoppel. In interpreting the language of the collective agreement, the negotiating history is not helpful in discerning the union and employer's mutual intention, but the past practice is.

[40] Eligible employees at retirement "continue to be insured" at the employer's expense under the medical, extended health and dental plans. This is the context in which Article 26.07, the final provision in the benefit article, can be harmoniously read within the article and must be interpreted.

> Article 26.07 does not, as does the prior articles, distinguish between the various benefits. It groups all of the benefits and simply provides that the employee who meets the 2 preconditions "shall continue to be insured". It is simply unnecessary for the clause to repeat the specific benefit that is available to the retiring employee. That has already been done in the companion language.
>
> If the word continue is to be given its plain meaning, one must conclude that the employee would continue to receive the same benefits as they had been while working for BCNU. (*Union Written Argument*, p. 6)

[41] The union submits the use of the language "continue" is a natural choice in the context of the health and welfare benefit provisions. It assumes receiving the same benefits after as before retirement. In support of this interpretation, the union submits any change in the continuation of earned benefits after retirement must be identified in clear language. (*Galco Food Products Ltd.* (1978), 18 LAC (2d) 220 (Beck)) This was done with respect to the two limitations on eligibility and the one circumstance when the benefit is lost or discontinued. "Where the parties have wanted limitations or restrictions, they have expressly set them out." (*Union Written Argument*, p. 7)

[42] The union submits the employer seeks to read in a limitation that was not bargained and is not expressed in the collective agreement. (*British Columbia Rapid Transit Co.* [2009] B.C.C.A.A.A. No. 137 (Brown), ¶ 62)

> BCNU is attempting to argue that a specific limitation to the continuance of the same benefits covering the same individual is present, despite an absence of any such language in the Collective Agreement, as well as clear, consistent past practice that contradicts this interpretation. There are specific limitations in the language used but fundamentally altering the coverage to eliminate retiree dependents from coverage is not one of those.
>
> To achieve its objective here of limiting the benefit, BCNU must take the position that the Collective Agreement provision regarding retiree benefits does not specifically include the words "dependents" or "spouses", unlike the preceding provisions, and therefore the intent was to exclude them from coverage.
>
> However, we submit that the exclusion of this one word in that particular provision is meaningless when one reviews the context of the provision as a whole. (*Union Written Argument*, p. 8)

A retiree benefit eligibility limitation should not be read in when there was serious attention in collective bargaining to the retiree benefit provision with limitations negotiated, as was the outcome in *Coast Mountain Bus Co.* [2006] B.C.C.A.A.A. No. 84 (Munroe), ¶ 27).

[43] The union submits the consistent past practice is clear and reflects the mutual intention of the union and employer. It meets the circumstances in which past practice can be used as an aid to interpretation (*John Bertram and Sons Co. Limited* (1967), 18 LAC 362 (Weiler)). On the other hand, the evidence of negotiating history is cryptic, equivocal and ambiguous. It does not clearly and cogently support one interpretation over another. It cannot be relied on to support the interpretation advanced by the employer as a mutual intention of the union and employer. (See *Strait Crossing Joint Venture* [1997] C.L.A.D. No. 360 (Christie), ¶ 37)

> For example, it is, given the fact that after the 1986 bargaining the BCNU continued to pay these benefits for retirees and their dependents, a likely (but still speculative) conclusion that the parties recognized that there was no need for this particular additional language since dependents were already recognized as being covered and the language of the clause supported it. Such acknowledgements were not at all unheard of in the 80's when this bargaining occurred.
>
> What is unlikely is that the matter was raised in 1986, the parties mutually understood that the benefit was not available to dependents, and then the BCNU promptly continued paying them to retirees and dependents for the next 21 years. The employer has provided no explanation for this fact.
>
> It is neither reasonable to conclude from 1986 bargaining notes that the intention was to completely exclude retiree dependents from continued coverage, nor may you, as arbitrator, use such equivocal evidence (notes and proposals without any accompanying evidence of the discussion) to come to a conclusion of mutual intention to overcome the language of the clause and the evidence of consistent practice.

