**IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

**INSURANCE CORPORATION OF BRITISH COLUMBIA**

**("Employer")**

**AND:**

**CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES' UNION, LOCAL 378**

**("Union")**

**RE:**

**POLICY AND GROUP GRIEVANCE – CLAIM FOR UNPAID OVERTIME FOR MEMBERS WORKING BEYOND PRESCRIBED HOURS**

**COUNSEL:**

| | |
|---|---|
| **FOR THE UNION:** | **Allan E. Black, Q.C.** |
| **FOR THE EMPLOYER:** | **Peter A. Csiszar** |
| **DATE OF HEARING:** | **March 14, 15, 16, April 27, June 7, 18, July 25, 2012 Vancouver, BC** |

**COLIN TAYLOR, Q.C.**
**Arbitrator**

**File: CT3183-2**

# I

**[1] This is a policy and group grievance asserting that the Employer "has knowingly and actively violated the Collective Agreement by allowing Union members to work longer than their negotiated hours of work." The Union contends that employees were not compensated for the time that they allegedly worked beyond their scheduled hours of work and asserts that the Employer has:**

**a) breached the Collective Agreement, including, but not limited to, Article 14.04 which states that: "All time worked in excess of the regular daily or weekly hours of work as established in Articles 12 and 13 shall be paid overtime rates …"**

**b) not remitted appropriate Union dues for all hours worked by Union members;**

**c) breached the *Employment Standards Act* (the "*Act*") and specifically Sections 27 and 28(1)(d) of the *Act*, and either expressly or implicitly, Section 35(1) of the *Act*, and**

**d) failed to keep accurate records of total hours worked of "insurable employment" for purposes of providing an accurate Record of Employment ("ROE") as required by Canada Revenue Agency.**

**[2] The Employer denies the grievance. It takes the position that:**

**a) not a single named employee has testified as to working unpaid overtime and the Union has failed to discharge its onus of proof;**

**b) this is a policy and group grievance, yet the Union has failed to adduce evidence about claims centres other than the 5th and Cambie Claims Centre in Vancouver;**

**c) the evidence does not reveal a "pervasive problem" as asserted by the Union;**

**d) the scheduling of overtime falls within the exclusive prerogative of management;**

**e) the Employer has continually and clearly communicated to the Union and employees a requirement that all overtime work receive pre-approval and if employees chose to work beyond their prescribed hours they did so unilaterally and without the requisite authorization and in the face of clear direction not to do so;**

**f) employees cannot unilaterally elect to perform work outside of their prescribed hours of work, without the knowledge or pre-approval of the**

> **Employer, and claim compensation for such work at overtime rates. This is particularly so in light of the Employer's consistent policy of pre-approval for any overtime hours which was repeatedly communicated to the Union and all employees.**

**[3] The Employer is a provincial Crown corporation established in 1973 to provide universal auto insurance to British Columbia motorists. The Employer is also responsible for driver licensing and vehicle licensing and registration. There are about 5,200 employees at 60 locations, of which about 45 locations are in the Lower Mainland.**

**[4] The largest Claims Centre in the Lower Mainland is located in Vancouver at 5th and Cambie where there are about 130 employees.**

**[5] The Union is certified to represent an all-employee bargaining unit. Approximately 80% of the workforce is in the bargaining unit.**

**[6] The hours of work are established by Article 12 of the Collective Agreement. The work day for full time regular Claims Centre employees is 7 hours, 50 minutes and may be scheduled to provide coverage from 7:30 am to 6:00 pm. Starting times are offered to employees on the basis of seniority.**

**[7] The relevant part of Article 14.04 of the Collective Agreement reads as follows:**

> **14.04 Overtime Rates**
>
> **All time worked in excess of the regular daily or weekly hours of work as established in Articles 12 and 13 shall be paid at overtime rates as follows:**
>
> **(a) Time worked prior to or following a regular shift or work day will be paid at one and one-half (1 ½) times the employee's hourly rate for the first hour of overtime and at two (2) times the employee's hourly rate thereafter. Overtime worked in excess of five (5) overtime hours per calendar week (i.e. Sunday to Saturday inclusive) will be paid at two (2) times the employee's hourly rate.**

**[8] The Union asserts that employees were not compensated for those periods of time worked beyond their scheduled hours of work.**

## II

**[9] Exhibit 6(75) in these proceedings is an email dated July 21, 2009 distributed among management staff by the then Manager, Employee Relations. It reads, in part, as follows:**

> **As you may be aware, over the past few months the Union has raised various Claims workload concerns. ICBC and the Union are currently in the process of discussing system-wide concerns. We expect to deal with individual location concerns in the coming weeks. During this process, the Union has stated, generally, a concern that ICBC is requesting, permitting, or turning a blind eye to overtime being worked without pay. We have requested particulars from the Union in this regard, and the Union has committed to submitting these individual cases to ICBC for investigation.**
>
> **Please be reminded that ICBC's policy and practice is not out of line with the Union's general position – *there is to be no unpaid overtime being worked by employees*. This includes overtime at the employee's own initiative. The employee is subject to the Collective Agreement between the Parties, and as such cannot "opt out" of its terms. All overtime hours worked are to be paid in accordance with the Collective Agreement at Articles 11 and 14. OT must be requested by the employee in advance of being worked, and must be pre-approved by the employee's manager. To be approved, overtime must be justified due to an increase in volume, short staff due to a weather event, holidays etc. The approval is not an "automatic" because an employee requests OT. Though nor should a manager deny overtime, and then allow an employee to put in the extra time without overtime pay. (emphasis in original)**

