Telus Communications Co. v. Telecommunications Workers Union (Policy Grievance No. 2011.228), [2016] C.L.A.D. No. 310

Canada Labour Arbitration Decisions

Canada

Labour Arbitration

Calgary, Alberta

Panel: Richard I. Hornung, Q.C. (Arbitrator)

Heard: March 25 and 26, October 9 and

11, 2013; May 5-9, 2014; June 22-24,

2015; written submissions, September 18, October 5, 23, 2015.

Award: May 14, 2016.

[2016] C.L.A.D. No. 310

IN THE MATTER OF the Canada Labour Code Between TELUS Communications Company (the "Employer"), and Telecommunications Workers Union (the "Union") Policy Grievance: #2011.228 Investigative Meetings without Union Representation

(221 paras.)

Case Summary

Labour arbitration — The collective agreement — Interpretation — Particular words.

Labour arbitration — Trade unions — Representation of employees.

The union for employees of a major telecommunications company filed a policy grievance alleging that the employer was denying employees at investigative meetings the right to have union representation. The union argued that the right to representation was a statutory right that flowed both from the certificate of collective bargaining and the Canada Labour Code. In response, the employer argued that the collective agreement was the governing document and had to be given precedence. The employer argued that the right of employees to union representation changed in 2011 with an amendment to the collective agreement designed to correct abuses by union representatives during investigative meetings. This conduct was referred to as the "cheat sheet" situation. The amendment relied on by the employer stated in Article 10.04: "When an employee is to be interviewed by a representative of the Company's Security Department, or at an investigative meeting where two managers will be present, the employee may request the presence of a Union representative"; "The Union representative shall attend as an observer to the process and not as a participant"; and, "The Union representative, unless the employee objects, shall be granted a maximum of 15 minutes to confer with the employee immediately prior to the investigative meeting."

HELD: Grievance allowed.

The employer argued that Article 10.04 gave it the right to determine who attended at investigatory meetings

and that the exercise of that choice dictated whether union representation would be provided at all. According to the employer, Article 10.04 required representation by the union only when the Company's Security Department or two managers were present. By extension, the employer could--in its sole discretion--determine when and if union representation would be made available. However, the employer ignored Article 10.01, which was not amended in 2011: "An employee may require the presence of an available Union representative at a meeting between a manager and the employee if the purpose of the meeting is to impose discipline." Though this clause provided for union representation only where the purpose of the meeting was to impose discipline, nevertheless, it unambiguously gave employees the right to union representation. If the amendment relied on by the employer was intended to limit this right, it should have added clear and unambiguous words to that effect. Moreover, the bargaining history and past practice between the parties revealed that they had a long-standing practice of union representation at investigative meetings. The provisions of Article 10.04 were intended to address a specific mischief regarding the conduct of union representatives at investigative meetings. Article 10.04 was not intended to restrict or replace the existing rights to union representation provided in Article 10.01.

Statutes, Regulations and Rules Cited:

Canada Labour Code, R.S. 1985, c. L-2, s. 8, s. 36, s. 37, s. 94, s. 94(1)(a), s. 95, s. 96, s. 97

Authorities cited:

Authorities Relied on by the Union

Health Services and Support -- Facilities Subsector Bargaining Assoc. v. *British Columbia* [2007] 2 S.C.R. 391.

Excerpt from E. Tucker and J. Fudge. Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900-1948. Oxford University Press.

Noel v. Sociètè d'ènergie de la Baie James [2001] S.C.J. No. 41.

National Association of Broadcast Employees and Technicians v. New Brunswick Broadcasting Co. Ltd. CLRB Decision No. 711 (1988).

Re Canada Post Corp. and Canadian Union of Postal W orkers (Larabie) [1988] C.L.A.D. No. 29 (Weatherill).

Re Bell Canada [2003] C.I.R.B.D. No. 1.

Public Service Alliance of Canada v. Canada Post Corporation (1985) C.L.R.B. Decision No. 544.

TELUS v. Telecommunications Workers Union (Employee Share Purchase Plan) [2010] C.L.A.D. No. 347 (Sims).

Cement Lime and Gypsum Workers Division of the International Brotherhood of Boilermakers Local D486 v. *Chemical Lime Co. of Canada (Pension Contributions Grievance)* *[2007] B.C.C.A.A.A. No. 222* (Dorsey).

Communication, Energy and Paperworkers Union, Local 444 v. *British Columbia Nurses' Union (Benefits Grievance)* *[2012] B.C.C.A.A.A. No. 48* (Dorsey).

Excerpts from the *Canada Labour Code*, R.S. 1985, c. L-2; (Preamble, ss. 8, 36, 37, 94, 95, 96, 97).

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Re Windsor Western Hospital Centre Inc. and Mordowanet et al. *[1986] O.J. No. 786* (HCJ).

Chapdelaine v. Emballage Domtar Limitèe-Division des Papiers et Cartons Krafts 1983 CLB 9235; 6 C.L.R.B.R. 1 (Que. Lab. Court).

Calco Club v. Calgary Co-operative Association Ltd. *[1992] A.L.R.B.D. No. 77*.

Re Lakeside Feeders Ltd. *[2005] A.L.R.B.D. No. 6*.

Re British Columbia Telephone Co. and T.W.U. *[1988] B.C.C.A.A.A. No. 20*.

Shoppers Drug Mart #222 v. UFCW, Local 1518 (Controls Grievance) *[1995] B.C.C.A.A.A. No. 483* (Hickling).

C.I.B.C. TV Kelowna v. Communications, Energy and Paperworkers Union of Canada, Local 832-M (Hagglund Grievance) *[2005] C.L.A.D. No. 23* (Burke).

Brink's Canada Ltd. and Independent Canadian Transit Union, Local 1 (Freeman Grievance) *[1997] C.L.A.D. No. 756* (Jamieson).

Canada Post Corp. v. Canadian Union of Postal Workers (Scarlett Grievance) *[2013] C.L.A.D. No. 151* (Shime).

Riverdale Hospital v. Canadian Union of Public Employees, Local 79 (Delos Reyes Grievance) *[2000] O.L.A.A. No. 879* (Surdykowski).

Alberta v. Alberta Union of Provincial Employees (Cordingley-Wagner Grievance) *[2006] A.G.A.A. No. 86* (Hornung).

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Excerpt from Brown and Beatty, *Canadian Labour Arbitration*, 4th ed, at 7:2130.

Re Brinks Canada Ltd. and Teamsters, Local 213 (Ehsani) *(2010) 192 L.A.C. (4th) 310* (Burke).

New Flyer Industries Ltd. v. C.A.W. -- Canada, Local 3003 *[2006] M.G.A.D. No. 2* (Wood).

Medis Health and Pharmaceutical Services v. Teamsters (Satar Grievance) *(2001) 100 L.A.C. (4th) 178* (Corkwood).

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B.C. Tel v. *T.W.U. (Knox)*, unreported, May 21, 1996 (Germaine).

British Columbia Telephone Company v. T.W.U. (Read), July 29, 21997 (Diebolt).

TELUS v. T.W.U. (McKinney), March 14, 2007 (Francis).

TELUS v. T.W.U. (Rutledge), May 11, 2007 (Pekeles).

TELUS v. T.W.U. (H.S.), July 23, 2007 (Beattie).

TELUS v. T.W.U. (Groenke), July 13, 2012 (Sims).

TELUS v. T.W.U. (Underwood), October 24, 2012 (Beattie).

TELUS v. T.W.U. (Glen), September 30, 2013 (McFetridge).

TELUS v. T.W.U. (Huband), January 2, 2013 (Sullivan).

TELUS v. T.W.U. (Barber), December 30, 2012 (McPhillips).

TELUS v T.W.U. (Jones), November 19, 2014 (Nichols).

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TELUS (Montreal Investigative Meetings), February 10, 2014 (Hornung).

Re British Columbia Public Service Employee Relations Commission *(1995), 27 C.L.R.B.R. (2d) 161* (BCLRB) (Hall).

Re Canex Placer Ltd. And Cdn. Assoc. of Industrial, Mechanical and Allied Workers, Local 17 *(1978) 21 L.A.C. (2d) 127* (Weiler).

Purolator Courier Ltd. v. *Teamsters, Local 31* (unreported) March 17, 1992 (McPhillips).

Re Brink's Canada and Independent Canadian Transit Union, Local 1 (1995) 47 L.A.C. (4th) 342 (Bluman).

Boeing Canada Technology Ltd. v. CAW --Canada, Local 2169 [1998] M.G.A.D. No. 21 (Hamilton).

Imperial Parking Canada Corp. v. Construction & Specialized Workers' Union, Local 1611 (Abula) [2001] B.C.C.A.A.A. No. 127 (McDonald).

Re Canadian Food Inspection Agency and Hickling (2007) 163 L.A.C. (4th) 151 (Love).

B.C.Tel v. T.W.U. (Mikalishen), unreported, December 12, 1979 (Hope).

Alberta Government Telephones Commission v. I.B.E.W., Local 348 (Morgan) [1993] C.L.A.D. No. 135 (Power).

T.W.U. v. TELUS Communications Inc. 2003 C.I.R.B. 222 (CanLII).

Canadian National Railway Company v. B.L.E. [1993] C.L.A.D. No. 1220 (Picher).

Authority Referred to by both Parties

Telus Communications Inc. v. *T.W.U.* 2015 B.C.S.C. 1570 (SC).

Appearances

For the Union:

Richard Edgar.

Ivana Niblett, VP East.

Betty Carrasco, VP West.

For the Employer:

John Craig.

Julie-Ann Cardinal.

Todd Langley - Telus Director.

AWARD

I

Policy Grievance -- 25 August 2011

1 This arbitration arises as a result of a policy grievance filed by the Union on August 25, 2011, alleging that:

> *"Investigative meeting (sic) are going along without Union representatives who are available and have been requested by employees brought into investigation (sic) meeting."*

2 The remedy sought by the Union is as follows:

> *"The question of union participation in investigatory interview (sic) is a standard topic of collective bargaining. Our agreement incorporates provisions that grant and define such rights.*
>
> *As a result, TELUS has violated the collective agreement by not permitting a Union Representative who is available from being present in the hearing.*
>
> *Telus is to cease and desist this and any statements made by any griever (sic) during an investigation meeting without the requested shop steward present is not to be used against them in future proceedings. This will have started June 6, 2011 until present. ..."*

II

Collective Agreement Language at issue

3 The issues here revolve around new language in the Collective Agreement (the emphasized portions below) negotiated between the parties between July 2010, and April, 2011. Those provisions provide:

> ***ARTICLE 10 - JUST CAUSE***
>
> *10.01*
>
> *An employee who has successfully completed the probationary period, shall not, for disciplinary reasons, receive a written warning suspension or be dismissed, except for just cause.*
>
> *An employee may request the presence of an available Union representative at a meeting between a manager and the employee if the purpose of the meeting is to impose discipline.* ***The requested presence of a Union representative may be by way of teleconference where a Union representative is participating in either the At Home Agent or Work Styles program or any other situation where the parties mutually agree****.*
>
> *Disciplinary action is to be confirmed in writing, with a copy to the Union.*
>
> ***Investigative Meetings***
>
> ***10.04***
>
> *When an employee is to be interviewed by a representative of the Company's Security Department, or at an investigative meeting where two managers will be present, the*

employee may request the presence of a Union representative who is available at the location where the interview is to be conducted. If there is no available Union representative at that location, the Company will arrange for the nearest available Union representative to attend.

When present at this interview, the Union representative shall attend as an observer to the process and not as a participant.

The Union representative, unless the employee objects, shall be granted a maximum of fifteen (15) minutes to confer with the employee immediately prior to the investigative meeting.

III

Positions of the Parties

4 In their opening arguments, counsel outlined the broad positions they would take with respect to the grievance.

Union

5 According to the Union the issues involved in this arbitration include the broader general principle of the right of union members to be represented by the Union when they face the possibility of discipline. It argued that the right of representation in these circumstances is both a fundamental (reflected by the jurisprudence and the Canada Labour Code; see e.g., s. 94 (1) (a)), as well as a substantive right (arising under the Collective Agreement). It suggested that given the fact that it is a fundamental and substantive right, it is imperative that employees facing discipline have an opportunity to obtain Union representation in a timely way.

6 It suggests that the Employer is improperly interpreting and administering the provisions of Articles 10.01 and 10.04 of the Collective Agreement in a manner that breaches the substantive and fundamental right to Union representation.

7 The Union maintained that the history between the parties has always been that when an employee faced disciplinary action, a Steward was present at the investigative meeting. Such representation was the case throughout the preceding Collective Bargaining Agreement when Article 10.01, (without the emphasized part) was the only clause that existed relative to employee representation at meetings with management.

8 It suggested that the evidence would disclose - via statements made and notes taken during the negotiations of clauses 10.01 and 10.04 - that it was not the intent of Article 10.04 to deprive employees of the Union representation they were entitled to in the past. Accordingly, in denying its employees access to Union representation at investigative meetings, TELUS is administering Article 10 both in breach of its intent and contrary to its established past practice.

9 It seeks a declaration that its members are entitled to Union representation at any investigative meetings where discipline may result from the issues addressed therein.

The Employer

10 The Employer emphasized that the present grievance is a policy grievance. While it pointed

out that grievances such as the present are usually individual grievances where discipline has actually been imposed on a specific employee, it nevertheless agreed that the board should hear this case in order to provide clarity regarding how the parties should interpret and apply the provision at issue going forward.