> This is particularly true in this case, where there are over 20 years of continued coverage after this discussion in bargaining.
>
> Note that, while there was another attempt to reduce the retirement age to 55 in the 1988 bargaining ... the Union made no further attempt to bargain the "dependents" language into the agreement: the expectation was that retirees and their dependents were already receiving the continued benefit. (As testified to, without contradiction, by each of the union's witnesses.) (*Union Written Argument*, pp. 12 - 13)

[44] The union submits the employer's approach of consistently providing post-retirement benefits and then unilaterally deciding to stop was rejected in *Global Calgary* [2007] C.L.A.D. No. 390 (Sims) and should be rejected here using the same analysis.

> In particular, the parties negotiated this language into their second Collective Agreement in 1982 and the language has remained the same ever since. Since that time, there has been consistent past practice whereby retirees continue to be enrolled in the same plan they were enrolled in prior to retirement.
>
> The Union's position is that the language of the provision itself supports this interpretation, as does the past practice over almost three decades and the employees' expectations that this practice would continue.
>
> This is, the Union submits, a classic case of deferred compensation, and the employees had a reasonable, legitimate expectation that their dependents would continue to receive health benefits coverage after they retired.
>
> Therefore, the Union submits, for all the above reasons, that this grievance must be allowed. (*Union Written Argument*, p. 18)

[45] In the alternative, the union submits the employer cannot apply its interpretation of Article 26.07 to existing retirees for whom the dependent benefit is vested at the time of retirement and cannot be retroactively withdrawn. (*Dayco (Canada) Ltd. v National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada)* [1993] S.C.J. No. 53; *Toronto (City)* [2009] O.L.A.A. No. 349 (Luborsky))

> Therefore, the Union's position is that, at the very least, current retirees have a legal right to continue receiving the benefits they have received since their retirement date, as these were accrued benefits that vested on the date they retired. Determining otherwise would, in the Union's submission, deprive retirees of a significant benefit for which they had worked hard, gave consideration, and anticipated would be an expense that they would not have to incur when they retired. (*Union Written Argument*, p. 22)

[46] The employer submits the benefit claimed by the union was never bargained and obtained by the union. It was provided by the employer in error. The fact it was provided for a long time does not create a continued right to receive the benefit.

[47] The employer submits the past practice does not create a contractual right or determine the validity of that practice. And the evidence adduced by the union of the practice is not as extensive as the union asserts.

[48] The employer submits when benefit entitlements are granted by prescription in Article 26, the scope is delineated by use of the words "employees" and "dependents." The union seeks to have the use of the word "employees" in Article 27.06 read as "employees plus dependents."

[49] In applying principles of collective agreement interpretation collated in *Pacific Press* [1995] B.C.C.A.A.A. No. 637 (Bird), ¶ 27 the primary task of the arbitrator is to search for and determine the mutual intention of the employer and union (*University of British Columbia* [1976] B.C.L.R.B.D. No. 42, ¶ 23). In this dispute over collective agreement language interpretation, the evidence is that the longstanding practice arose "divorced from mandatory language in the collective agreement."

[50] The employer submits what is known is that the union sought to negotiate inclusion of the benefit it now claims into the collective agreement in 1986 and dropped its proposal. Therefore, the employer submits it cannot be concluded post-retirement health and welfare benefits extend beyond "employees."

> It would be difficult to conceive of a circumstance which is more antithetical to the finding of "mutual intention" than the fact that what is being sought by the process of interpretation was something which was previously specifically sought and denied. (*Employer's Outline of Argument*, ¶ 4)

[51] The employer submits it cannot be assumed, as the union submits, the use of the word "employees" in Article 26.07 includes "dependents." These are different words to be given different meanings. Their usage is clear. Reading one to mean or include the other ignores their plain meaning; creates a disharmonious interpretation; and, in effect, reads "dependents" out of the article.