**[10] The evidence is replete with written reminders to employees that overtime requires pre-authorization, e.g.:**

> **a. Management Team Meeting Minutes August 18/09**
>
> **Overtime – all overtime must be requested by the employee in advance of being worked, and must be pre-approved by the employee's manager.**
>
> **b. Management Team Meeting Minutes August 18/10**
>
> **Staff have their hours of work, both start times and finish times for their shift. Staff are to approach their manager if they feel OT is required. Unauthorized OT is neither to be endorsed or approved.**

**Similar reminders continued after the grievance was filed on November 30, 2010.**

**[11] On September 22, 2010, Norman Ridley, the then Claims Centre Manager, sent an email to the management team which, in part, reads as follows:**

> **OT is a <u>significant</u> monetary reward and it should be best used to drive the business forward. In only exceptional circumstances is it to be used for adjusters who have performance problems. In cases of dire straights, OT can be used as part of a comprehensive plan to kick start them back on to the road of success, but it should never be the mainstay of their plan. If we constantly use OT for these situations, then in fact poor performers get rewarded. And conversely, those that do their job well at the end of the year literally make less money than their poor performing peers! And believe me, people notice who is in on OT and they**

> **know who the good performers and poor performers are. This truly is performance punishment and can disengage our top performers who may never need or ask for OT … I am getting a sense that the adjusters are now looking at creating opportunities to ask for OT.**
>
> **When it comes to using OT to move the business forward, then we should look for clear accountability for the day that they are in. (emphasis in original)**

**[12] Notwithstanding those positions with respect to overtime, as well as certain steps taken by the Employer to discourage employees from working beyond their scheduled hours of work, the evidence is clear that certain employees did work beyond their regularly scheduled shifts even though told not to do so. The uncontradicted evidence of Ms. Tracy Diver, a Job Steward, is that she personally observed employees on the program "Session Manager" working on files beyond their regularly scheduled hours. The evidence in this respect is extensive. There are numerous emails from Ms. Diver and Job Steward Vianne Bacchus sent to Managers which relate what the Job Stewards personally observed in respect of employees working beyond their regularly scheduled shifts.**

**[13] At Exhibits 6(57), (101) and (103), there are acknowledgements by two employees of working beyond regularly scheduled hours.**

**[14] There are also numerous emails between Ms. Diver and Ms. Bacchus (not sent to managers) identifying Claims Adjusters who were observed working beyond their regularly scheduled shifts. Despite not being copied to managers, no evidence was adduced which contradicts the personal observations recorded in those emails. No witness said or suggested those observations were incorrect or should not be believed.**

**[15] Indeed, the evidence of Employer witnesses supports the Union's theory of the case that certain employees were working beyond their regularly scheduled hours and the Employer recognized this as a problem. Consider the evidence of Ms. Lesley Garlough who at all relevant times was Acting Claims Manager or Claims Manager at the 5th and Cambie Claims Centre. In re-examination, the following exchanges occurred:**

> **Q: You answered a lot of questions about what individuals could do at their desk but you knew and all the other managers knew the core issue was working unpaid overtime and it was a continuing issue?**
>
> **A: Yes it was.**
>
> **Q: Despite memos, people were working beyond hours?**
>
> **A: Some were, yes.**
>
> **Q: That's why it was continually raised at the meetings?**
>
> **A: Yes.**

**Q: Despite the efforts you made to stop people, it continued didn't it?**

**A: Yes.**

**Q: The concerns continued into 2011?**

**A: Yes.**

**Q: You could have asked those CAs to write down what time you start and finish. Could have asked CAs when they finished work?**

**A: Yes.**

**Q: You hoped that what you did would rectify it but it didn't, did it?**

**A: No, it didn't.**

**.....**

**Q: At the Bacchus arbitration, Tracy said 15 minutes was not a concern for the Union. The Union was not concerned about the give and take of a few minutes up to 15 minutes?**

**A: I understood the issue was about going past 15 minutes.**

**Q: The emails you got were up to an hour?**

**A: I believe so, yes.**

**.....**

**Q: Michelle was brought to your attention a number of times – fairly chronic?**

**A: I guess so – yes.**

**Q: Based on emails, you knew she was staying past her shift?**

**A: I knew she was doing it – yes.**

**Q: Nothing you did was preventing it?**

**A: Didn't appear to – no.**

**Q: You knew it was happening and you knew she was working on ICBC files?**

**A: I assume she was working on ICBC files.**

**Q: Why didn't you pay her?**

**A: Not pre-authorized.**

**Q: You knew she was working overtime and on ICBC files and you knew it and didn't pay her overtime only because it was not pre-authorized?**

**A: Not pre-authorized and sometimes I didn't know.**

**Q: You new she was working overtime on ICBC files but you didn't pay her overtime?**

**A: No.**

**[16] The concern of the Union with respect to employees working unpaid overtime was a "systemic issue", to use the words of Employer witness Mr. Rob Wilson, the Claims Centre Manager at 5th and Cambie from July 2009 to March 2010. For this reason, he did not respond to the Union's concern about Claims Adjuster MB working beyond regularly scheduled hours:**