11 The Employer agreed that the parties had a past practice of Union representation at employee meetings with management. However, the meetings became "*messy*" as a result of Union representatives following representational tactics spurred on by the "*Investigative Meeting - Cheat Sheet*" (Ex. 4.3) provided to them by their counsel. This Cheat Sheet had the effect of disrupting and derailing the meetings. Because of this, the Employer concluded that it was constructive to bring the issue to the bargaining table and sort it out to provide clarity in the future with respect to the conduct of the meetings. In this fashion, Article 10.04 was added to the Collective Agreement to specifically deal with Union representation at investigative meetings.

12 Counsel asserted that it was not the agreed intention of the parties that Union representation was necessary at all meetings with employees. The *raison d'etre*, for Article 10.04 is obvious in that it is a more serious matter if two managers are present or if a security agent is present at a meeting. The Employer posits that one-on-one meetings with managers do not compel the presence of Union representation.

13 The Employer takes the position that the changes to Article 10.01 and 10.04 were designed to address a specific mischief in respect of which the parties required clarity. The revisions, included in Article 10, were arrived at through the negotiation process to address that specific mischief. The language is clear and the parties knew what they were agreeing to. The Employer takes the view that: the issue of Union representation at investigative meetings was a significant issue during collective bargaining; that language was tabled; positions were explained; concessions were made, and the new language in Article 10 was ultimately agreed to with full knowledge and understanding of its clear intent.

14 The Employer argues that the withdrawal of 11 grievances (as reflected in Ex. 4.17), provides further evidence that the parties agreed that a resolution with respect to the representational issues had been arrived at. The "*deal*" reached at the bargaining table was not just the inclusion of Article 10.04, but also the withdrawal of grievances that were indicative of the conflicts between the parties arising from representational issues at investigative meetings.

15 In response to the Union's argument that the representation of employees in a Union environment is a fundamental right guaranteed by the *Canada Labour Code*, the Employer argued that the Collective Bargaining Agreement is the governing document and must be given precedence by virtue of the fact that the right to representation is a contractual matter negotiated between the parties in the Collective Bargaining process. It points out that there is no principle in the Code that prevents the parties from negotiating rules on Union representation in meetings.

16 The Employer asserted that the language which the Union now seeks to impugn was negotiated and agreed to during the bargaining process. Attempting to attack it now because it did not "like" the language it negotiated, represents the antithesis of good labour relations.

Summary of Conclusion

17 After a review of the evidence, jurisprudence and argument as summarized below, the

grievance is allowed.

IV

Evidence

18 Extensive testimony was presented. The parties called 13 witnesses who testified over the course of 11 days, and provided relevant documentation. The full hearing (including Final Submissions and Arguments) extended over a period of two and a half years.

19 The evidence adduced, was broad and far reaching. In the pages that follow, I will attempt to provide sufficient details to provide an understanding of the evidence relied upon by the parties but will do so in a narrative form that does not result in an overwhelming amount of detail. Where there is a conflict in the evidence, the facts, as I describe them hereafter, will represent my findings of fact based on the evidence adduced.

20 The testimony of the witnesses related to two principal issues: (1) the circumstances surrounding the inclusion of the new provisions to Article 10 in the last round of negotiations between the parties; and, (2) the manner of Union representation available to members at meetings held before and after those negotiations.

V

Union Evidence

Ms. Jennifer Bucholz

21 Ms. Bucholz was, at all relevant times, employed by TELUS as a Data Network Support Assistant. She was also the Secretary Treasurer of the Union's Local 51 and a member of the 2011 Union bargaining committee. In that vein, she was the Recording Secretary for the Union's team. In that capacity, at the end of each day, she collated her own notes with those of other team members and compiled a master set of notes. In anticipation of her testimony she reviewed those notes and prepared a compilation of excerpts which contained every note of any collective bargaining discussions wherein Article 10 was mentioned. That compilation was introduced as Exhibit 3.3.

22 In providing her evidence, Ms. Bucholz referred both to her notes as well as corresponding bargaining session notes taken by TELUS' bargaining committee (Ex. 4).

23 As reflected by Ms. Bucholz' evidence and notes, reference to the issue of investigative meetings (and Article 10) first arose in the opening comments of George Doubt, the Union's President and Chief Negotiator. Mr. Doubt indicated that the dispute with respect to the absence of Union representatives sitting in on investigative meetings had first arisen approximately six months prior to that first meeting date of July 26, 2010, and that the Union wanted to stop what it perceived as an abuse of process (Ex. 3.3.2).

24 According to Ms. Bucholz, Mr. Steve Bedard, the Employer's Vice-President of Labour Relations and Chief Negotiator, first addressed the issue of changes to Article 10.01 at Ex.3.3.4.

There, he states that problems have arisen in circumstances where:

> *"An employee may request the presence of an available union representative at a meeting...if the purpose of the meeting is to impose discipline"* (which is the wording of Article 10.01).

25 A reading of the Exhibit discloses that one concern to be addressed by Mr. Bedard's proposed amendments to Article 10.01 then centered on the difficulties that had arisen where employees demanded a "specific" union representative and/or the lack of availability of union reps in certain locations (such as the Montreal Call Centre) which could be addressed through teleconferencing. Later, down the page of Ex. 3.3.4, Mr. Bedard raised his proposal for Article 10.04. According to his comments, the apparent mischief that the Employer wished to address is that which arose from the Cheat Sheet (Ex. 4.3), which was distributed at the Union's February 2010 convention. The notes reflect Mr. Bedard's concern:

> *"Stewards deployed a number of tactics. Certain groups/union reps coming (to) investigative meetings to nothing but frustrate the process. Demanding questions in advance, asking for caucus with member...not across the board thankfully. ... Not contractual but there is jurisprudence on meeting of investigation that may result in discipline. Non Contractual but long standing practice of the company. Good practice to have union rep there if can get one there, to observe* not participate. *Much as it is under Article 10 announcing discipline. Rep hears company at meeting. Not a free fall. Tried to determine how best to respond, tried to take measured approach; want to discuss, it is something we want at the table. ... Union rep not lawyers, not legal proceedings. Not grievance. Invited to observe background; so they are aware of the situation."*

26 Later, further down the page, Mr. Bedard observes that:

> *"... Investigative meeting is not a contractual right; we have made it common practice. ... Not saying union reps shouldn't or couldn't be invited just for fun. Understand obligation. That's why they are invited. ... This is our concern, Get back to balance. ..."*

27 TELUS' Bargaining notes show a corresponding discussion and concerns provided by Mr. Bedard (Ex. 3.4.5) wherein he states:

> *"...we all know why we invite shop stewards to these meetings. It's a long standing practice. Jurisprudence. Investigative meetings may result in some disciplinary action being taken. We try to get union representation there to observe, not participate like Article 10 when we are announcing discipline...not a huge issue. I want to talk about the role. Some things in cheat sheet. Things are going on that don't allow us to do proper investigations..."*

28 Ms. Bucholz pointed out that in the Employer's original proposals (Ex. 3.2), reference to Article 10.01 refers only to providing access to a Union representative via teleconference where they are otherwise unavailable in person. Any subsequent reference to amendments to the Article refers generically to:

"...Discuss the role of union representative during investigation meetings (noncontractual), be discussed in an effort to reduce any disputes on this issue in the work place."

29 More will be said of the exchanges around the provisions of Article 10, contained in both the Bargaining Minutes of TELUS and the Union, during the discussion of Mr. Bedard's evidence.

30 According to Ms. Bucholz (and the Bargaining Minutes provided), although bargaining began on July 26, 2010, the language of Article 10.04 was first put to the Union on April 1, 2011, 19 days before negotiations concluded (Ex. 3.3.18).

31 It is apparent that the Union rejected the proposed language when it responded on April 6, 2011 (Ex. 3.3.21). Article 10.04, proposed by the Employer, was introduced, according to the comments of Mr. Bedard, (Ex. 3.3.23 and 3.4.21), to address the specific issues that arose as a result of some of the stewards employing the tactics set out in the Cheat Sheet. According to Mr. Bedard - and the comments in both sets of notes appear consistent - he said (as quoted in the Union's version) that he had:

"...hoped to avoid necessity to table contract language, long standing legacy BC and Alberta, long standing understanding of these sort of meetings. Of no cause for the change, your direction February 2010 convention. It is now an issue whether we like it or not ..."

32 The last occasion on which Article 10 was discussed, before the signing of the new Collective Agreement, was on April 10, 2011. In that discussion the then CEO of TELUS, Mr. Darren Entwistle, discussed the amendments to Article 10 with Mr. Doubt. After Mr. Doubt provided his comments, Mr. Entwistle asked:

"What's been the experience with observer status? Was it problematic? How were the rights and interests of employees served?" (Ex. 3.4.29)

33 The Union's notes reflect a similar discussion except that Mr. Entwistle's questions was:

"What has been your experience with the observer status at these meetings? Is there a problem with the process or how the employer has dealt with?"

34 Later that night, as the negotiations were coming to a close, the issue of Article 10 was raised again. According to the Union's notes (Ex. 3.3.34), Mr. Entwistle's states that the Company intended to maintain its position on Article 10.04 (Ex. 3.4.30). This discussion, and the comments by Mr. Entwistle, were the last comments made with respect to Article 10.04. A Collective Agreement was arrived at in the early hours of April 11th which maintained Article 10.04 in the agreement.

35 Ms. Bucholz evidence was that no one from TELUS had ever suggested what was intended by Mr. Bedard's reference to "*jurisprudence or labour law*" in the comments made during bargaining. She was of the same view regarding the position that Article 10 was to be a complete code with respect to the representational rights of the Union. She was adamant that TELUS never told the Union that Union representation would not be permitted in meetings except in the situations specifically set out in Article 10.01 and 10.04. Her position was that, in

fact, Mr. Bedard took an opposite approach in that he said, on several occasions (as reflected in the quotes provided earlier), that Union representatives were welcome - both currently and historically - to attend investigative meetings and that TELUS was not trying to stop Union representation but rather to clarify it so that Union representatives did not undertake the kind of interference and tactics suggested by the *Cheat Sheet*.

36 Ms. Bucholz spoke of the different types of one-on-one meetings held by TELUS with its employees. Employee meetings with managers are used on a regular basis as work reviews to deal with the day-to-day issues of work and performance. The meetings are usually scheduled with a couple of days' notice. Their were also "side-by-side' meetings where managers would join employees at their work site to explain or assist with workplace issues. To her knowledge these meetings had never been used, prior to the conclusion of the 2011 bargaining, as preliminary to disciplinary actions. She suggested that since the 2011 Collective Agreement was put in place, employees are not sure whether these one-on-one meetings will be investigative meetings or disciplinary. Her evidence was that prior to the 2011 Agreement, Stewards were almost always present at investigative meetings; since that time, they are rarely present. Instead, one-on-one meetings are being turned into investigative meetings; and, in circumstances where investigation or representation is asked for in those meetings, it is denied. Some employees have been told that they will be sent home for insubordination if they do not proceed with the interview following such a denial. Ms. Bucholtz agreed, however, that she had since attended investigative meetings where two managers are present in circumstances where discipline was imposed.

37 In cross-examination, Ms. Bucholz was referred to Ex. 3.2.5 and confirmed that the comprehensive offer contained in that document was tabled on April 1, 2011 and included the "*investigative meetings*" clause under Article 10.04. She allowed as well - as reflected in Ex. 4.9 - that the Employer's proposal with respect to Union representation is included in the report to its member employees which was circulated on April 5, 2011. She agreed that at the April 7, 2011 meeting (Ex. 3.3.23), the Employer modified its proposal with respect to Article 10.04 to include the necessity for a Union representation when two managers were present. On April 9, 2011 (Ex. 3.3.29), the Employer modified its proposal further with additional language allowing the Union representative fifteen minutes prior to the meeting to confer with the employee.

38 Finally, she agreed that after TELUS made it apparent (through the comments of Darren Entwistle), that it was not going to move on its 10.04 proposal, the Union subsequently came back (see: Ex. 3.3.35) and Mr. Doubt commented (at approximately 9:12 PM) that: "*The difference is small. It is around pensions and around duration*." He then went on to itemize the specific pension and duration aspects still in dispute. She agreed, that at that point in negotiations, they had narrowed the issues down to pensions and duration of the agreement. There was subsequently no further discussion on Article 10.04 and the Union focused its further negotiations on the two remaining issues.

Testimony Regarding Individual Employee-Manager Investigative Meetings

39 The Union called a series of witnesses to establish that meetings, such as one-on-one meetings - which in the past had only involved discussions between the employees and their managers to inform or assist an employee in the execution of his/her job - had, since the conclusion of the last agreement, been used by TELUS for the purposes of investigating an employee's actions, which then grounded the basis for discipline.

Kim Strauss

40 Kim Strauss works with TELUS in Montreal as an installer. Mr. Strauss' evidence satisfied me that he was denied the benefit of a Union representative during the course of an interview with his manager wherein his manager was, in fact, investigating his conduct for the purposes of determining whether or not to impose discipline. When Mr. Strauss' met with his Manager, Mr. Wood, he was initially accompanied by a Shop Steward. Mr. Wood contemplated the situation; left the room; conferred with someone and returned whereupon he advised Mr. Strauss that this was an "*informal meeting*" and that he neither needed nor was permitted a Shop Steward. The Shop Steward left the room. Mr. Strauss was examined by Mr. Wood from a pre-prepared list of questions (see Ex. 3.8) which, even a cursory glance suggests, were prepared for the purposes of investigating possible disciplinary action as opposed to determining whether or not employee assistance or further training was necessary. My conclusion with respect to the purposes of the meeting is supported by a review of the email chain leading up to the meeting (Ex. 3.6).

41 Following the meeting, there were no further interviews or discussions with Mr. Strauss and Mr. Strauss received a disciplinary letter dated November 19, 2012 (Ex. 3.5.10).