[52] The employer submits the past practice evidence in the nature of past conduct does not meet the strict limitations for use to determine mutual intention. There is a clear preponderance in favour of "employees" meaning just "employees" and not including "dependents." There is no evidence of unambiguous conduct by the employer. There is no evidence of management knowingly acquiescing in the practice which was addressed immediately when Mr. Fane learned about it. It happened and persisted because of inattentiveness. How the practice developed is irrelevant because past practice does not create a right.

> Where we are left is a circumstance where there is a longstanding practice of payment of the benefit and the assertion presently before you that the benefit is not required by the language of the agreement.
>
> There are numerous instances where contractual entitlements are asserted on the basis of past practice. Past practice has never been held to be a basis for the creation of a contractual obligation. Indeed, rulings to that effect by arbitrators are routinely overturned by the Labour Relations Board under section 99 of the *Code*. (*Columbia Hydro Constructors Ltd.* [1981] B.C.L.R.B.D. No. 1; *Fletcher Challenge Canada Ltd.* [1994] B.C.C.A.A.A. No. 253 (Taylor), ¶ 25; *Marco Marine Container Inc.* [1999] B.C.L.R.B.D. No. 412)
>
> As noted earlier, the fundamental premise of an arbitrator's task in interpreting the collective agreement is to search for "mutual intention". In circumstances where the particular scope of a collective agreement obligation has been raised and rejected, it is, with respect, virtually impossible to find mutual intention (*Catalyst Paper (Powell River Division)* [2010] B.C.C.A.A.A. No. 177 (Dorsey), ¶ 64; *Orca Bay Sports & Entertainment* [1997] B.C.C.A.A.A. No. 522 (Kelleher)) (*Employer's Outline of Argument*, ¶ 7 – 9)

[53] The employer submits the Supreme Court of Canada did not determine there are vested rights in the retirees covered by the collective agreement before it or generally in a collective agreement situation. The subsequent arbitration found that collective agreement language ambiguous and permitted extrinsic evidence to be adduced. (*Allen Industries Canada Ltd., a Division of Dayco (Canada) Ltd.* [1994] O.L.A.A. No. 368 (Burkett)) Premium-free, post-retirement benefits were not found to have vested under the statutory schemes in *B.C. Nurses' Union v. Municipal Pension Board of Trustees*, 2006 BCSC 132 and *Bennett v. British Columbia*, 2012 BCCA 115. Premium-free, post-retirement benefits were found to have vested in employment was under a common law contractual agreement, not a collective agreement, in *Lacey v. Weyerhaeuser Company Limited*, 2012 BCSC 353.

7. Discussion, Analysis and Decision

[54] This grievance involving interpretation of a collective agreement provision conferring a benefit on persons no longer in the workplace highlights the nature of collective agreements that distinguishes them from commercial agreements negotiated for other relationships. Collective agreements do not have the fine print common in contracts of insurance, mortgages, leases and other commercial contracts. They are do-it-yourself agreements usually negotiated by successive committees whose members have varying degrees of knowledge, experience and tolerance for attention to detail, potential disputes and hypothetical future scenarios.

[55] Collective agreements evolve within the context of a union-employer relationship. The history of a relationship can be both the bane and the strength of a relationship sustained over decades through successive collective agreements negotiated by a succession of union leadership and employer representatives.

[56] Because the relationship is ongoing and expected to continue indefinitely, much of the ongoing foundation of the relationship is based on mutual trust and cooperation. Part of the trust is that the words of the collective agreement will be administered and applied or sometimes ignored in accordance with the past practice, common sense and the relationship. To further trust and cooperation, the union restrains the zealous barrack-room or shop floor lawyer among its membership or within its ranks and the employer restrains the overly ambitious and literal manager.

[57] As an expression of the trust that the past is a reliable predictor for the future relations, most matters that have worked or, at least, have not caused a problem are ignored at successive rounds of collective bargaining. Even, at times, collective agreement language that is honoured more in the breach than in the observance is left untouched. One example is collective agreement time limits for processing a grievance or proceeding to arbitration.