> **I spoke to her about staying late – clarified our position that we will pay overtime where warranted. I thought she was over-investigating. I gave her some tips and talked to her manager. I told her she would not get ahead by staying overtime.**

**[17] In cross-examination, the following exchange occurred:**

> **Q: You didn't get back to the Union [about MB] because it was systemic. The systemic issue was employees working overtime and being unpaid?**
>
> **A: Global may be better than systemic. Not a one off with [MB].**

**[18] Mr. Wilson wrote an email on October 28, 2009 to management staff which succinctly sets out the extensive evidence with respect to the assistance offered to employees to avoid the need for overtime:**

> **We are seeing a few requests for OT right now. If warranted we will say yes, but we need to look at other options like days off claims, intake, assigned files, mgr. support etc. I want to keep on top of this for now, so please see me if you get any requests for OT. We will look at it on a case by case basis, as always. If it is short notice and I'm not available, use your judgement, but please loop me in afterward.**

**[19] The evidence of Mr. Ridley was that the problem of employees working past the scheduled hours of work existed not only at 5th and Cambie but also at Victoria, Prince George and Chilliwack.**

**[20] Mr. Ridley acknowledged that the issue of unpaid overtime was an "important concern" for the Union. He testified that he had no reason to disbelieve any of the emails written by Stewards Diver and Bacchus. No manager ever told him the emails were wrong. He was asked if he had instructed managers to pay overtime in those cases of reported unpaid overtime. Mr. Ridley said he had not because overtime was not authorized.**

**[21] Asked if he would ever instruct payment for overtime, the witness said he would not unless it was authorized overtime and referred to an "unwritten policy". Mr. Ridley went on to testify:**

> **Q: Unpaid overtime continued – it didn't stop?**
>
> **A: Based on the emails, it continued.**
>
> **Q: You knew some adjusters had to be spoken to more than once.**
>
> **A: Yes.**

**[22] Ms. Faith Lewis was a Claims Manager at 5th and Cambie from May 2010 until October 2011. It was put to her that claims adjuster GT was a "chronic offender":**

**A: She did stay after her shift on a number of occasions.**

**[23] Ms. Lewis was asked if she ever authorized overtime pay for GT:**

**A: If not authorized in advance – no.**

**Q: So she worked unpaid overtime because it was not authorized?**

**A: Yes.**

**[24] Despite the steps taken by the Employer to discourage employees working beyond their scheduled hours, including speaking to certain employees and raising the issue at numerous meetings of management and staff, Ms. Lewis testified that it continued to occur "to some level". She agreed in cross-examination that the issue was discussed at management meetings and offenders were identified. Even after GT took a time-management course, she continued to work after scheduled hours:**

**A: She did and I continued to speak with her.**

**[25] Mr. Anthony McDermott was a Claims Manager at 5th and Cambie from May 2010 until October 2011. He said there was a concern arising from employees working past their shifts without prior approval and he found it necessary to speak to employees within his group about**

**this. Mr. McDermott gave this evidence in cross-examination:**

> **Q: The vast majority of emails you got [from the Union], they were working unauthorized overtime?**
>
> **A: Agree with that.**
>
> **Q: Did you ever pay for the unauthorized overtime?**
>
> **A: No, if not authorized it's not payable.**
>
> **Q: Because it was not authorized?**
>
> **A: Vast majority was not paid. On one or two occasions, I told employees to send in a bill but not the vast majority.**

**[26] Mr. McDermott said he was unaware of any written policy requiring overtime to be pre-authorized.**

**[27] As to the emails which he received from Ms. Diver and Ms. Bacchus alerting him to employees working past their scheduled hours, Mr. McDermott said no-one ever said the reports were inaccurate or untrue. He went on to say that he had no reason to disbelieve similar emails on which he was not copied.**

**[28] Mr. McDermott described the issue of employees working past scheduled hours of work as an "on-going problem" and he spoke to non-compliant persons on a number of occasions. He said DW did not comply.**

**[29] Mr. McDermott described his approach in the following exchange:**

> **Q: If you are concerned about a few individuals, you could keep closer tabs on them to ensure they left on time?**
>
> **A: The approach we took of constant reminders is the extent of my ability.**
>
> **Q: But it didn't work with some individuals?**
>
> **A: No, it didn't. We didn't turn a blind eye – we kept dealing with it. Meetings were monthly.**

**[30] Following consideration of the whole of the evidence, I make the following findings of fact:**

**a) During the year 2010, some employees who are Claims Adjusters at 5th and Cambie performed work for the Employer after their regularly scheduled hours of work.**

**b) Even where certain employees acknowledged they were staying beyond their regularly scheduled shifts and would not do so again, they continued to do so.**

**c) Management employees were aware that this was occurring. The CA Meeting Minutes of August 26, 2010, at page 1, states:**

> **Shifts – People are staying longer than allotted shifts. Please let manager know if you require assistance with your desk rather than working extra time.**

**d) Employees were not compensated for working beyond their scheduled shifts either at overtime rates or at all, except as set out in Exhibit 6(7).**