42 In cross-examination, Mr. Strauss allowed that the reason he had a Shop Steward present was that he believed that this was going to be a disciplinary investigation and that two managers would be present. He was, in fact, surprised the second manager was not there. He repeated, in cross-examination, that his manager, Mr. Wood, had taken the position that it was not, in fact, an investigative meeting for which Mr. Strauss required a Shop Steward.

Stefanie Ventura

43 Stefanie Ventura, is employed by TELUS in Montreal as a Customer Service Representative. She provided a similar account of being called into a direct meeting with her manager, Mr. Lamarche, to discuss her performance in recorded calls made as part of her job with TELUS. She testified that, Mr. Lamarche requested she attend the meetings - which he described as being "*coaching meetings or one-on-ones*" - through the intra-work scheduler. At no point, was she told that the meeting would be an investigative meeting. This occurred for a meeting of July 3. A similar process ensued for a second meeting which was held on July 11. At no point was Ms. Ventura advised that her job would be in jeopardy or that she was being investigated for conduct that could lead to her termination, much less discipline. In fact, she recalled asking Mr. Lamarche, in the midst of one of the interviews, whether or not she required a Shop Steward and was advised that: "*We'll have to see what goes on from here*".

44 Her evidence established that Ms. Ventura was interviewed on two occasions through the relatively - up until then - benign process of a one-on-one or coaching interview with her manager. Following the July 11 meeting, she was called into a third meeting on July 12 with two managers present as well as a Shop Steward. Mr. Lamarche, at that point, explained why she was called to the meeting and provided her with a letter of termination. This meeting was brief, lasting 10 minutes or less.

45 Whether or not the discipline imposed was warranted or justified in the circumstances, is not germane. I am satisfied that Ms. Ventura was interviewed by her manager on at least two occasions with respect to her performance issues, including the misuse of the soft shopper

incentives, and that at no point in that process was she advised that she was being investigated for disciplinary purposes or that her job hung in the balance.

Stacey Smith

46 The account provided by Stacey Smith, employed by TELUS at Scarborough, Ontario as a Channel Care Analyst, is similar to that of the previous witnesses.

47 Ms. Smith described how she received a disciplinary letter on March 7, 2013. The letter begins by advising that it is further to the "*investigation meeting of March 5, 2013*" and confirms her suspension for one day with respect to her misconduct in her failure to adhere to her schedule. According to Ms. Smith, the investigation meeting referred to was a meeting between her and her manager Karli Kilgannon. She was invited to the meeting by a pop-up on her computer. At no point was she advised that this was an investigative meeting. Prior to this she had a one-on-one meeting with Ms. Kilgannon at which a number of issues were raised.

48 When she got to the meeting on March 5, 2013, she was told by Ms. Kilgannon that it was not a one-on-one meeting but, rather, she had some concerns to address. While in that meeting, Ms. Smith asked about Union representation. However, she was not provided the opportunity to have a Shop Steward present. Ms. Kilgannon asked her a series of questions that were typed out in advance and stapled together in a small "*booklet*".

49 Ms. Smith had been in an investigative meeting earlier in her career - when two managers were present along with a Shop Steward - and a similar booklet with similar pre-prepared questions were put to her. When she saw the booklet and recognized the similarity in process, she asked if she should have a Union representative and was told that "*no*" she did not need one because this was just an "*investigative*" meeting.

Tamara Wong

50 Tamara Wong has been with TELUS since 2007, working at the Help Desk. She has been a Shop Steward since 2009.

51 She related the circumstances of Tunisia Walters, who worked in her department. She described how Ms. Walters was disciplined in September 2011 and that she, Ms. Wong, was present at the disciplinary meeting when the letter of discipline was provided. She was not at the investigative meeting or did she or any Shop Steward assist Ms. Walters in that respect. She described how she was not given any prior notice of the disciplinary meeting or the circumstances surrounding the disciplining of Ms. Walters.

52 In cross-examination she agreed that the Union did not file any grievance with respect to the discipline which she described being imposed and - other than her testimony until today - had not raised the issue of lack of Union representation.

Hans Wolsy Balan

53 Mr. Balan has been with TELUS in Montreal since 1999, working in the Retention Department. He has been a Shop Steward since 2006 and a Business Agent for the Union since 2011. He is responsible for grievances at the Montreal Metcalfe location.

54 Based on information that Mr. Balan received from Shop Stewards, in the normal course of his work as Shop Steward and Business Agent, he discussed four employees who were disciplined without Union representation present when the investigative meetings took place. Those individuals were: Seyla Lim (Ex. 3.5.8 - 5 days' suspension); François Boucicault (Ex. 3.5.9 - termination); Rmimooy Aazi (Ex. 3.5.14 - 5 days' suspension); and Ralph Derolus (Ex. 3.5.16 - 5 days' suspension).

55 In each of the above occasions, according to Mr. Balan, although Shop Stewards were present when the disciplinary letters were handed out, but were not involved in any investigative meetings prior to the discipline.

Martin Irbet

56 Martin Irbet has been employed with TELUS on the Client Management and Loyalty Resource Teams in Montreal since January 5, 2010. He has been a Shop Steward, since 2012.

57 Mr. Irbet testified with respect to the circumstances of discipline imposed on the individuals whose disciplinary letters appear in Ex. 15 and Ex. 16. In each instance, to his knowledge, shop stewards were not present at the investigative meetings that led to the discipline. He was fully cross-examined with respect to the circumstances disclosed by the exhibits. At the end of his testimony I concluded that - particularly in the circumstances of Ms. Katherine Pacheco (Ex. 15.4) - an investigative meeting took place in which a Shop Steward was not present. According to Mr. Irbet, the manager who interviewed Ms. Pacheco even advised her that the answers that she provided might be used to discipline her at the conclusion of the meeting.

58 As discussed earlier, I am not called upon to determine whether or not the discipline imposed as discussed in the evidence of the individual employee witnesses and shop stewards was warranted; or, whether the absence of a Shop Steward at the investigative meeting - which led to the discipline - operated so as to vitiate the discipline imposed.

59 I am satisfied, having considered the evidence, that the Union established that since the signing of the Collective Agreement in 2011, individual employees, without the benefit of Union representation, have been called into what amounts to investigative (in the full sense of the term) meetings and that the information gleaned from those meetings was subsequently used as a basis to impose discipline.

Testimony Concerning General Circumstances and Practices Regarding Meetings

Betty Carrasco

60 Ms. Carrasco is TWU's National Vice-President, British Columbia Arbitrations. As part of her responsibility she reviews grievances and discusses bargaining agent concerns on a regular basis.

61 She testified that she was not aware of any circumstances, up to the 2011 Collective Agreement, where Shop Stewards did not attend investigative meetings. Nor was she aware of any instances where only a single manager attended at investigative meetings. Up until then,

the established practice had always been to have two management representatives and a Union representative present at investigative meetings.

62 Although there were meetings where one manager met with employees, they were "*one-on-one*" meetings and usually entailed discussing performance-related and, sometimes personal issues. Historically, these meetings never led to discipline being imposed. The other kind of meetings where only a single manager was involved, were called "*side-by-side*" meetings. These mainly had to do with coaching and improvement of the employee's performance. Again, discipline did not follow these type of meetings.

63 She testified that since the 2011 Collective Bargaining Agreement, there were repeated situations where Shop Stewards do not attend investigative meetings even in circumstances where the meetings led to discipline. This, according to Ms. Carrasco, was a dramatic departure. For decades where investigative meetings leading to discipline were held, the Union always a chance to meet with, support, guide and represent the employee.

64 Since the signing of the 2011 Collective Agreement, the Employer has taken the position that Shop Stewards could not be present at these one-on-one meetings, even where they served an investigatory purpose and led to discipline. According to Ms. Carrasco, the position taken by the Employer restricts the Union from representing its members properly under the *Canada Labour Code*. As a member of the National Executive she is concerned that this lack of representation could lead to section 37 complaints under the *Canada Labour Code*.

65 Ultimately, during the course of her cross-examination, the Union and the Employer stipulated that notwithstanding the concerns raised by Ms. Carrasco, Shop Stewards were present at all 24 meetings - raised by the Employer in her cross-examination - and which fell under her jurisdiction as a BC Vice-President. The Employer, for its part, conceded that at all of the 24 meetings discussed, two managers or a member of the security personnel were present.

66 While Ms. Carrasco agreed that the Shop Stewards were present while two managers were there, that was the norm in termination cases. However, in her experience in nontermination disciplinary cases, Shop Stewards' attendances are very low. In retrospect, she was not aware of any investigatory meetings prior to the 2011 Collective Agreement, where a Shop Steward was not present and two managers were present.

Ivana Niblett

67 Ivana Niblett, at the relevant times, served as National Vice-President of Eastern Canada Arbitrations. She was on the negotiating team for the 2011 round.

68 She testified that prior to the Collective Agreement being signed in 2011, she was not aware of any circumstances where a Shop Steward was not present at investigative meetings. Her evidence was that the Employer always had two managers or a member of security at investigative meetings when she attended as a Shop Steward.

69 Similar to Ms. Carrasco, she was not aware of any instance where only one manager attended an investigatory meeting. She described the one-on-one meetings that occurred with managers in normal circumstances as representing an opportunity to review the quality of the employee's work, coaching opportunities and opportunities to deal with concerns raised by an

employee. These one-on-one meetings were between managers and the employee and had never led to discipline being imposed in the past. The same thing applied to side-by-side meetings. They were opportunities to coach and assist and did not lead to discipline.

70 Subsequent to 2011, she became aware of several investigatory meetings where no Shop Steward was present even where the meetings led to discipline.

71 She described how the absence of a Shop Steward at an investigative meeting made the job of processing grievances more difficult. In such cases, when the matter got to her desk, significant information was lacking and she was required to do her own investigation of the circumstances in order to appraise the appropriateness of a grievance. She took a similar position with respect to the Union's ability to represent its members as that taken by Ms. Carrasco, arguing that the inability to attend investigative meetings held by a single manager restricts the Union's ability to represent employees. Like Ms. Carrasco, she was concerned with the potential consequences of section 37 *Canada Labour Code* applications.

72 Ms. Niblett testified that the departure from having Shop Stewards at investigatory meetings - and the movement of those investigative meetings to managers acting alone - began almost immediately after the 2011 Collective Agreement was signed. This fact was reflected, *inter alia*, by the notice of grievance in this case that was filed on August 25, 2011 for a violation alleged to have occurred on June 23, 2011.

73 In cross examination, Ms. Niblett allowed that there had been four arbitral awards issued under the 2011 collective agreement as of the date of her, all of which had union representation at investigative meetings.

David Skrober

74 David Skrober has been a Shop Steward since June 2011. He testified that prior to June 2011 he had been involved in investigative meetings virtually every time they took place within his ambit of authority. He was involved as follows: approximately 75% in 2012; 50% in 2013-2014 and, since 2014, 35%. In Ex. 19, he provided a chart detailing these estimations. Having been cross-examined at length as to both the proportionate percentages he gauged and the document (Ex. 19), on which he based the same, I accept his testimony that the percentage of attendances as Shop Steward in investigative meetings has declined at or near the proportions he provided.

VI

Employer Evidence

Mr. Steve Bedard

75 Since 2000 Mr. Bedard has been TELUS' Vice-President of Labour Relations. As such, he is responsible for the negotiation of Agreements and the administration of Labour Relations at TELUS. He was TELUS' Chief Negotiator in the 2010-2011 collective bargaining round and was the only employer witness called.

76 Mr. Bedard explained how the Employer's position with respect to the changes to Articles

10.01 and 10.04 which were introduced and bargained by the Company prior to the conclusion of the 2011 Collective Agreement.

77 He began by pointing out that there is no clear, contractual or working definition in the Collective Agreement, of what an "investigative meeting" is. That was one of TELUS' considerations in drafting the language of Article 10.04. He suggested that even if there was such a definition, he could not imagine that a simple inquiry, such as a manager or supervisor asking an employee why he is late, could somehow become an investigative meeting. He expressed a similar view with respect to a manager asking an employee, in a one-on-one meeting, to explain why he/she performed a task in a certain fashion. His view is that requesting an explanation from an employee does not constitute an investigative meeting.

78 That said, he allowed that, while one-on-one and side-by-side meetings are not regarded as investigative meetings, they could become such, depending on ones' definition of the term "*investigative meeting*".

79 While his evidence went into detail with respect to how Articles 10.01 and 10.04 were arrived at in bargaining, he took the position that the changes in the language incorporated in Article 10.04 now makes it clear that the undefined term "investigative meeting" relies on a consideration of who is present at the meeting in order to determine when Union representation is required. He noted that Article 10.04 also imposes an obligation to give a Shop Steward 15 minutes with the employee.

80 He described how the initial IBEW contract, which applied to the merged TWU unit, was in place until 2005 and allowed for Union representation in circumstances where the Employer identified the purposes of the meeting as being, *inter alia*, investigatory (Ex. 4.1). He indicated that a similar approach had applied in the CEP agreement (Ex. 4.2). He stated that his objective during negotiations was to be specific about what the "*trigger*" is that will obligate the Employer to ensure Union representation at a meeting.

81 He agreed that the language in the prior Collective Agreements between the parties (Ex. 5) did not contain a definition of an "investigative meeting". While he did not take issue with the evidence of the various witnesses who described the circumstances wherein Union representatives were not provided at investigative meetings (although subsequent discipline followed), he reiterated that the practice prior to the 2011 Collective Agreement - which left the Union with the impression that representation was to be made available at investigative meetings - was, in fact, "non-contractual". He suggested that there were no provisions in the agreement which obligated the Employer to do what it did. Nevertheless, he agreed that Union representation was provided/allowed, on a non-contractual basis, for a long period of time.