[58] The focus at collective bargaining is pragmatic and most often on current issues, wages and benefits and employer costs under the existing terms and application of the collective agreement. For this reason, new or inventive claims for benefits advanced at arbitration attract arbitrator scrutiny to ensure the language of the collective agreement is interpreted in a manner that does not generate employer costs that were not mutually agreed.

[59] This background character of an uninterrupted union-employer relationship presents a context for interpreting the written expression of agreement on terms and conditions of employment for bargaining unit employees that is distinct from a single commercial transaction or ongoing supplier commercial agreement that provides the context for the evolution of the common law of contracts. Past practice, organizational dynamics and institutional memory, rather than the letter of the collective agreement, often direct how things are done. In the day-to-day operation of the workplace, mutually

accepted deviations from the agreement will occur for the arguable benefit or detriment of either the employer or some employees.

[60] Fair outcomes in disputes over collective agreement language and workplace practice require the application of legal and equitable doctrines of interpretation and redress fashioned for the context of collective bargaining relationships. For example, a Manitoba arbitrator prevented a union from redress for a vacation benefit under the language of a collective agreement because of the union's long-standing acquiescence to the employer's open and consistent practice in calculating vacation entitlement. The arbitrator held the employer was entitled to assume the union had accepted its practice through five successive collective agreements and to rely on that acceptance not to seek to negotiate a change to the language. (*Nor-Man Regional Health Authority Inc.* [2008] M.G.A.D. No. 30 (QL) (Simpson), ¶ 96) This is one example of reliance on routine operating practice and not burdening the collective bargaining table with matters not seen to be in dispute.

[61] In upholding the decision, the Supreme Court of Canada underscored the importance of the labour relations and industrial context in which grievance arbitrators decide disputes.

> ...labour arbitrators are authorized by their broad statutory and contractual mandates — and well equipped by their expertise — to adapt the legal and equitable doctrines they find relevant within the contained sphere of arbitral creativity. To this end, they may properly develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievances of which they are seized.
>
> This flows from the broad grant of authority vested in labour arbitrators by collective agreements and by statutes such as the *LRA*, which governs here. Pursuant to s. 121 of the *LRA*, for example, arbitrators and arbitration boards must consider not only the collective agreement but also "the real substance of the matter in dispute between the parties". They are "*not bound by a strict legal interpretation of the matter in dispute*". And their awards "provide a final and conclusive settlement of the matter submitted to arbitration".
>
> The broad mandate of arbitrators flows as well from their distinctive role in fostering peace in industrial relations (*Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 ("*O.S.S.T.F., District 15*"), at para. 36; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157, at para. 17).
>
> Collective agreements govern the ongoing relationship between employers and their employees, as represented by their unions. When disputes arise — and they inevitably

will — the collective agreement is expected to survive, at least until the next round of negotiations. The peaceful continuity of the relationship depends on a system of grievance arbitration that is sensitive to the immediate and long-term interests of both the employees and the employer.

Labour arbitrators are uniquely placed to respond to the exigencies of the employer-employee relationship. But they require the flexibility to craft appropriate remedial doctrines when the need arises: Rigidity in the dispute resolution process risks not only the disintegration of the relationship, but also industrial discord.

These are the governing principles of labour arbitration in Canada. Their purpose and underlying rationale have long been well understood by arbitrators and academics alike. More than 30 years ago, Paul C. Weiler, then Chairman of the British Columbia Labour Relations Board and now Professor Emeritus at Harvard University, underlined their importance in a dispute of particular relevance here. He explained in the following terms why the doctrine of estoppel must be applied differently in a grievance arbitration than in a court of law:

> . . . a collective bargaining relationship is quite a different animal. The union and the employer deal with each other for years and years through successive agreements and renewals. They must deal with a wide variety of problems arising on a day-to-day basis across the entire spectrum of employment conditions in the workplace, and often under quite general and ambiguous contract language. By and large, it is the employer which takes the initiative in making operational decisions within the framework of the collective agreement. If the union leadership does not like certain management actions, then it will object to them and will carry a grievance forward about the matter. The other side of that coin is that if management does take action, and the union officials are fully aware of it, and no objection is forthcoming, then the only reasonable inference the employer can draw is that its position is acceptable. Suppose the employer commits itself on that assumption. But the union later on takes a second look and feels that it might have a good argument under the collective agreement, and the union now asks the arbitrator to enforce its strict legal rights for events that have already occurred. It is apparent on its face that it would be inequitable and unfair to permit such a sudden reversal to the detriment of the other side. In the words of the Board in [*Corporation of the District of Burnaby and Canadian Union of Public Employees, Local 23*, [1978] 2 C.L.R.B.R. 99, at p. 103], "It is hard to imagine a better recipe for eroding the atmosphere of trust and co-operation which is required for good labour management relations, ultimately breeding industrial unrest in the relationship — all contrary to the objectives of the Labour Code"..... (*Re Corporation of the City of Penticton and Canadian Union of Public Employees, Local 608* (1978), 18 L.A.C. (2d) 307 (B.C.L.R.B.), at p. 320)

Reviewing courts must remain alive to these distinctive features of the collective bargaining relationship, and reserve to arbitrators the right to craft labour specific remedial doctrines. Within this domain, arbitral awards command judicial deference.

But the domain reserved to arbitral discretion is by no means boundless. An arbitral award that flexes a common law or equitable principle in a manner that does not reasonably respond to the distinctive nature of labour relations necessarily remains subject to judicial review for its reasonableness.

Other contextual factors favour judicial deference to labour arbitrators as they adopt and apply common law and equitable principles within their distinctive sphere: Section 128(2) of the *LRA* contains a privative clause in respect of labour arbitrators and boards of arbitration. They benefit from *institutional expertise* in resolving disputes arising under a

> collective agreement (*O.S.S.T.F., District 15*, at para. 37), even if they lack *personal expertise* in matters of law. *Dunsmuir* makes clear that, "at an institutional level, adjudicators . . . can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions" (para. 68 (emphasis added)). (*Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals,* 2011 SCC 59 (CanLII), 2011 SCC 59, ¶ 45 – 53)

[62] It is in this context and against this background that the interpretive approach toward collective agreements emphasizing the search for the mutual intention in an ongoing relationship departed from the common law approach of placing primacy on the security of written agreements when interpreting contracts. The departure from that common law approach in interpreting collective agreements recognizes the inevitable imprecision of collective agreement language; the need to remain faithful to workplace expectations; and often the availability of useful historical material in deciphering the actual intent behind the language. (*University of British Columbia* [1976] B.C.L.R.B.D. No. 42)

[63] I find there is a genuine and not a contrived ambiguity in the language in Article 27.06. Is "employees" intended to identify a group entitled to the benefit that does not include "their dependents" who are specifically included in Article 26.01, 26.02 and 26.03, as the employer argues? Or is "employees", as qualified by 5 years of service and 60 years of age, intended to identify those for whom their pre-retirement medical, extended health and dental plan benefits entitlement, including coverage of their dependents, will continue after retirement unless the retired former employees are subsequently employed elsewhere, as the union argues? In the words and structure of the agreement there is no clear preponderance in favour of one meaning of Article 27.06.

[64] Some of the murkiness of the ambiguity is reflected in Ms Leighton's situation. Her benefit coverage was initiated at the time of her retirement for her future protection because she and the employer had the advantage of her husband's coverage before her retirement. The change included post-retirement coverage for group life insurance for her "spouse", a word that appears in Article 26.06 but not in 27.06. On the employer's reasoning "spouse" is a distinct word to be given a meaning separate from "employees" in Article 27.07. On the union's reasoning, Ms Leighton could purchase

post-retirement group insurance on her husband's life because the right under Article 26.06 simply continued although life insurance is not identified as a benefit continuing.

[65] The employer reaches back beyond decades of openly and continually providing medical, extended health and dental plan benefits to retirees' dependents to say continuation of benefit coverage for dependents of retired former employees could not have been mutually intended because the union made and dropped a proposal to this effect in 1986 when it sought to lower the retirement age to 55.