## III

**[31] I have rejected the Employer's submission that the Union failed to prove some claims adjusters at 5th and Cambie performed work beyond their regularly scheduled hours. The evidence of Mr. Ridley establishes that he found it necessary to deal with a similar issue in claims centres other than 5th and Cambie. The Employer contended that the issue was not "pervasive" and involved only a few employees. The relevance of this is not readily apparent. This is not an issue of numbers. The evidence of the Union and the Employer conclusively establishes that certain claims adjusters performed work beyond their regularly scheduled shifts. Is that a breach of the Collective Agreement?**

**[32] The Employer submits that the scheduling of overtime falls within the exclusive prerogative of management and that the Employer has continually and clearly communicated to the Union and employees a**

**requirement that all overtime work receive pre-approval. It follows, argues the Employer, that if some employees chose to work beyond their prescribed hours, they did so unilaterally, without the requisite authorization, and in the face of clear direction from the Employer not to do so.**

**[33] The Employer relies, *inter alia*, upon the following provisions of the Collective Agreement:**

> **14.01 Equitable Distribution of Overtime**
>
> **Overtime will be offered in an equitable manner amongst the employees in a department who are able to perform the work. Such overtime will first be offered to employees on a voluntary basis in the order of seniority. If there are no volunteers, overtime will be assigned based on reverse seniority.**
>
> **14.02 Notification of Overtime**
>
> **Except in emergency situations, employees will be notified of any overtime requests not later than the end of the work day preceding the day on which the overtime is to be worked.**

**[34] The Employer submits that none of the alleged overtime hours worked were offered to bargaining unit employees and the Union can not bring the case within the requirements of Article 14.01. It is quite clear, however, that Article 14.01 does not apply to the facts of this case. That provision, in the words of Mr.**

**Ridley, is "to deal with high volumes", e.g. Exhibit 6(106) "We will be offering up overtime to work on Settlements … Those interested in working extra hours either before or after their shift, a Friday Off – Come and see your manager!" When the Employer has such a need, it must be offered in accordance with Article 14.01. There is no evidence that when an individual employee sees the need for overtime, the Employer says we have to give it to a senior employee. Overtime under Article 14.01 is "offered" when the Employer has a volume of overtime to be filled. Such overtime is voluntary and is assigned if there are no volunteers. Under Article 14.02, "employees will be notified of any overtime requests …" Read in context, this must refer to requests by the Employer. Clearly, that is not what this grievance is about nor is it what the Manager, Employee Relations, was speaking of in his email of July 21/09: *supra,* para.9:**

> **Please be reminded that ICBC's policy and practice is not out of line with the Union's general position – *there is to be no unpaid overtime being worked by employees*. <u>This includes overtime at the employee's own initiative</u> … OT must be requested by the employee in advance of being worked, and must be approved by the employee's manager. (see to the same effect, Exhibit 6(44), (48), (49), (76), (78), (108 p.7)**

**[35] Ms. Lewis testified that "overtime can arise from appointments going over time, over customers without an**

**appointment, or where you need overtime to catch up". Clearly this is not Article 14.01 overtime.**

**[36] Mr. Wilson testified that "Adjusters who needed overtime ask for it. There is no ban on overtime – if you need it you get it." That refers to an employee-initiated need for overtime – not an Employer-initiated equitable distribution of overtime.**

**[37] The MTM Minutes of August 18/09 say: "all overtime must be requested by the employee in advance …" The Minutes of August 18/10: "all overtime must be requested by the employee in advance …" Mr. Ridley's email of September 22, 2010, *supra*, para.11, speaks to overtime being used for "adjusters who have performance problems". That is not the type of equitable distribution of overtime contemplated by Article 14.01 and that provision is not applicable in these circumstances. This case is about employees allegedly working beyond their regularly scheduled hours of work.**

**[38] The Employer moves to firmer ground when it submits that, subject to the collective agreement, the scheduling of overtime falls within the exclusive prerogative of management: Brown and Beatty, *Canadian Labour Arbitration*, 4th ed., para.5:3200; Palmer & Snyder, *Collective Agreement Arbitration in Canada*, 4th ed., para.18.12.**

**[39] The leading case in this area is *Cooper Tool Group Ltd. (1975)*, 10 L.A.C. (2d) 407 (O'Shea) involving an**

**overtime claim arising from employees arriving early for their scheduled shift in order to perform preparatory work. Though the pre-shift work was unpaid, it increased an employee's incentive earnings. The union argued that permitting employees to perform work before their scheduled shift was a manipulation of the incentive system and the employer should either pay overtime rates or prohibit employees from working outside their scheduled shifts.**

**[40] The relevant provisions of the collective agreement in *Cooper Tool* read as follows:**

> **4.02 The Union further recognizes the exclusive right of the Company to operate and manage its business in all respects. Without limiting the generality of the foregoing, it is agreed that … the direction of the working forces … the schedules of production … the establishment and revision of incentive standards and rate, the determination of work assignments or methods … are sole and exclusively the responsibility of the Company …**
>
> **12.02 The regular work week shall consist of 40 hours per week comprised of five 8-hour days, Monday to Friday inclusive.**
>
> **12.05 The Company shall have the right to schedule overtime when in its discretion same is required …**