82 He described how the issue of representation at investigative meetings came to the fore in February 2010: "l*ike a shot out of a cannon*". At the Union convention in February 2010, counsel for the Union had prepared an "*Investigating Meeting - 'Cheat Sheet*'". The Cheat Sheet was distributed amongst the members attending the convention and provided a detailed list of suggested conduct to be employed by a Union representative at investigatory meetings.

83 According to Mr. Bedard, following the distribution of the Cheat Sheet, the Employer began hearing concerns that Shop Stewards were attending investigative meetings, to which they had been invited, and took positions which caused problems in the investigation process. In the

consultative meetings leading up to bargaining, the Cheat Sheet - and amendments to the Collective Agreement to counter it - were raised as an issue to be addressed.

84 According to Mr. Bedard, no one in Labour Relations had an inkling as to why the Cheat Sheet was created or the mischief it was intended to address. He indicated that, even today, he remains ignorant of the rationale behind the document and its aggressive tone. For example: the Cheat Sheet suggests (Ex. 4.3, page 2):

> *"...the Union representative should tell the member how he/she expects the process to evolve, and to keep quiet until the rep says it is ok to talk, even if they want to say something. If they feel the need to do so, you will caucus with him/her first.*
>
> *...the Union representative should tell the investigator that the representative will be the one talking at the meeting, and whether or not the member will be answering questions will depend on the meeting taking place in a manner that is fair to the member...*
>
> *...don't let the member answer any questions directed at them by the investigator, like "are you refusing to participate?" - let the Employer know that the member is not saying anything until they have a chance to get advice from their Union rep.*

85 And at page 3:

> *"...you will get push back on this, but in my view that is better than leading members to the proverbial slaughter without the benefit of informed advice..."*

86 According to Mr. Bedard, the contents of the Cheat Sheet simply did not reflect what was taking place in the TELUS work place at the time. The practice had been that where a Shop Steward was requested to attend an investigative meeting, management would advise them who the employee was and, at the start of the meeting, the purpose of the meeting was stated. Generally speaking, Shop Stewards would observe quietly but were not excluded from asking questions. Mr. Bedard could not recall a single instance, prior to the dissemination of the Cheat Sheet, where he was told that Shop Stewards were "interfering". Up until February 10, 2010, management was under the impression that the investigative meeting process was working well - including the Union's representative role therein.

87 The effect of the Cheat Sheet was to ramp up the adversarial nature of the investigative meetings to a point where both management and the Union were compelled to conduct themselves in a fashion that they had not prior to February 2010. In that respect, point no. 5 in Ex. 4.3 put management in the awkward circumstance where it had to instruct its managers that if the advice provided in point 5 was applied, and they determined that there would be no cooperation, they were to simply end the meeting. The total effect of the Cheat Sheet was to create a disruptive workplace and cause the issues of rights and legalities to be debated at the investigative meeting level where none of the participants were equipped to deal with those issues.

88 Let me note at this point: given my experience in the Labour Relations field, I have no hesitation in concluding that if Union representatives conducted themselves in the fashion suggested by the Cheat Sheet, the orderly and functional discussion of work place issues and investigation of prospective disciplinary conduct would be seriously impeded if not, in fact, ground to an alarming halt. It is, frankly, understandable why TELUS concluded that the

problems which Mr. Bedard testified to having arisen following the distribution of the Cheat Sheet, needed to be addressed in some practical way.

89 The situation escalated to a point that by the time bargaining commenced, there were 11 Union representation grievances (see Ex. 4.17). It appeared, from the same, that the Union was unhappy with the manner in which investigative meetings were conducted and the Employer was equally unhappy with the Cheat Sheet and the fall-out therefrom. Hence, Mr. Bedard was determined to raise the issue in negotiations.

The Negotiations

90 It is useful to consider, in greater detail, how negotiations addressed the issues described in the preceding paragraph.

91 On the first day of bargaining, Mr. Bedard presented TELUS' proposal which included the following:

> ***"Article 10 - Just Cause***
>
> *1. Modify section 10.01 so that the requested presence of a Union representative may be by way of teleconference where a Union representative is unavailable in the same work location as the employee (similar to section G2.01-Article 10). Similar change to be applied to appendix E.*
>
> *2. Discuss the role of Union representative during investigation meetings (non-contractual) in an effort to reduce any disputes on this issue within the work place."*

92 No corresponding proposal with respect to Article 10 was raised by the Union. Mr. Bedard indicated that he presented the proposal in the hopes of generating a discussion around the representational issues and the effect of the Cheat Sheet so that he could understand what the problems were. Management's notes reflect that, in introducing the proposal, Mr. Bedard made the following comments (at page 6, Ex. 4.4):

> *"Just cause, for instance at home agents are Union reps and they are not in building.*
>
> *Article 10.2 we are not suggesting Union reps can't be part of this, we want to stop what we see as an abuse of this."*

93 When Mr. Doubt replied to Mr. Bedard's proposal on August 25, 2010, there was no discussion about Union representatives. However, at Ex. 4.5.8 and 9, there is a discussion between Messrs. Doubt and Bedard (see also Ex. 3.3.4 and 5) which is instructive. Mr. Bedard, at Ex. 4.5.8 states:

> *"The role of the Union rep is non-contractual. There is no definition of investigative meetings. We've been having disputes over this and we are bringing it to the bargaining table in an attempt to cut down on unnecessary activity. Out of the TWU 2010 convention, you distributed an investigative meeting cheat sheet. After that convention, Shop Stewards and Union reps were coming to investigative meetings, employed a number of tactics such as demanding questions in advance, caucusing after each question. It was like someone turned on a spout. It's not consistent. We all know why we invite Shop Stewards to these meetings. It's a long standing practice. Jurisprudence.*

Investigative meetings may result in some disciplinary action being taken. We try to get Union representation there to observe not participate like Article 10 when we are announcing discipline...not a huge issue. I want to talk about the role. Some things in cheat sheet. Things are going on that don't allow us to do proper investigations. Union reps in these meetings are not lawyers. Not a grievance meeting. They are invited to allow to know what's going on and have the background..."

94 Mr. Doubt responds, in part:

"We have a duty to represent our members as possible discipline will arise. Whether discipline is needed to be imposed. Sometimes no discipline is necessary. Sometimes there is discipline afterwards. The member has the right to representation. We are not there to interfere but to ensure it happens in a fair way and the member understands the implications...We are faced with professional investigators and need Shop Stewards there."

95 Mr. Bedard states:

"The rights are in the Collective Agreement, Article 10. The right to attend investigative meetings is not a contractual right. As long as I have been here, it has been common practice. If you look through the cheat sheet and ask some who have done these things. It is an interference, a fundamental change by the Union. I understand the rep's obligation and that's why we have invited you. ...I am just trying to get back to a balance..."

96 Mr. Doubt responds:

"There's been an increase of formality of investigative meetings. That increase in an increase in the occurrence of these meetings. That's what has brought on the questions of people's roles in these meetings."

97 To which Mr. Bedard replies:

"We have had investigative meetings forever. I don't know what caused this change. You brought this to convention...had your lawyer draft it up, sent it out and said go to it."

98 At the October 26, 2010, bargaining meeting, the parties discussed the issue further (see Ex. 4.6.12; 3.9), Mr. Bedard again raised questions about the genesis of the Cheat Sheet. In response, Mr. Doubt speaks about the purpose of investigative meetings and states:

"Our view is investigative meetings are to determine if there will be discipline imposed."

99 To which Mr. Bedard responds:

"That's why you've been invited to them for twenty (20) years (3.3.9) or to gather information that support not doing so." (4.6.12)

100 At the next meeting at which the issue of Article 10.04 was raised (February 8 2011), the following exchange ensued (Ex. 3.3.15):

G. Doubt; 10.02 investigative meeting

S. Bedard: Still open. Will get back to you

G. Doubt: We talked about our view of the process.

S. Bedard: Our concerns were around being coached to be disruptive.

G. Doubt: Our view is there to see fair process. Not to be disruptive.

S. Bedard: Better review guidelines (Here he is speaking about the cheat sheet).

101 Thereafter on April 1, the Employer, having concluded that the bargaining had progressed far enough for the Company to crystalize its proposal, forwarded the document, Ex. 4.7 (final two pages) which proposed the following language for Article 10.01 and 10.04. Article 10.01 was to be amended by adding, after the word "discipline" in the second paragraph, the following:

"...The requested presence of a Union representative may be by way of teleconference where a Union representative is unavailable in the same work location as the employee."

102 And, a new Article 10.04 was proposed as follows:

Investigative Meetings

10.04 When an employee is to be interviewed by a representative of the Company's Security Department, the employee may request the presence of a Union representative who is available at the location where the interview is to be conducted. If there is no available Union representative at that location, the Company will arrange for the nearest available Union representative to attend.

When present at this interview, the Union representative shall attend as an observer to the process and not as a participant."

103 At Ex. 4.8.3, Mr. Bedard discussed the proposed changes set out above. He states the following:

"Article 10, 10.04 dealing with investigative meetings. The employee may request the presence of a Union rep. The Union rep shall attend as an observer, not a participant. The language came out of Bell Canada agreement. We had hoped to avoid this but the issue grew even while we have been in negotiations."

104 The above quotation reflects the fact that Union representatives, following the suggestions of the Cheat Sheet, continued to cause problems. In his evidence, Mr. Bedard stated that these incidents developed to a point where the Employer decided it would not be able to get the Union back to the "*status quo*" and needed language which clearly and expressively dealt with the Union representation issue.

105 Following the tabling of the Employer's proposal regarding changes to Article 10 (Ex. 4.7), the Union reported the following to its membership (Ex. 4.9, page 2):

"The Company has a proposal that the requested presence of a Union representative may be by way of teleconference where a Union representative is unavailable in the same work location as the employee. The Company has put forward a proposal regarding

Union representation during investigative meetings. The Union believes it is a fundamental right to provide full representation to each of you in a potentially disciplinary situation."

106 This communication is consistent with the position taken by the Union at the April 6 bargaining meeting (Ex. 3.3.20/21):

> *"...Disciplinary meetings can go a variety of ways, some not difficult or not so emotional, others are extremely emotional. This language leaves it open for the parties to discuss. Think reasonable compromise to meet needs of Company and Union reps. Position of Telus proposed 10.04 issues a matter of labour law, no language is required. Don't agree to changes."*

107 In response to the Union's objection to Article 10.04, the Employer's proposal was expanded as per (Ex. 4.10.7) to include the presence of two managers.

108 In making the proposal, Mr. Bedard makes the following significant statement:

> *"...we hope to avoid contract language, we've had a long standing understanding which we were able to work with. We know of no cause...the February 2010 convention...this is now a fact whether we like it or not. Not all Stewards are obstructing these meetings. Some are not good for us. To sail through this negotiation without addressing...what we are proposing hopefully will clarify the rights, hopefully."*

109 Mr. Bedard's reference to the "long standing" understanding is reflected in the Union's minutes as well (Ex. 3.3.23) where he is recorded as saying:

> *"...had hoped to avoid necessity to table contract language, long standing legacy BC and Alberta, long standing understanding of these sort of meetings. Know of no cause for the change, your direction February 2010 convention..."*

110 At a subsequent meeting between the parties, Mr. Bedard presented the Union with an outline of the current status of negotiations including the Union's responses (Ex. 4.11) - which disclosed the movement of the parties on each issues and the changes listed side by side. As reflected in the Union's minutes (Ex. 3.3.29), the following was Management's concession with respect to Article 10:

> *"Article 10 investigation meeting 10.04 addition to language we have presented to you, two managers present additional that Steward may have fifteen (15) minutes prior to meeting commencing to confer with employee. Time with the person prior, fifteen (15) minutes."*

111 Mr. Doubt advises that the parties are:

> *"Still apart on the investigative meeting clause 10.04 although they are closer they are still not in agreement."*

112 Later in the day, as reflected in Ex. 4.13.11, Mr. Doubt addressed the proposal again and advised that while agreement had been reached on Article 10.01, they were still apart on

investigative meetings. Mr. Doubt proposed that:

> *"Rather than put words in the Collective Agreement, the Union and Company can resolve at a high level...Shop Stewards rights and investigative meetings so everyone can be educated on how to pursue. Already had language on disciplinary meetings..."*

113 He then proposes the establishment of a committee with an independent chair to resolve how Shop Stewards should be involved and be more effective in the relationship going forward.

114 As reflected in the Union's notes, Ex. 3.3.32, Mr. Doubt, then speaking to Mr. Darren Entwistle the Chief Executive Officer of TELUS, states that:

> *"I'll be frank. The TWU lawyers they didn't understand the impact their statements would have. Shop Stewards weren't involved enough; don't understand the seriousness of what they are involved in. Need to be involved slightly more. The concept isn't that a Shop Steward there to inhibit or interfere with process but to ensure protection of our members' rights in the investigative process."*

115 Later in the evening of April 10, 2011, the Employer's final position on the various outstanding issues was put to the Union by Mr. Entwistle. With respect to Article 10.04 he made the following statement:

> *"In areas we are making amendments. This a real time operation. Steve will furnish you with the information on what has not changed...10.04 investigative meetings.. what has not changed..."*

116 According to Mr. Bedard, there was no further discussion with respect to Union representation - a conclusion that is confirmed by a review of the minutes of the bargaining meetings on both sides. The Employer's proposed language was contained in the document (Ex. 4.12) and is couched in the precise language which was subsequently adopted into the Collective Agreement. According to Mr. Bedard and the notes of the meetings, the remaining two issues left to be resolved were: "*pensions and the duration of the agreement*".