[66] There are difficulties concluding this union action twenty-five years ago persuasively supports the employer's position.

- It minimizes and discards the employer's regular and routine actions over the decades in paying for benefit coverage for retirees' dependents.
- No one engaged in collective bargaining in 1986 testified that either the employer or the union sought to establish a new benefit rather than simply codify the application of a provision in a relatively new collective agreement. The proposed additional words – "The plans shall cover retired employees and their dependents" – were redundant, in part, because retired employees were covered. While the union notes from its 1986 bargaining conference suggest the goal was to add dependents, perhaps, unknown to those involved in that meeting dependents were already covered or it was considered to be a simple language codification to achieve.
- Perhaps, in 1986 the employer simply resisted opening the retiree benefits article at all to avoid entertaining a lower retirement age which the union brought back in the next round of collective agreement. Perhaps, the part of the proposal addressing retiree benefits was not "denied" as the employer asserts without supporting evidence, but treated as unnecessary redundancy. If that is the case, employer payment for coverage was not divorced from mandatory language in the collective agreement.
- At least as early as 1987, when Ms Reid was first employed, the employer provided post-retirement coverage for dependents of retired employees.

- Perhaps, the union did not bring the post-retirement benefit proposal to the 1988 round of collective bargaining because, at the time, there was no difference between the union and employer on this issue.

- Employer "inattentiveness" is a convenient phrase to dismiss its consistent conduct, but it presumes no Executive Director, President, Council Member, accountant or auditor before Mr. Fane or the employer's "new auditors" identified and calculated the future liability of continuing post-retirement benefits for dependents of former employees in audited or unaudited financial statements prior to 2007 or in costing wages and benefits under the collective agreement before and after successive rounds of collective bargaining from 1987 to 2007. It presumes no one identified or noticed the practice in reviewing insurance plan costs and speaking to insurers about the group and demographics of the group covered by the plans for which the employer was paying or in dealing with any insurer inquiries about the identity of covered dependents. It is difficult to attribute such "inattentiveness" to so many persons, expected to discharge basic accounting, managerial and governing oversight responsibilities.

- Ms Duteil, none of her Executive Director predecessors and no employer representative testified the provision and maintenance of post-retirement benefit coverage for dependents of retired former employees was not thought to be covered by Article 26.07 and was provided and paid for over the decades at great cost to the employer, as reflected in Mr. Fane's memorandum, because of employer "inattentiveness."

- Before Mr. Fane raised the issue in 2007, there was no need for the union in successive rounds of collective bargaining to question whether Article 27.06 provided for continuation of benefit coverage because either, as the employer asserts, no employer representative knew the coverage was being erroneously paid for by the employer and, or as the union asserts, it was not an matter of disagreement because payment was provided for in the collective agreement.

[67] I find the past practice evidence is clear and assists in resolving the ambiguity I find in the language in Article 26.07. The employer's open and consistent conduct unambiguously supports the union's interpretation.

[68] Attributing the discharge of due diligence expected from past managers and representatives of the employer in the performance of their responsibilities, I infer and conclude from the "longstanding practice" that the employer acquiesced to the meaning advocated by the union. I find the seamless continuation of medical, extended health and dental plan benefit coverage, including coverage of dependents, for qualified retiring employees reflected the mutual agreement that "employees" who retire and qualify "shall continue to be insured" as they were before retirement. Continuing to be insured includes coverage for their dependents. It is not necessary for me to consider the submissions on current retirees' vested rights.

[69] The grievance is allowed. The employer is ordered to compensate all eligible retired former employees for costs to them and their dependents as a consequence of the employer's decision to discontinue paying for medical, extended health and dental plan coverage for retirees' dependents as of December 31, 2010. I retain and reserve jurisdiction over the interpretation and implementation of this decision and the amount of compensation to be paid to whom.

APRIL 30, 2012, NORTH VANCOUVER, BRITISH COLUMBIA.

James E. Dorsey