**[41] In dismissing the grievance, Arbitrator O'Shea, at para.12, said:**

> **It is clear from art.12.05 that the company may schedule overtime work when "in its discretion" such work is required. Employees cannot unilaterally elect to perform work outside of their scheduled hours of work and claim compensation for such work at overtime rates or even at straight time rates. Under art. 4.02, the company has the exclusive right to schedule production. Employees cannot perform unscheduled production and then enforce a claim for such work.**

**[42]** ***Cooper Tool*** **is distinguished by the strong and specific collective agreement language relied upon by the arbitrator in reaching his decision. Overtime work in** ***Cooper Tool*** **was at the "discretion" of the employer. There is no article 12.05 language to be found in the Collective Agreement of the present case (hereafter called the "ICBC Collective Agreement"). Nor is the** ***Cooper Tool*** **management rights provision comparable to that found in the ICBC Collective Agreement. Contrast Article 4.02 in** ***Cooper Tool*** **with the following:**

> **0.10 Management Rights**
>
> **All management rights heretofore exercised by the Corporation, unless expressly limited by this Agreement, are reserved to and are vested exclusively in the Corporation.**

**[43] Unlike Article 12.02 in** ***Cooper Tool*****, the ICBC Collective Agreement provides for regularly scheduled hours of work. Article 14.04 says that all time worked in excess of the regular daily or weekly hours of work**

**shall be paid at overtime rates. There is no such similar language in *Cooper Tool*.**

**[44] In *Northwest Territories (Minister of Personnel) and Union of Northern Workers (Bertulli)*, 52 L.A.C. (4th) 353 (Chertkow), the arbitrator followed *Cooper Tool* describing that decision as follows:**

> **There, art.4.02 of the agreement specifically spelled out that the company had the exclusive right to schedule production and that it may, as provided in art.12.05, schedule overtime work in its discretion when such work was required. (emphasis added)**

**That conclusion can not be drawn from an examination of the ICBC Collective Agreement.**

**[45] In *Northwest Territories*, the grievor had been authorized to participate in a field project in a remote area and was required to submit a request for any pre-authorized overtime. Following the project, the grievor claimed for work performed on weekends and holidays which the union alleged was implicitly authorized by the grievor's participation in the field work.**

**[46] In asserting the application of *Northwest Territories* to the case at hand, the Employer said:**

> **Arbitrator Chertkow commenced his analysis by commenting on the fundamental right of management to schedule overtime (at para.18)**
>
> **First, it is trite law to say that unless the collective agreement provides otherwise, the scheduling of overtime work falls within the exclusive prerogative of management.**

**[47] That sentence, however, must not be read standing alone. The full quote is this:**

> **First, it is trite law to say that unless the collective agreement provides otherwise, the scheduling of overtime work falls within the exclusive prerogative of management. That is especially so given the wording of art.23.02. The essential elements of that provision are stated in clear and unequivocal language. First, the employee must be "required to work overtime", secondly, that "the overtime work is authorized in advance by the employer" and finally, the employee does not control the duration of the overtime work. (emphasis added)**

**[48] No such similar language is found in the Collective Agreement which governs this arbitration. Article 14.04 says nothing about authorization. It says all time worked in excess of regular hours shall be paid at overtime rates. It is the specific collective agreement language in *Cooper Tool* and *Northwest Territories* which distinguish those cases from the present case.**

**[49] A similar conclusion obtains from a review of *Lafarge Canada Inc. v. Canadian Merchant Service Guild (Newsome***

*Grievance)*, **[2000] C.L.A.D. No. 376 (Blasina) in which article 1.24 of the collective agreement required that overtime work be "ordered". The arbitrator found the work was performed without the vessel captain's knowledge and the overtime claim was denied.**

**[50] Re** ***Technical Associates, Lodge 1922, and Hawker Siddley Canada Ltd.*****, 16 L.A.C. 144 (Bennett) and** ***Zehrs Markets v. UFCW, Local 1977 (Joedicke Grievance)*****, 2000 O.L.A.A. No. 505 (Nairn) do not advance the discussion. The former involved collective agreement language which provided for authorized overtime – language not found in this case – and** ***Zehrs Markets*** **is not an overtime case.**

## IV

**[51] The reason advanced by Employer witnesses for not paying employees who worked beyond their regularly scheduled shifts was that overtime work was required to be pre-authorized. In point of fact, though, the Employer did pay overtime in certain circumstances where it was not pre-authorized. Those circumstances include where a customer arrived nearing the end of a shift or a meeting with a customer or a telephone call with a customer extended beyond the end of an employee's regular shift. Employees were not required to obtain permission to stay beyond their regularly scheduled shifts but were paid overtime on those**

**occasions. There is evidence that Ms. Diver was paid overtime for working past her scheduled shift even though the overtime was not pre-authorized (Exhibit 6(26)). On August 27, 2010, Ms. Garlough wrote to a Claims Adjuster:**

> **I understand that you stayed late yesterday. Please leave early one day or start early or … so that it balances out**

**[52] The Employer did take steps to curtail employees working beyond their regularly scheduled shifts. The issue was raised at meetings held with claims adjusters and managers. The Minutes of the July 22, 2009 meeting record the following:**

> **Overtime – all overtime must be requested by the employee in advance of being worked, and must be pre-approved by the employee's manager.**