Post Bargaining

117 In examination in Chief, Mr. Bedard was asked to provide his interpretation of how investigative meetings are to be handled based on the language in the Collective Agreement. He allowed that managers should be reasonable and attempt to understand all of the facts. On some occasions, management has a lot of facts and on others there may be doubts. In circumstances where management has all of the "*data*", for example where an employee is late for work, the purpose of a meeting with the employee is to give the employee an opportunity to explain. Whatever behaviour is being addressed, making the decision to hold an investigative meeting is a step along the way in helping the Employer reach a decision on whether or not disciplinary action should be taken. It is imperative that the employee be given an opportunity to explain.

118 When asked specifically how managers could conduct themselves, he suggested:

1. Managers may choose not to hold an investigative meeting where a conversation with the employee would be sufficient;
2. If a manager determines that the conduct of the employee is significant in terms of the outcome or it is more complicated, then he/she should arrange an investigative meeting with at least four people present. If there is potential that something could arise from the meeting another manager and the Union representative should be invited in;
3. For serious suspension cases or dismissal, Union representatives and two mangers should always be present;
4. Managers should always be mindful of sensitive or serious cases and always counsel on the safe side and have two people present;
5. On the other hand, if is a case of a written warning/progressive discipline, for example, lateness, there is no sense having an investigative meeting for that. The Employer follows progressive discipline and for fairly routine matters, a meeting with an employee along is ok. As matters get more severe, we should have an investigative meeting with four people in the room to emphasize the severity.

119 In response to the Union's suggestion that 90% of investigative meetings since 2011 lacked Shop Stewards, he allowed that the Union's view of what an "investigatory meeting" is, is broader than his. His view was that cases such as a suspension or serious discipline should have two managers at investigative meetings as well as a Shop Steward. In this vein, he does not see the necessity for a Shop Steward to be present when written warnings are issued.

120 During cross-examination, Mr. Bedard testified that, following the conclusion of the new agreement, management provided guidelines to its managers on how to implement Article 10.04. TELUS held presentations for all of the Employer's Labour Relation representatives, at sessions in Vancouver and Montreal. His recollection was that an interpretation of the language in Article 10 was provided and the Labour Relations representatives were given opportunities to ask questions of the bargaining committee. The meetings would have closely followed the ratification date and a power-point presentation was provided at each roll-out.

121 Copies of the relevant power-point presentations (Exs. 26 and 27) were provided to Union counsel during an adjournment of the hearing.

122 Ex. 26 reflects that at the on April 18-19, 2011, the Labour Relations Managers were provided with a "*Master Section*", with respect to the provisions of Article 10. It states:

Article 10 - Just Cause

* *10.01 option for teleconference for AH-Work Styles*
* *10.04 Investigative meetings*
  * *Where security or two managers present*
    * *Union representative who is available at the location*
  * Observer not participant
    * *Has 15 minutes prior to interview to meet with employee*

123 A review of Ex. 27, the Contract Review East, the roll-out document states:

Investigative Meetings

- *Team member may request a union rep only when 2 managers or corporate security attend*
- *Investigative meetings can be performed by a single manager in most cases If no steward is available at the location, management will arrange for nearest available*
- *Shop Stewards shall attend as an observer to the process and not as a participant (Art. 10.04)*
- *Give warning that steward must leave if they attempt to participate*
- *Remove steward from meeting if behaviour continues*

Meetings including 2 managers should be the exception to the rule

124 Ex. 27 reflects that the information and direction being given to Labour Relations personnel at TELUS with respect to the application of Article 10.04 is significantly at odds both with what was discussed during the course of the bargaining meetings and the evidence provided with regard to the intent of Article 10.04. It makes it apparent that "*investigative meetings can be performed by a single manager in most cases" and more importantly, that, "meetings including two managers should be the exception to the rule*."

125 Mr. Bedard's explanation of Ex. 27 was that the suggestion that meetings including two managers should be the exception to the rule were not consistent with his instructions and opined that perhaps - because in the East they deal largely with call centers - there may have been a confusion of whether they needed a Steward present. Be that as it may, it is apparent that the directives provided in Ex. 27 do not coincide either with the evidence given at the hearing with respect to management's intended implementation of Article 10.04 or the explanation provided to the Union during the course of bargaining as disclosed in the notes.

126 It also does not accord with what I have found - later in this award - to be a long standing past practice regarding Union representation nor with the representations made by the Employer to the Union that it was not the ability to represent members that it intended to affect, but the conduct of the representatives.

127 In his cross-examination, Mr. Bedard did not take issue with either of the two sets of notes (Ex. 3.3) or the various sub-exhibits in Ex. 4. The question was put to him whether, in bargaining discussions, he had ever told Mr. Doubt - or the Union bargaining committee - that he would change TELUS' practices on Union representation at investigative meetings? His response was that he had raised problems with the abuses which arose in the process, springing from the Cheat Sheet in February 2010. He was asked further whether or not he had ever advised the Union that he would change the practice of ensuring two management members were present when an investigative meeting took place? In response, he said that although he had not gone through the notes, his position was set out in the written proposals addressed during bargaining upon which an agreement was ultimately reached. He gave a similar response with respect to whether or not he had ever told the Union that he would change the "long standing practice"

referred to in the bargaining notes. His response was that he had put that information in his proposal which required two managers present.

128 He was asked whether or not he was aware that there was a long standing practice that two managers were to be present at an investigative meeting. He responded that it was a long standing practice to invite Stewards to certain investigative meetings but not all of them. In summary, he was asked whether or not he agreed with the proposition that nothing appeared in the notes, except the contract language that he alluded to, that would suggest that long standing practice would be changed. His response was that he provided an explanation when he introduced the proposals.

VII

Argument

129 The Union and Employer each filed an extensive Brief of Authorities to support their respective positions. Counsel canvassed the jurisprudence and its application to the facts here. While this award specifically refers to only a select few, I have attached, as Appendix "A", a list of the authorities referred to and which were considered in arriving at this decision.

130 Earlier in this decision I referred broadly to the arguments made by the parties in their Opening Statements. Below I have set out the development of those arguments - which have been distilled significantly from their original length.

Union Argument

131 The Union took the view, as a general principle, that rights to representation are substantive rights, and are entitled to interpretation on a "full and purposive" approach.

132 It argues that the right of an employee to representation at an investigative meeting - or any meeting where discipline could result - is a statutory right, which flows both from the certificate of collective bargaining and the Canada Labour Code; and exists independently of the actual provisions in the collective agreement. The Union notes that the *Canada Labour Board*, as well as Boards in Quebec, Ontario and Alberta , have recognized the right to representation at any meeting that may lead to discipline (following from the decision in *N.L.R.B. v. Weingarten, Inc.* (1975) 420 US 251). It argues that the underlying purpose and rationale of the United States and Canadian statutes are the same. At the very least, the Union suggests that if an employee asks for Union representation, it must be provided to him.

133 According to the Union, two conclusions flow from this reality. First, parties cannot contract out of this statutory protection. While parties can negotiate for stronger protection regarding representation, this statutory right to representation represents a "floor" beneath which parties cannot bargain. To the extent that the parties have done so, any resulting provision would be illegal as not complying with the *Code*. Secondly - and following from this limitation - the language of the collective agreement must *not* be interpreted in a manner which removes these statutory protections. While parties can bargain about the *mode* of protection of these rights, they cannot bargain to give up these rights.

134 The Union posits that this right to represent employees extends to everything that is done

which affects the legal framework of the relationship between the employee and the employer. In this manner, the Union is a "screen" between the employer and the employee. This right flows from the Union's duty to represent its employees and is not limited to its duty to collectively bargain terms and conditions of employment. There is a risk to the Union that they could be found to have breached their duty to their member employees if they do not provide representation when discipline could result.

135 Secondly, according to the Union, the practice between these parties for the past several decades is to have Union representation at investigatory meetings which might lead to discipline. This practice was acknowledged by Mr. Bedard on several occasions in his evidence. When the Employer proposed Article 10.04, Mr. Bedard represented to the Union that it was not the Employer's intention to exclude Union representatives from investigative meetings, rather - as stated by Mr. Bedard - the Employer's intention was to control Union conduct *within* meetings that could lead to discipline. The Employer was concerned about specific abuses and wanted to bring investigative meetings back to the previous process enjoyed between the parties prior to the "Cheat Sheet". It was not its intention to change the "decades long practice" of always having stewards present at these meetings. The Employer's expressed aim was not to change the previous practice, but to correct what were seen as abuses, following the development of the "Cheat Sheet" situation.

136 Hence, TELUS negotiated "observer status" for Union representatives at the meetings in exchange for 15 minutes of preparation time between the Union representative and the employee prior to the meeting. This was to address conduct following the "Cheat Sheet" that the Employer viewed as interfering with the investigatory meeting process.

137 The Union asserts that the history and practice between the parties supports the above interpretation of Article 10.04, to supplement the right to union representation under Article 10.01. The Union argues that the evidence of the witnesses made it apparent that - in the vast majority of cases - it was a long and established practice for the Employer to have two managers at investigative meetings. According to the Union, after the 2011 collective agreement was signed, the pendulum swung and the vast majority of investigative meetings proceeded without shop stewards. In fact, as reflected by the evidence, the Employer explicitly urged its managers to make two manager meetings the "exception", rather than the rule. The directive was designed to give the Employer the ability to manipulate Union representation at investigate depending on the personnel that it decided - in its sole discretion - to invite to a meeting. This is in contravention of the intended purpose of the amended article that it represented at bargaining and the decades long practice under Article 10.01.

138 Thirdly, the Union argues, this time in the alternative, that the Employer is estopped from having investigative meetings without two managers present. It asserts that if it is found that the Employer has the discretion to determine how many managers are present at an investigatory meeting, that discretion must be exercised fairly and reasonably so as not to defeat the "legitimate rights and expectations of the other parties" to the agreement. The Union says that the opposite has occurred in this case.

139 A direction was explicitly included in the Employer's guidelines that most interviews should **not** involve two managers. In view of the past practice between the parties (and the evidence of Mr. Bedard during collective bargaining), the actions of the Employer in having one manager investigative interviews represents an exercise of its discretion in a manner that prevents the

Union from providing representation to its employees; thwarts a legitimate right and expectation based on both the past conduct between the parties and Article 10.01; and flys in the face of direct representations made in collective bargaining. By doing so the Employer is effectively negating an employee's substantive rights.

140 The Union argues this meets the elements of the modern doctrine of estoppel, as it would be unconscionable to allow the Employer to rely on its strict legal rights when it advised the Union that it did *not* intend to change the past practice with the introduction of Article 10.04, but was, instead, introducing the clause to control abuses.

141 The Union seeks a declaration that it is entitled to attend any investigative meeting where discipline may result, and that any statements made in meetings where that representation was not given are inadmissible in arbitration proceedings.

142 The Union also made representations based on the decision in *Telus Communications Inc. v. Telecommunications Workers' Union (Huband Grievance), 2013* (*Sullivan*). While that case involved union representation in cases of accommodation, Arbitrator Sullivan made certain comments regarding representation in cases involving discipline, and the concern with undermining the Union's authority *vis a vis* its members. After Argument but prior to this decision, Arbitrator Sullivan was overturned on judicial review *(Telus Communications Inc. v. Telecommunications Workers' Union 2015 BCSC 1570)*. Both parties made representations regarding the impact of the decision on this Award. Obviously, the comments of Arbitrator Sullivan must be considered in light of the subsequent decision.

Employer Argument

143 The Employer filed a lengthy written argument wherein it principally argued that the Collective Agreement governs the issue of union representations at investigative meetings and that this agreement is clear on its face. It pointed out that the first collective agreement between these parties was in 2005, replacing all predecessor agreements for British Columbia and Alberta employees. Article 10.01 was new in 2005 and was "well understood" by the parties to apply to meetings where managers advised employees of the discipline decision, and provided a disciplinary letter. Article 10.04 was new in 2011 and is "straightforward". When the Employer tried to "get to the bottom" of what prompted the "Cheat Sheet", it was told it resulted from the tactics being used by Telus Security personnel to intimidate employees, and because meetings were becoming more frequent.

144 According to TELUS, the Collective Agreement is clear on its face and provides for three situations where union representation is allowed/required: (i) Where the meeting was to impose (or announce) discipline (Article 10.01); (ii) Where the interview involves TELUS Security personnel (Article 10.04); and, (iii) Where there is an investigative meeting with two managers present (Article 10.04)

145 It argues that Article 10.01 does not provide a right to union representation, but rather only assures Union representation when discipline is actually "imposed" and not in investigative meetings where discipline might result.

146 The Employer acknowledged that between 2005 and 2010 Telus's practice was to offer union representation at "most" investigative meetings.

147 TELUS disputes, in argument, that a "decades long" past practice of Union representation was established. It argues that the evidence led by the Union regarding past practice prior to 2005 is irrelevant. The 2005 collective agreement was the first between the parties and replaced predecessor agreements in two provinces under which there were different practices and provisions. There was in fact no evidence led regarding the IBEW practice in Alberta - one of those predecessor agreements - that is similar to Article 10.04, and which would have been persuasive. While Ms. Niblett's evidence was that there was a practice of always having two managers present at investigative meetings, she admitted her experience in Alberta prior to 2005 was in respect of the CEP agreement (which covered around 500 to 800 employees) and not the IBEW agreement, which covered the vast majority of unionized Alberta employees (4700 to 5000). According to the Empoyer, it is not possible to draw conclusions regarding past practice from this limited experience.