**That was repeated in the August 18, 2009 minutes. Other examples: the April 22, 2010 minutes: "If you need OT please see your manager, who will then get the permission from Rob (if you require to update your diaries"; August 18, 2010: "Staff have their hours of work, both start and finish times for their shift. Staff are to approach their managers if they feel O/T is required. Unauthorized O/T is neither to be endorsed or approved."**

**[53] Sometimes managers would speak with employees where they were personally observed or were advised (usually by Job Stewards Diver and Bacchus) that employees were working beyond their regularly scheduled shifts. On several occasions, the observations of the Stewards were not reported to managers. The evidence of Employer witnesses related earlier is that notwithstanding the efforts of Claims Managers Garlough, Lewis and McDermott, some employees continued to work beyond their regularly scheduled shifts and were not paid for such work. Mr. McDermott testified that after the grievance was filed, one manager attempted to go around and speak to employees to ensure they were leaving work at the end of their shift but that did not stop employees continuing to work beyond their regularly scheduled shifts.**

**[54] The Union submits that the Employer failed to put mechanisms in place to monitor the workplace so as to prevent employees working beyond their regularly scheduled shifts. According to the evidence of Ms. Lewis and Mr. McDermott, there would always be a manager on duty when claims adjusters were in the building. It follows, urged the Union, that the Employer could have taken steps to ensure that the mutual understanding and agreement of the parties that there was to be no unpaid overtime worked could have been enforced: see Exhibit 6(75), *supra*, para.9: "… ICBC's policy and practice is not out of line with the Union's general position – *there is to be no unpaid overtime being***

***worked by employees*. This includes overtime at the employee's own initiative." (emphasis in original)**

**[55] The Employer put the onus on employees to obtain prior approval for overtime and did not allow for approval after the fact. This being so, the Union submits that the Employer bears the responsibility of ensuring that employees are not permitted to work beyond their regularly scheduled shifts unless it is to be compensated. This proposition is informed by s.35 of the *Employment Standards Act*, RSBC 1996, c.113:**

> **(1) An employer must pay an employee overtime wages in accordance with section 40 if the employer requires, or directly or indirectly allows, the employee to work more than 8 hours a day or 40 hours a week.**

**[56] Section 35 is superseded by the "hours of work" or "overtime" provisions of the Collective Agreement as a result of s.3 of the *Act*, but it informs the Union's case that overtime need not be authorized and the expectation that employees will be paid where the employer "directly or indirectly allows" employees to work beyond their regularly scheduled hours.**

**[57] It is indisputable that the Employer has the right to protect itself against unrequested and unwanted overtime but the Union submits it is the duty of the Employer to implement and enforce overtime policies to prevent abuses and to comply with its contractual**

**obligations under the Collective Agreement. The fact is that the Employer's attempts to put a stop to employees working past their regularly scheduled shifts were not successful. Some employees continued to perform work past their scheduled shifts and were not paid for the sole reason that the overtime was not pre-authorized.**

**[58] While the Union is quick to say that it is not its responsibility to devise ways and means by which the Employer could prevent employees working unpaid overtime, there are, asserts the Union, numerous steps the Employer could have taken and advances the following examples:**

**a) The Employer could have ensured that all managers were kept apprised of the scheduled hours of work of all Claims Adjusters at 5th and Cambie. This way, managers would be aware of any employee who was observed to remain at their work station beyond their regularly scheduled hours with or without authorization to do so.**

**b) Managers could have done regular work walkabouts shortly after the end of each shift to observe who was staying beyond their regularly scheduled shifts and make inquiries of those individuals as to why they were there and, specifically, were they authorized to remain working.**

**c) All "special arrangements" that had been agreed to between an employee and a manager could have been made known to all managers so that employees who stayed beyond their regularly scheduled shift to work, would have a legitimate reason for doing so and the managers would be aware of that fact.**

**d) Managers were well aware of the "chronic offenders" who regularly stayed beyond their hours of work. Those persons could have been monitored much more closely to assure compliance with the expectations of the Employer and the Union rather than simply waiting to be told by a Job Steward that these persons are working beyond their regularly scheduled hours.**

**e) The Employer could have installed mechanisms for employees to either sign in or punch in or sign or punch out to monitor when employees were coming to work and when they were leaving work.**

**f) The Employer could have configured the computers of specific individuals to restrict computer use only during their "log on" hours or any other similar mechanism to restrict the use of computers for people who sought to work beyond their regular scheduled hours.**

**[59] I should add that the Union was at pains to emphasize that it was not seeking overtime work for its**

**members. It prefers that members go home at the end of their shifts. But, if employees do work past their scheduled shifts, the Union wants them to be paid.**

**[60] In *T-Line Services Ltd. and Morin*, [1977] C.L.A.D. No. 422, a complaint under the *Canada Labour Code* for unpaid overtime, Referee J.E. Emrich recognized the obligation of employers to take active measures to prevent uncompensated overtime. At para.33, he said:**

> **It is within the control and discretion of management to establish the hours of work and to supervise the work force effectively to avoid the triggering of overtime liability. Thus, it is reasonable to cast the onus upon management to take active measures to regulate the hours that employees may work. In the absence of such measures, the employer runs the risk that through oversight or omission, workers are permitted to work overtime and thereby liability to pay overtime is triggered.**

**[61] The Union submits that it was within the knowledge and discretion of the Employer to prevent employees working beyond their regularly scheduled shifts and it failed to do so.**

## V

**[62] Article 14.04 bears repeating:**

> **14.04 Overtime Rates**
>
> **All time worked in excess of the regular daily or weekly hours of work as established in Articles 12 and 13 shall be paid at overtime rates as follows: (emphasis added)**
>
> **(a) Time worked prior to or following a regular shift or work day will be paid at one and one-half (1 ½) times the employee's hourly rate for the first hour of overtime and at two (2) times the employee's hourly rate thereafter. Overtime worked in excess of five (5) overtime hours per calendar week (i.e. Sunday to Saturday inclusive) will be paid at two (2) times the employee's hourly rate. (emphasis added)**

**[63] It will be observed that Article 14.04 does not say "may be paid" or "paid only if authorized" or "when authorized". The language is plain and unambiguous: "shall be paid" and "will be paid". There is no qualification.**

**[64] The Employer's response is that its unwritten policy requires all overtime to be authorized in advance and did not allow for approval after the fact. Moreover, asserts the Employer, the pre-approval requirement for overtime was necessary and appropriate to manage the business and to control overtime costs. The Employer adduced extensive evidence which established that employees knew that pre-approval of overtime was the rigorously enforced policy and that employees were constantly reminded both verbally and in**

**circulated minutes of meetings of claims adjusters and managers.**

**[65] That unwritten policy, however, must conform with the requirements that govern the unilateral introduction of workplace rules found in *KVP Co. v. Lumber & Sawmill Workers' Union, Local 2537 (Veronneau Grievance)* (1965), 16 L.A.C. 73 (Robinson).**

**[66] At para.34 of *KVP*, the Board said:**

> **A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:**
>
> **1. It must not be inconsistent with the collective agreement.**
>
> **2. It must not be unreasonable.**
>
> **3. It must be clear and unequivocal.**
>
> **4. It must be brought to the attention of the employees affected before the company can act on it.**
>
> **5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.**
>
> **6. Such rule should have been consistently enforced by the company from the time it was introduced.**

**[67] The policy which the Employer seeks to rely upon offends requirements 1 and 6 of *KVP*. The policy is not consistent with the express language found in Article 14.04 of the Collective Agreement. By requiring pre-authorization of overtime, the Employer is adding words to and amending the language of the Collective Agreement. Article 14.04 does not provide for pre-authorization. It says all time worked in excess of the scheduled hours shall be paid at overtime rates.**

**[68] In *Rosewood Manor and Hospital Employees' Union, Local 180* (1990), 15 L.A.C. (4th) 395 (Greyell), the collective agreement required employees to notify the employer of an absence due to illness "as promptly as possible" and that they notify the employer "prior to their return". The impugned policy purported to impose time parameters on such notification. It was held that a time-related requirement was inconsistent with the language of the collective agreement.**

**[69] At page 10 of *Rosewood Manor* there is a passage which informs the present case:**

> **… we must presume that the employer has addressed its ability to effectively organize its work place in the language it has chosen to negotiate into the collective agreement … In other words, the parties must be presumed to have addressed their minds to the degree of notice required at the time they drafted their collective agreement language. To now place time parameters around this language**

> **would constrain and alter the meaning and intent of the language.**

**[70] Applying that reasoning to the present case, the Union argues that the Employer must be presumed to have turned its mind in bargaining as to whether it required pre-authorization of all overtime performed. Likewise, it is asserted, the Union must be presumed to have proposed or accepted that language in bargaining, upon the understanding that silence with respect to such an obligation meant that such a required obligation did not exist.**

**[71] A similar result obtained in *British Columbia Workers' Compensation Board and Compensation Employees' Union*, [1997] B.C.C.A.A.A. No. 453 where Arbitrator Laing held that the Employer policy "must be voided in that, in part, it is in conflict with the language itself." (para.17)**

**[72] Applying those authorities, the Union submits the Employer cannot implement a policy that adds language to the Collective Agreement which imposes a pre-authorization obligation which was not bargained. That is inconsistent with the Collective Agreement and therefore fails to meet the first of the *KVP* conditions for the introduction of a unilateral workplace rule. Moreover, contends the Union, the parties have expressly accepted and adopted this principle in Article 3.07(d) of the Collective Agreement, where it states:**

> **The Arbitrator shall not be authorized to alter, modify or amend any part of this Agreement.**

**[73] In my view, the Employer policy requiring pre-authorization of overtime offends the *KVP* rules in that it is inconsistent with Article 14.04 of the Collective Agreement and it offends the sixth requirement of *KVP* in that the rule has been inconsistently enforced. The Employer has not consistently required overtime to be pre-authorized: para.51, *supra*.**

## VI

**[74] My task is to ascertain what the parties meant by the words they have used; to discover the meaning of what is written in Article 14.04 so as to give effect to the intention as expressed by the language chosen by the parties to reflect their bargain.**

**[75] The cardinal presumption is that the parties are assumed to have intended what they have said.**

**[76] It is, however, necessary to consider the language in dispute in accordance with the legal principles defined in *University of British Columbia and Canadian Union of Public Employees, Local 16* (1976), 1 Can L.R.B.R. 13 (Weiler)**

**which directs arbitrators to read disputed language together with any extrinsic evidence which is presented to persuade the arbitrator of the proper interpretation of the written contract.**