148 Ms. Carasco's testimony that investigative meetings were "always" held with shop stewards present prior to 2005, was challenged by the Employer who pointed to past awards between the two parties in support of its challenge. It argued the predecessor Alberta collective agreements took a similar approach to Article 10.04 by linking personnel to the determination of the nature of the meeting.

149 The Employer notes the BC Tel collective agreement was silent on the issue of union representation. In supplementary submissions, the Employer noted that in the judicial review of Arbitrator Sullivan's decision in *Telus Communications Inc. v. Telecommunication Workers' Union, supra*, the court sounded a caution regarding past practice between these parties in view of this history.

150 While the Employer admitted in its argument that its practice between 2005 and 2010 was to provide union representation not only in cases where discipline was imposed but also "commonly" during earlier, fact-finding investigative meetings, it urges this was a "non contractual practice and not a "requirement" of the Collective Agreement.

151 The Employer argues that the Union has not met the necessary elements, required by arbitral jurisprudence, to establish or rely on past practice. Specifically, it asserts that there is no ambiguity in Article 10.04 to address; neither is there unambiguous conduct and clearly expressed acquiescence. Further, even if there were past practice, that practice would have been brought to an end by the contract in 2011, through the negotiation of Article 10.04. The Employer made it clear in those negotiations that: it considered the union's participation in investigative meetings non-contractual; that it had the right to stop union representation in investigative meetings; and that it wanted to "clarify" the rights and roles of the Union not just within the meeting, but whether Union representation would be allowed at all. The Employer argues that it "should have been obvious" to the Union - by the introduction of Article 10.04 - that any practice (even if it existed, which it denied) was being brought to an end.

152 Furthermore, the Employer argues that whatever past practice may have existed, the Union changed it with its use of the "Cheat Sheet" and cannot now seek to hold the Employer to any past practice in view of this conduct. The Employer does not dispute that the contextual need for Article 10.04 was to address the use of the Cheat Sheet and its impact on investigative meetings. The conduct that resulted from the Cheat Sheet was completely different than the established practice between the parties in investigative meetings. The Employer asserts that its

intention, in introducing Article 10.04, was to restrict both the actual union involvement in investigatory meetings, and the participation of Union representatives once there. The Employer argues that its intentions are obvious from a review of the record of the negotiations; that these intentions were relayed to the Union by Mr. Mr. Bedard; and, that the Union knew what it was agreeing to in the negotiations.

153 The Employer suggests that Article 10.04 actually represents a net gain for the Union. It introduced clarity in that, prior to Article 10.04, there was no contractual right to union involvement in investigative meetings. It argues that an approach that linked union representation to the personnel at the meeting was not unfamiliar to the Union, as it was the same approach taken under the predecessor Alberta collective agreements, which the Union administered. Further, because it was raised as an issue by the Union, Article 10.04 addresses the issue of the involvement of TELUS Security at investigative meetings. The Article also resolves the issue of the Cheat Sheet problems by requiring that representatives be silent in investigative meetings.

154 TELUS argues that the bargaining history establishes that the Union leveraged its position on representational rights against other bargaining priorities. And that the Union now has "buyer's remorse" over what it freely negotiated. In these circumstances, an arbitrator should not permit the Union to achieve what it could not gain itself in collective bargaining.

155 To combat the Union's assertion that Article 10.04 effected a fundamental change, the Employer argues that it has not in fact excluded the Union from the "vast majority" of investigative meetings since 2011 and that such representation is still common in investigative meetings. By the chart created by the Union's own witness, 61% of the cases had union representation. The Employer asserts that over 70% of investigative meetings since 2001 have had union representation. TELUS argues that the "impressionistic" evidence of a few witnesses, without establishing a basis, does not meet the evidentiary standard.

156 TELUS expressed the concern, as discussed in Mr. Bedard's evidence, that if the Union's approach were adopted, a manager could not contact an employee - who does not report for work to determine his whereabouts - since that would be construed as conducting an investigative meeting. If such were the case it would prove unworkable from a labour relations perspective.

157 With respect to the "statutory entitlement" argument, while the Employer does not dispute that the rationale for representation is found in the Union's status as an exclusive bargaining agent pursuant to the *Canada Labour Code*, it asserts that the authorities have consistently found that the nature and scope of representation rights as between the parties in each case is *contractual*. There is no separate, independent set of statutory rights. While the right to representation may be fundamental, it is also subject to bargaining and it is the collective agreement - and not the statute - that determines *both* whether the right exists, and its nature. Specifically, there are no statutory rights that arise from the *Code*, which override what the parties have negotiated. As such, Articles 10.01 and 10.04 govern as between these parties. Even if such a right were found to exist, the Employer disputes that it represents any "floor" under which the parties cannot contract. The Union freely bargained limits to whatever rights exist.

158 With respect to estoppel, the Employer states that this argument hinges on the evidence of

Mr. Doubt. It argues that there were no representations made in bargaining that investigative meetings would continue to have two managers attend. In fact, Bedard believed he was clear that the Employer intended to hold single manager meetings. TELUS asserts that if the Union felt they understood the proposal and therefore did not ask any questions, the fault lies with the Union and not the Employer. TELUS allows that the burden in this respect falls to the Union and notes that the Union's chief spokesperson (George Doubt) did not testify.

VIII

DECISION

159 In view of the evidence and arguments presented, this matter can be determined by a consideration of the previous and present provisions of the relevant Collective Agreement; the circumstances of its negotiation and the past practice of the parties. Therefore, it is not necessary to address the arguments concerning the nature of the representational rights of the bargaining agent.

160 The Employer argued that the terms of the collective agreement are clear on its face, and that - at least since 2011 - the collective agreement contains a clear and unambiguous provision that circumscribes any rights to union representation at investigative meetings. In particular, the Employer suggests that, by virtue of Article 10.04, it has the right to determine which personnel attend at an investigatory meeting. And, the exercise of that choice thereby dictates whether Union representation will be provided at all, irrespective of whether the meeting is "fact finding" or in contemplation of discipline.

161 It asserts that a "past practice" of having two managers present at investigative meetings cannot be established or relied upon in the circumstances here in that, in order to do so, there must first be an ambiguity in the language, which does not exist here. Further, it argues that even if there were a past practice, the introduction of Article 10.04 should have made it obvious to the Union that this practice would not continue in the 2011 Collective Agreement.

Ambiguity

162 It is well established arbitral jurisprudence that extrinsic evidence can be considered as an aid to contract interpretation where there is an ambiguity. Ambiguity can be evident on the face of an agreement, or demonstrated as a lack of clarity which can be revealed through facts related to the negotiation and application of a provision: (Mitchnick and Etherington, *Labour Arbitration in Canada*, at p. 285).

163 In Canadian Labour Arbitration (Brown and Beatty) the point is made in Para: 3:4401, that:

> *"...it is recognized that, while extrinsic evidence may be admitted, it will be an error of law for an arbitrator to rely solely upon it in interpreting a collective agreement unless either a latent or a patent ambiguity exists.*
>
> *Where an ambiguity is patent, that is, where it appears on the face of the agreement, an arbitrator may resort to extrinsic evidence as an aid to its interpretation. Where an ambiguity is latent, that is, where it is not apparent on its face, an arbitrator may rely upon extrinsic evidence not only as an aid to resolve the ambiguity once it is established but*

also to disclose the ambiguity. However, arbitrators have had a difference of opinion as to what constitutes an ambiguity. One view holds that more than the arguability of different constructions of the collective agreement is necessary to constitute an ambiguity. Another view is that an ambiguity exists if there is no clear preponderance of meaning stemming from the words and structure of the agreement. In Ontario, a decision of the Court of Appeal (Leitch Gold Mines Ltd. v. Texas Gulf Sulphur *(1968) 3 D.L.R. (3d) 161* at pp. 215 - 216), *provided a fresh point of departure for determining whether an ambiguity exists in the following terms:*

> *The Court is not necessarily concerned only with the literal meaning of the language used but rather with its meaning in the light of the intentions of the signatories...*
>
> *A transaction having been reduced to writing, extrinsic evidence is generally inadmissible to contradict, vary, add to or subtract from its terms. This is fundamental in the interpretation of written instruments. Parol evidence may, however, be admitted in aid of interpretation.*
>
> *Where the language of the document and the incorporated manifestations of initial intention are clear on a consideration of the document alone and can be applied without difficulty to the facts of a case, it can be said that no patent ambiguity exists. In such a case, extrinsic evidence is not admissible to affect its interpretation. On the other hand, where the language is equivocal, or if unequivocal but its application to the facts is uncertain or difficult, a latent ambiguity is said to be present. The term "latent ambiguity" seems now to be applied generally to all cases of doubtful meaning or application.*
>
> ...
>
> *Extrinsic evidence may be admitted to disclose a latent ambiguity, in either the language of the instrument or in its application to the facts, and also to resolve it, but it is to be noted that the evidence allowed in to clear up the ambiguity may be more extensive than that which reveals it. Thus, evidence of relevant surrounding circumstances can be accepted to ascertain the meaning of the document and may clarify the meaning by indirectly disclosing the intention of the parties.*
>
> ...

164 There is no definition of "Investigative Meetings" in this collective agreement. Neither is there a definition of what is involved in "impos[ing] discipline" (Article 10.01). It is therefore instructive to carefully consider the actual wording of the Collective Agreement itself. For ease of reference, the Articles at issue are repeated below:

ARTICLE 10 - JUST CAUSE

10.01

An employee who has successfully completed the probationary period, shall not, for disciplinary reasons, receive a written warning suspension or be dismissed, except for just cause.

An employee may request the presence of an available Union representative at a meeting between a manager and the employee if the purpose of the meeting is to impose discipline. The requested presence of a Union representative may be by way of

> *teleconference where a Union representative is participating in either the At Home Agent or Work Styles program or any other situation where the parties mutually agree.*
>
> *Disciplinary action is to be confirmed in writing, with a copy to the Union.*
>
> ***Investigative Meetings***
>
> *10.04*
>
> *When an employee is to be interviewed by a representative of the Company's Security Department, or at an investigative meeting where two managers will be present, the employee may request the presence of a Union representative who is available at the location where the interview is to be conducted. If there is no available Union representative at that location, the Company will arrange for the nearest available Union representative to attend.*
>
> *When present at this interview, the Union representative shall attend as an observer to the process and not as a participant.*
>
> *The Union representative, unless the employee objects, shall be granted a maximum of fifteen (15) minutes to confer with the employee immediately prior to the investigative meeting.*

165 What is of particular importance for our purposes is the initial sentence in the second paragraph of Article 10.01. This sentence was not changed in negotiations. It provides that :

> *"An employee may require the presence of an available Union representative at a meeting between a manager and the employee if the purpose of the meeting is to impose discipline."*

166 The portion added to Article 10.01 at the 2011 negotiations provides that in certain circumstances, the attendance of the Union representative may be by teleconference. As is apparent, no reference is made as to the number of Management employees that must be present at these meetings. A Union representative is required only where the **purpose** of the meeting is to impose discipline. While the Employer took the position that it was "well understood" by the parties that Article 10.01 referred to a situation where an employee is given a disciplinary letter, no evidence was proffered on this point. What is clear is that, in the past, two managers would - as rule - be present if discipline was meted out at such a meeting. While the Article presupposes that meetings between managers and employees may take place, it is only where the purpose of the meeting is discipline that a Union representative must be present.

167 The Employer says the provisions of Article 10.01 and 10.04 are unambiguous. It argues that Article 10.04 clearly only requires Union representation when either TELUS Security or two managers are present. By extension, it is therefore for the Employer to determine - in its sole discretion - when and if Union representation will be made available based on the complement of Employer representatives it chooses to have at the meeting.

168 There are thus two provisions governing meetings between managers and employees. Article 10.01 is arguably a more general introductory provision governing employee manager meetings while Article10.04 refers to meetings which are characterized as "Investigative". The class of meetings governed by 10.01, on its face, is a larger class than the specifically "Investigative" class, governed by Article 10.04.

169 The Employer's argument however, is that the effect of the addition of Article 10.04, is that the representational rights set out in 10.01 have been limited and reduced by the addition of Article 10.04. The representation provided for by 10.01 is now limited by whom the Employer, in its discretion, sends to the meetings. A Security representative, or two managers, will trigger the entitlement to representation. Nothing else will do so.

170 While the Employer argues that Article 10.01 is limited to those meetings where discipline is formally imposed, the language of Article 10.01 does not easily bear this restriction. It provides for representation when the **purpose** of the meeting is to impose discipline. The intention to limit the general terms of Article10.01 is not at all manifest from a reading of the two Articles together. If it had been the clear intention of the parties to limit the effect of Article 10.01, it could have added words to that effect. If it was intended to limit Article 10.01 to cover only meetings attended by a Security representative or two managers, the Article itself could have been directly amended. Instead, the Union representational aspect of Article 10.04 is directed to certain Investigative meetings while Article 10.01 assumes a meeting (investigative or otherwise) but restricts Union representation to meetings which have the purpose of imposing discipline.

171 Another factor which militates against the imposition of the limit contended for on Article 10.01 is that Article 10.01 provides for attendance in some instances by teleconference, while in the case of Article 10.04 it is anticipated that arrangements for a Union representative to attend personally will be made. This is consistent with the notion that Article 10.04 is intended to cover a more serious and narrower class of "Investigative" meeting, while Article 10.01 deals with a broader category which do not require the personal and direct attendance of a union representative.

172 If the first sentence in Article 10.04 ended after the words "Union representative", the Employer's position might be more tenable. However, it does not. As it reads, the clause continues that in those particular circumstances (i.e. where two managers are present), *"the employee may request the presence of a Union representative who is available at the location where the interview is being conducted."* It could be interpreted that it is the location of Union representation that is qualified by the fact of two managers being present, as opposed to whether Union representation will occur *at all* for investigatory meetings, especially in view of the requirement for Union representation that is already set out in Article 10.01. Had the parties intended to have Union representation at investigatory meetings tied to the personnel attending, they would have finished the first sentence of Article 10.04 after the words "Union representative", and crafted the second sentence in the same manner as the change made to Article 10.01 allowing for the Union representative to participate by teleconference.

173 While the Employer urges an interpretation which would see Article 10.04 limiting Article 10.01, the fact that Article 10.04 - in its interplay with Article 10.01 - is capable of another less limiting interpretation which would see Article 10.01 remaining in force unabated, has created an ambiguity on the face of this contract.

174 I am of the view that the better interpretation of the two clauses together would be that Article 10.01 was intended to remain in force in accordance with its terms as discussed; that Article 10.04 - given its content and position - is intended to deal with more limited and specific circumstances; and, that the two Articles can be given appropriate effect together.

175 Alternatively, in the event I am mistaken on whether a patent ambiguity exists, I nevertheless find that the language of Article 10.04 discloses a latent ambiguity as to its meaning and/or application in the context of Article 10 and, accordingly, that the Employer's interpretation/application of the same is not in keeping with the intention of the parties. In keeping with the comments in *Leitch Gold Mines (supra)* this latent ambiguity is acutely accentuated by both the negotiations and the past practice of the parties:

> *... evidence of relevant surrounding circumstances can be accepted to ascertain the meaning of the document and may clarify the meaning by indirectly disclosing the intention of the parties*

176 The bargaining history and past practice between these parties reveal that the parties had a long standing practice of Union representation at investigative meetings.

177 It is apparent, from both Mr. Bedard's evidence and the bargaining notes, that the mischief which the addition of Article 10.04 was intended to address was the conduct of certain Union representatives at investigative meetings - which conduct was driven by an over the top directive in the Cheat Sheet distributed at the February 2010 convention.

178 Management's intentions and representations in this respect are disclosed, *inter alia*, in Mr. Bedard's comments, alluded to earlier, that

> *"...we hope to avoid contract language, we've had a long standing understanding which we were able to work with. We know of no cause...the February 2010 convention...this is now a fact whether we like it or not. Not all Stewards are obstructing these meetings. Some are not good for us. To sail through this negotiation without addressing...what we are proposing hopefully will clarify the rights, hopefully."*

179 The bargaining notes and evidence of both sides reflects that Article 10.04 was not introduced or intended to exclude the Union from investigative meetings altogether in the manner exercised by the Employer (i.e. by choosing to have meetings with only one manager but no Union representation and/or to allow Union representation only at investigative meetings when two managers or security personnel were available). This is not simply a case of the arguability of two construction perspectives or two conflicting positions taken at bargaining. It is apparent that no preponderance of meaning stems from the words and structure of Article 10. In this case, even if I were to find that the language is unequivocal (which I do not) its meaning and application as advanced by the Employer, is unsupportable.

180 Express representations were made by the Employer, during bargaining, regarding its intention to continue its past practice with respect to investigative meetings, but otherwise "control" the Union representatives conduct at these meetings so as to restore both an orderly process and the "*status quo*". The term "*status quo*", taken in context, clearly refers to the established past practice of the parties at investigatory meetings.

181 While the considerations discussed above provide an adequate basis upon which to resolve the policy questions that led to this grievance, it is also informative to consider the evidence and submissions regarding past practice and estoppel.

182 The Union argues that if the language of Article 10.04 applies as urged by the Employer - requiring Union representation only at investigatory meetings where two managers are present - then extrinsic evidence should be considered to support its arguments of both past practice and estoppel to counter the same. It asserts that the Employer is prevented - by both past practice and estoppel - from exercising any discretion to determine whether any Investigative Meetings can take place without two managers being present.

183 The issue of past practice can be addressed first.

Past Practice

184 The Employer argues that the past practice relied upon by the Union has not been established as set out in *Re IAM Local 1740 and John Bertram Sons Co.* (1967) 18 L.A.C. 362, in that there is no ambiguity and Article 10.04 is clear "on its face". It suggests that the elements of *John Bertram, supra*, require "unambiguous conduct" and "clearly expressed acquiescence" and that these are lacking on the facts of this case.

185 The Employer's assertions, in argument, regarding unambiguous conduct and/or acquiescence do not square with the evidence adduced at the hearing. Mr. Bedard in his evidence admitted that between 2005-2011 there was a practice (albeit a "non-contractual" one supported by "jurisprudence") that Union representatives were invited to, what in my view amounted to, an overarching majority of investigative meetings. The Union presented evidence through several of its witnesses that this practice existed; that it had been ongoing for several decades (a point agreed to by the Employer at the bargaining table); and, that the practice was for the investigatory meetings to take place with two managers present.

186 The only direct evidence the Employer offered regarding the period prior to 2005 was from Mr. Bedard, who admitted that the involvement of Shop Stewards in Investigative Meetings was a "long standing practice". He also stated, *inter alia*:

> *We all know why we invite Shop Stewards to these meetings.* ***It's a long standing practice. Jurisprudence. Investigative meetings may result in some disciplinary action being taken.*** *We try to get Union representation there to observe not participate like Article 10 when we are announcing discipline...not a huge issue.* ***I want to talk about the role. Some things in cheat sheet****. Things are going on that don't allow us to do proper investigations. Union reps in these meetings are not lawyers. Not a grievance meeting. They are invited to allow to know what's going on and have the background..."*
>
> (emphasis added)(Ex. 4.5.8)

187 Ex. 3.3, pages 8 to 10, were put to Mr. Bedard and he acknowledged (as reflected in the exchange on Ex. 3.3.10), that there has been a long standing practice that investigative meeting leading to discipline had a Union representative present.

188 In another bargaining exchange on October 26, 2010 (Ex. 4.6.12; 3.9), Mr. Bedard again raises questions about the genesis of the Cheat Sheet. In response, Mr. Doubt speaks about the purpose of investigative meetings and states:

> *"Our view is investigative meetings are to determine if there will be discipline imposed."*

189 Mr. Bedard effectively admits, in his response, that Union representatives have been involved in such investigative meetings for many years:

> *"**That's why you've been invited to them for twenty (20) years** (3.3.9) or to gather information that support not doing so." (4.6.12)* (emphasis added)

190 The Employer urged caution to be exercised when looking behind the 2005 Agreement for evidence of past practice, considering that several different employee groups were amalgamated into one collective agreement in 2005. It pointed to comments in the recent decision in *Telus Communications Inc. v. Telecommunications' Workers Union (Huband Grievance)* *2015 BCSC 1570* in this regard.

191 While I recognize the caution sounded by the Court in the *Huband Grievance*, that case is distinguishable from the one before this board: the context of that caution was in a situation where the Court had found that Arbitrator Sullivan's conclusions on past practice were **not** supported by his findings of fact on past practice and were, in fact, "counterfactual"; the provision at issue in that dispute was found to be "black and white (see: para. 109). And, there were no admissions by the Employer in that case - as there are here - that the practice at issue was "long standing". Furthermore, although the Employer advised caution in relying on past practice because of the various groups which were amalgamated in the 2005 agreement, Mr. Bedard conceded - in negotiations - that the practice of having Shop Stewards at investigative meetings was a longstanding one between the parties, dating back at least 20 years.

192 Furthermore, while the Employer characterized any practice relating to Union representation as "non-contractual", Mr. Bedard's evidence regarding the basis of that continued practice was that the Employer considered there to be a "*jurisprudential*" reason for the same making reference, *inter alia*, to: "*investigative meetings may result in some disciplinary action being taken*" or in "*discipline being imposed*" (which is the wording already used in Article 10.01 regarding Union representation).

193 Unlike certain of the case authorities offered, this was not a collective agreement that was "silent" on the issue of union representation at disciplinary meetings. In fact, Mr. Bedard was not in error when he concluded that there is a line of cases where arbitrators have held that union representation is contextual: i.e., if a meeting crosses the boundary between fact-finding into discipline, representation can be required. In the present situation it should be recalled that Article 10.01 - on which the parties' past practice was based - looks to the purpose of the meeting, not to the formalities or structure surrounding that purpose, to identify when union representation should be present.

194 It is not necessary for me to make a determination regarding that line of case authority to determine this issue. Nor is it necessary to determine if Mr. Bedard was correct in his concern or his summary of what "jurisprudence" would require. It suffices to say that the evidence reflects that Mr. Bedard believed jurisprudence affected the Employer's ability to deny Union representation in investigatory meetings and that there was a basis for this belief. In this regard therefore, Union representation in investigatory meetings was not as "non contractual" as might first appear; it flowed from the Employer's understanding of a risk that investigatory meetings

may devolve into disciplinary meetings - because their purpose could be to impose discipline - and thus from the existence of Article 10.01 and its requirements.

195 In my view, the evidence demonstrates that the parties, as reflected by their practice, understood that the wording of Article 10.01 was sufficiently ambiguous that it could require Union representation for investigatory meetings that developed into disciplinary meetings and sought to add language to provide for meetings which were investigatory in purpose at the outset.

The evidence regarding past practice satisfies me that the vast majority of investigatory meetings between these parties, prior to 2011, had two features: Union representation and two managers present. While I accept that this practice may not have occurred 100% of the time, the practice was clearly sufficiently entrenched to become a recognized and relied upon "past practice". This fact supports the interpretation that Article 10.01 was of a more general application and Article 10.04 is directed at meetings of a specific nature.

Did the Negotiation of 10.04 Give "Notice" to End the Practice?

196 The Employer argued, as a further alternative, that, even if a past practice existed, it was brought to an end with the negotiation of Article 10.04 in 2011, in that the Employer made "clear" its intentions in this regard during negotiations. It suggests that an adverse inference be drawn from the Union's failure to call George Doubt to state otherwise. It asserts it should have been "obvious" to the Union that the introduction of Article 10.04 meant that whatever practice had existed prior to it was at an end.

197 While I accept that in many cases a new bargaining round - and negotiation of new clauses - can have the effect of changing the state of affairs between consenting parties, the difficulty for the Employer here, is that in its negotiations at the bargaining table, it represented the opposite intention to the Union. As noted earlier, in negotiating changes to Article 10 the Employer's evidence was that it intended to address the disruptive conduct of Union representives (prompted by the Cheat Sheet) at investigative meetings. On the first day of bargaining, the Employer presented its proposal to the Union as follows:

> "Article 10 - Just Cause
>
> *Modify section 10.01 so that the requested presence of a Union representative may be by way of teleconference where a Union representative is unavailable in the same work location as the employee (similar to section G2.01-Article 10). Similar change to be applied to appendix E.*
>
> *Discuss the **role** of Union representative **during** investigation meetings (non-contractual) in an effort to reduce any disputes on this issue within the work place." (emphasis added)*

198 As previously noted, management's own notes show that, in commenting on these two points, Mr. Bedard stated (at page 6, Ex. 4.4):

> *"Just cause, for instance at home agents are Union reps and they are not in building.*
>
> *Article 10.2 **we are not suggesting Union reps can't be part of this**, we want to stop what we see as an abuse of this."* (Emphasis added)

199 In my view, this is another key representation by Mr. Bedard which did not materially change through the course of bargaining. In negotiations, the Employer could have indicated to the Union that its "long standing practice" of allowing Union representation at investigative meetings was coming to an end with the introduction of Article 10.04 and that Union representation at these meetings would depend on the personnel it invited to the meeting. It did not. If it was its intention to depart from the representations made earlier in bargaining, the Employer could have stated that it no longer believed it was bound by "jurisprudence" or past practice (as alluded to by Mr. Bedard). Rather than taking the position that Article 10.04 ended any previous practice, the Employer provided an express representation that *removing* Union representation from Investigative meetings was not the intent of its changes to Article 10; it was to stop abuses *during* the process.

200 The representations by the Employer at bargaining made it clear that it was the conduct of Union representatives at investigative meetings - and not their right to attend at the same - that the Employer was seeking to address through changes to Article 10. This position is consistent with Mr. Bedard's evidence that the Employer's concern was with addressing the disruptive behaviour and "abuses" which had been taking place in the investigative meetings. It was equally apparent from the bargaining notes, that Mr. Doubt agreed that the behaviour of some of the Union representatives (emanating from the Cheat Sheet instructions) needed to be reigned in.

201 Coupled with the past practice that I have found existed regarding the presence of two managers at investigative meetings, it is not surprising the Union did not see fit to negotiate further around Article 10.04 once the 15 minute conference and observer status was ultimately presented. Had the Employer wished to change the long standing practice of having two managers - along with a Union representative - present at investigatory meetings that might result in discipline, it could have given a clear and unequivocal notice of its intention to do so.

202 The introduction of Article 10.04 must be looked at in context. It came after clear representations were made that the Employer's intention was not to compromise the long standing practice of having Union representation at investigative meetings, but rather to curtail the abuses - resulting from the Cheat Sheet - which were taking place at those meetings. Taken in the circumstances and this context, simply proposing Article 10.04 does not qualify as clear and unequivocal notice of an intention to change that practice.

203 As a rule, for at least 20 years prior, when the Employer deemed an investigative meeting necessary, two managers would be present and a Shop Steward would be invited. The Employer's interpretation/implementation of Article 10.04 (as reflected by Ex. 27) presumes to determine whether a meeting is investigative or not on the basis of who attends it. That is inconsistent with the established past practice and was never made clear to the Union in the discussions disclosed in the collective bargaining notes.

204 Ex. 27 reflects a departure from the long standing past practice that Union representation would be available at investigative meetings and that such meetings would have two managers present. It confirms the conduct complained of by witnesses called by the Union. And, it underscores the fact that the representations made to the Union at bargaining with respect to the intended mischief to be addressed by Article 10.04 are not in keeping with its implementation.

Estoppel

205 As discussed earlier, the Union - in the alternative - raised the issue of estoppel.

206 If my conclusions regarding "past practice" are found to be in error, I nevertheless find, based on the evidentiary conclusions set out earlier, that the Employer is estopped from applying the provisions of Article 10.04 in a manner which deprives employees of Union representation at investigatory meetings.

207 The Employer notes the following in its written argument:

> *It is acknowledged that the modern approach to estoppel focuses in particular on the fairness of a party reverting to its strict rights after representing that it would not rely on those rights (at para. 152)*

208 It argues, firstly, that the success of the Union's estoppel argument "hinges" on the proposition that Mr. Doubt was a "neophyte" negotiator and that Telus took advantage of that fact. With respect, I do not consider that to be the basis of the estoppel argument that the Union framed, and which was summarized earlier.

209 Secondly, the Employer argues that the following factors militate against a finding of estoppel: the Employer never represented to the Union in bargaining that investigative meetings would have two managers; Mr. Bedard believed the Union team knew "full well" that the Employer intended to hold single manager meetings; it was incumbent on the Union to ask questions to clarify the Employer's intentions if it did not understand the proposed provisions; and, the Union, having failed to do so, was wilfully blind.

210 In my view, Mr. Bedard's evidence does not support the Employer's argument regarding what the Union was advised or believed. I have already found that, prior to 2011, there was a long standing past practice between these parties not just of Union representation but also two managers being present at investigative meetings. This practice informed the representations made during negotiations. Not only did the Employer fail to make the Union aware that the practice would change - clearly and unequivocally - with the implementation of Article 10.04, it expressly represented that it **would not**. I conclude that the Employer represented to the Union that it intended the Union to continue to attend such investigative meetings; and, that it considered that "jurisprudence" and past practice required this attendance if such meetings could result in discipline being imposed. In view of these representations, the fact that the Union did not ask further questions is more consistent with the fact that it believed the Employer's representations, than the Employer's assertion that it was wilfully blind.

211 Finally, in this regard, while I was initially given pause by the fact that Mr. Doubt, the Union's Chief Negotiator, did not testify to provide his interpretation of the circumstances leading up to Article 10.04, I concluded, after reflection, that an adverse inference need not be drawn from the same. There are references in the bargaining notes, from both sides, reflecting discussions between Mr. Doubt and Mr. Bedard which disclose that Mr. Doubt essentially agreed that the Cheat Sheet was "over the top" and that he understood the need to reign in the conduct of some Union representatives at investigative meetings. There is no suggestion in the bargaining notes or documents that the Employer made it clear to Mr. Doubt that the mischief

which Article 10.04 was intended to address was anything other than the unacceptable behaviour of some of the Union representatives at investigative meetings. There was no evidence to suggest that the Employer advised Mr. Doubt of any intended consequences of Article 10.04 other than the mischief already discussed herein.

212 The Employer's intentions in introducing Article 10.04 were already in evidence (as reflected by the bargaining notes) from Mr. Bedard. In the circumstances it would be injudicious to draw an adverse inference which would amount to an implied admission that Mr. Doubt's evidence would be contrary to the Union's position when in fact the "Union's position" is the one provided by Mr. Bedard himself in the bargaining notes. In the result, I draw no adverse inference regarding the failure of Mr. Doubt to testify.

213 Having regard to the "modern approach to estoppel", and in view of my factual conclusions, even if it were the case that Article 10.04 is to be interpreted in the manner urged by the Employer, it would be unfair and inequitable for the Employer to revert to its strict rights after the agreement was executed and the Employer is estopped from doing so.

Statutory Representation Rights

214 In view of my findings below, I need not determine whether the Union's right to represent its members in investigatory meetings stems from either arbitral jurisprudence or the *Canada Labour Code*. While it is apparent that Sections 37 and 94 of the Code contemplate that the representational rights of Unions are intended to be protected, and raise obligations on the part of Unions toward employees, it is equally apparent that the Employer has an important interest in how the relevant rights are defined and exercised, and that the mutual agreement of the Employer and Bargaining Agent in this regard will often find definition in the Collective Agreement. The agreement of the Employer and Union, as so far expressed in the relevant Collective Agreement provisions, does not raise fundamental issues not resolved by the present decision.

IX

Conclusion

215 The evidence disclosed that there was a long standing practice (as reflected in the facts set out above) between these parties that investigative meetings would take place in the presence of a Union representative and two managers. While I accept Mr. Bedard's view that every interview with an employee (*e.g.*: such as lateness or work performance) does not warrant an investigative meeting with 2 managers, it is nevertheless clear that the long standing past practice of these parties was that two managers and a Union representative would be present at an investigative meeting where discipline might result. This practice was utilized and enforced in circumstances where Article 10.01 was the only provision dealing with Union representation at investigative meetings.

216 The provisions of Article 10.04 were intended to address a specific mischief regarding the conduct of Union representatives at those investigative meetings. Having regard to the evidence - and particularly the express statements of the Employer during bargaining - Article 10.04 was not intended to restrict or replace the existing rights to Union representation provided pursuant to Article 10.01.

217 Consequently, the Employer holding investigative meetings with only one manager present and thereby essentially denying employees of Union representation at investigative meetings which might lead to discipline - as provided in its long standing past practice - amounts to a breach of Article 10.01 as it was implemented and applied in advance of 2011. It is sufficient for these purposes to declare that the proper interpretation and application of Articles 10.01 and 10.04 does not contemplate that the effect of Article 10.01 is to be limited by the terms of Article 10.04 except as it relates to the conduct of the Union representative present at the investigative meeting.

218 Whether a meeting is determined to be investigative or not shall depend on the application of the same principles which applied to the provision of Union representation under Article 10.01 prior to the 2011 round of bargaining. Specifically, the determination of whether a meeting is investigative or not shall not depend solely on the personnel assigned by the Employer to attend the same.

219 In keeping with the above, I declare that Article 10.01 must be given full force and effect according to its terms and the representation rights provided therein accorded, as they had in the past, whenever the purpose of the prospective meeting (or meeting in progress) is seen to be disciplinary. The process at such investigative meetings shall accord the Union representatives the rights specified in Article 10.04.

220 I shall retain jurisdiction with respect to the application, interpretation and implementation of this Award.

Dated at the City of Calgary, Alberta.

May 14, 2016.

Richard I. Hornung, Q.C.
Arbitrator

* * * * *

APPENDIX "A"

TELUS v. T.W.U. (Investigative Meetings) Authorities List

221

Authorities Relied on by the Union

Health Services and Support -- Facilities Subsector Bargaining Assoc. v. *British Columbia*

[2007] 2 S.C.R. 391

Excerpt from E. Tucker and J. Fudge. Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900-1948. Oxford University Press

Noel v. Sociètè d'ènergie de la Baie James [2001] S.C.J. No. 41

National Association of Broadcast Employees and Technicians v. New Brunswick Broadcasting Co. Ltd. CLRB Decision No. 711 (1988)

Re Canada Post Corp. and Canadian Union of Postal W orkers (Larabie) [1988] C.L.A.D. No. 29 (Weatherill)

Re Bell Canada [2003] C.I.R.B.D. No. 1

Public Service Alliance of Canada v. Canada Post Corporation (1985) C.L.R.B. Decision No. 544

TELUS v. Telecommunications Workers Union (Employee Share Purchase Plan) [2010] C.L.A.D. No. 347 (Sims)

Cement Lime and Gypsum Workers Division of the International Brotherhood of Boilermakers Local D486 v. *Chemical Lime Co. of Canada (Pension Contributions Grievance)* [2007] B.C.C.A.A.A. No. 222 (Dorsey)

Communication, Energy and Paperworkers Union, Local 444 v. *British Columbia Nurses' Union (Benefits Grievance)* [2012] B.C.C.A.A.A. No. 48 (Dorsey)

Excerpts from the *Canada Labour Code*, R.S. 1985, c. L-2; (Preamble, ss. 8, 36, 37, 94, 95, 96, 97)

N.L.R.B. v. Weingarten, Inc., 420 U.S. 251 (1975)

El Paso Healthcare Systems Ltd. and National Nurses Organizing Committee, 358 NLRB No. 54

TELUS Communications Inc. v. T.W.U. (Accommodation Grievance) (Sullivan) *Mordowanec v. Ontario Nurses' Association and Windsor Western Hospital; ONA v. Windsor Western Hospital* 1984 CanLII 1078 (ON LRB); [1984] OLRB Rep. Nov. 1643

Re Windsor Western Hospital Centre Inc. and Mordowanet et al. [1986] O.J. No. 786 (HCJ)

Chapdelaine v. Emballage Domtar Limitèe-Division des Papiers et Cartons Krafts 1983 CLB 9235; 6 C.L.R.B.R. 1 (Que. Lab. Court)

Calco Club v. Calgary Co-operative Association Ltd. [1992] A.L.R.B.D. No. 77

Re Lakeside Feeders Ltd. [2005] A.L.R.B.D. No. 6

Re British Columbia Telephone Co. and T.W.U. [1988] B.C.C.A.A.A. No. 20

Shoppers Drug Mart #222 v. UFCW, Local 1518 (Controls Grievance) [1995] B.C.C.A.A.A. No. 483 (Hickling)

C.I.B.C. TV Kelowna v. Communications, Energy and Paperworkers Union of Canada, Local 832-M (Hagglund Grievance) [2005] C.L.A.D. No. 23 (Burke)

Brink's Canada Ltd. and Independent Canadian Transit Union, Local 1 (Freeman Grievance) *[1997] C.L.A.D. No. 756* (Jamieson)

Canada Post Corp. v. Canadian Union of Postal Workers (Scarlett Grievance) *[2013] C.L.A.D. No. 151* (Shime)

Riverdale Hospital v. Canadian Union of Public Employees, Local 79 (Delos Reyes Grievance) *[2000] O.L.A.A. No. 879* (Surdykowski)

Alberta v. Alberta Union of Provincial Employees (Cordingley-Wagner Grievance) *[2006] A.G.A.A. No. 86* (Hornung)

Authorities Relied on by the Employer

T.W.U. v. TELUS Communications Inc. 2009 C.I.R.B. 475 (CanLII)

Excerpt from Brown and Beatty, *Canadian Labour Arbitration*, 4th ed, at 7:2130

Re Brinks Canada Ltd. and Teamsters, Local 213 (Ehsani) *(2010) 192 L.A.C. (4th) 310* (Burke)

New Flyer Industries Ltd. v. C.A.W. -- Canada, Local 3003 *[2006] M.G.A.D. No. 2* (Wood)

Medis Health and Pharmaceutical Services v. Teamsters (Satar Grievance) *(2001) 100 L.A.C. (4th) 178* (Corkwood)

British Columbia Telephone Company v. *T.W.U. (Shorsky)*, unreported, July 4, 1991 (Weiler)

B.C. Tel v. *T.W.U. (Knox)*, unreported, May 21, 1996 (Germaine)

British Columbia Telephone Company v. T.W.U. (Read), July 29, 21997 (Diebolt)

TELUS v. T.W.U. (McKinney), March 14, 2007 (Francis)

TELUS v. T.W.U. (Rutledge), May 11, 2007 (Pekeles)

TELUS v. T.W.U. (H.S.), July 23, 2007 (Beattie)

TELUS v. T.W.U. (Groenke), July 13, 2012 (Sims)

TELUS v. T.W.U. (Underwood), October 24, 2012 (Beattie)

TELUS v. T.W.U. (Glen), September 30, 2013 (McFetridge)

TELUS v. T.W.U. (Huband), January 2, 2013 (Sullivan)

TELUS v. T.W.U. (Barber), December 30, 2012 (McPhillips)

TELUS v T.W.U. (Jones), November 19, 2014 (Nichols)

TELUS v. T.W.U. (Tucker), July 31, 2014 (Pekeles)

TELUS (Montreal Investigative Meetings), February 10, 2014 (Hornung)

Re British Columbia Public Service Employee Relations Commission *(1995), 27 C.L.R.B.R. (2d) 161* (BCLRB) (Hall)

Re Canex Placer Ltd. And Cdn. Assoc. of Industrial, Mechanical and Allied Workers, Local 17 *(1978) 21 L.A.C. (2d) 127* (Weiler)

Purolator Courier Ltd. v. *Teamsters, Local 31* (unreported) March 17, 1992 (McPhillips)

Re Brink's Canada and Independent Canadian Transit Union, Local 1 *(1995) 47 L.A.C. (4th) 342* (Bluman)

Boeing Canada Technology Ltd. v. CAW --Canada, Local 2169 *[1998] M.G.A.D. No. 21* (Hamilton)

Imperial Parking Canada Corp. v. Construction & Specialized Workers' Union, Local 1611 (Abula) *[2001] B.C.C.A.A.A. No. 127* (McDonald)

Re Canadian Food Inspection Agency and Hickling *(2007) 163 L.A.C. (4th) 151* (Love)

B.C.Tel v. T.W.U. (Mikalishen), unreported, December 12, 1979 (Hope)

Alberta Government Telephones Commission v. I.B.E.W., Local 348 (Morgan) *[1993] C.L.A.D. No. 135* (Power)

T.W.U. v. TELUS Communications Inc. 2003 C.I.R.B. 222 (CanLII)

Canadian National Railway Company v. B.L.E. *[1993] C.L.A.D. No. 1220* (Picher)

Authority Referred to by both Parties

Telus Communications Inc. v. *T.W.U.* 2015 B.C.S.C. 1570 (SC)

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