**[77] The board in *U.B.C.* described the task of the arbitrator as being to:**

> **… decipher the actual intent of the parties lurking behind the language which they used: and not rely on the assumption that the parties intended the 'natural' or 'plain' meaning of their language considered from an external point of view. (p.16)**

**[78] Extrinsic evidence may not be used to defeat language where the intention of the parties is made clear. This point was reaffirmed by the British Columbia Labour Relations Board in *Nanaimo Times Ltd. and Graphic Communications International Union, Local 525-M*, BCLRB No. B40/96:**

> **If the arbitrator decides, after considering both the collective agreement language and the extrinsic evidence, that there is no doubt about the proper meaning of the clause in question, the arbitrator then reaches an interpretive judgment without regard to the extrinsic evidence. See Pacific Press Ltd., BCLRB No. B97/94 (upheld on reconsideration BCLRB No. B427/94) where the Board concluded that after considering the extrinsic evidence and finding the language of the collective agreement to be clear, the arbitrator did not need to (and would not be entitled to) resort to extrinsic evidence as an aid to**

> **interpretation. This amounts to the arbitrator effectively concluding: 'I have considered all of the evidence, both the collective agreement and that which is extrinsic to the agreement, and conclude that what the language means is what it appears to mean to me on the first reading.'**

**[79] Arbitrator Hope, in *Re Board of School Trustees of School District No. 43 (Coquitlam) and Canadian Union of Public Employees, Local 561* (1988), 1 L.A.C. (4th) 301, expressed his understanding of the interpretive principles enunciated in *U.B.C.* this way:**

> **… while an arbitrator should receive and consider extrinsic evidence in the initial examination of the language, the language remains the primary interpretive resource and extrinsic evidence will not be permitted to overcome language that is clear in its meaning. (p.313)**

**[80] The extrinsic evidence in this case establishes that employees (including Job Steward Tracy Diver) have sought pre-authorization to work overtime. That, however, does not assist the Employer in the face of the clear and unambiguous language of Article 14.04**

**[81] In *Victoria Times Colonist, a Division of Canwest Publications Ltd. v. Victoria-Vancouver Island Newspaper Guild, Local 30223 (Refusal to Work Grievance),* (2010), 203 L.A.C. (4th) 297, Arbitrator Germaine said:**

> **The object of the interpretive process is "to ascertain and give effect to the mutual intent of the parties": *Corporation of the City of Cranbrook,* BCLRB Decision No. B294/2001, [2001] B.C.L.R.B.D. No. 294, as quoted in *Canwest Mediaworks Publications Inc.* (2009), 162 CLRBR (2d) 252 (BCLRB No. B13/2009), at paragraph 53. The language used by the parties to express their agreement is the foremost indicator of their mutual intention. (para.52)**

**[82] At para.75 of that decision, Arbitrator Germaine said:**

> **Therefore, on the authority of *John Bertram & Sons*, past practice cannot be used to assist the interpretation of the first tier of the clause. Further authority is supplied by *BC Ferry Corp. and BCF & MWU,* [1996] B.C.C.A.A.A. No. 386 (Kelleher), which observed that relying on past practice when the words and structure of a disputed provision clearly favours one interpretation amounts to varying contract terms: paragraph 30. In my view the principle applies to other types of extrinsic evidence as well.**

**[83] In an early decision, the British Columbia Labour Relations Board cautioned against allowing extrinsic evidence to overtake the language of the agreement itself:**

> **It is the agreement and not the extrinsic evidence which must be interpreted. The evidence will assume greater or lesser significance according to the degree of ambiguity in the text. If the parole evidence**

> **itself is equivocal the Board is merely deprived of one tool in its interpretive function. In all instances it must settle the difference with regard to the wording of the agreement:** ***Board of School Trustees, School District No. 57, Prince George and International Union of Operating Engineers, Local 858*****, [1976] BCLRBD No. 41 at p.5**

**[84] The language of Article 14.04 admits of no ambiguity.**

**[85] The language of the collective agreement overrides a practice that is inconsistent with the express language of the agreement:** ***Howe Sound School District No. 48 v. Howe Sound Teachers' Assn. (Detlef Grievance)*** **[1995] B.C.C.A.A.A. No. 165 (Williams):**

> **… If however the wording of the Collective Agreement once understood is clear and plain, in a situation where one of the parties to the past practice was assenting to that practice without full knowledge of its rights under the Collective Agreement and where the two are in direct conflict, then it seems to me the Collective Agreement in those circumstances would prevail. (para.24)**

**[86] The fact that there has developed a practice of requiring overtime to be authorized cannot create a "right" to one party inconsistent with the language of the Collective Agreement. "Even a long-standing error in the interpretation of a collective agreement may be corrected once it is discovered by one of the parties":**

***Canadian Union of Public Employees, Local 50 and the Corporation of the City of Victoria*** **(1974), 7 L.A.C. (2d) 239 (Weiler)**

**[87] A review of the Collective Agreement indicates that the word "authorized" is not a stranger to the parties. They used it in at least six articles: 2.01; 5.05; 7.01(e); 15.13; 17.10; 20.11. Thus, where the parties intended something to be authorized, they said so. Nowhere in Article 14 is there reference to the word "authorized" in dealing with the requirement for overtime payments. These are sophisticated parties with a mature collective bargaining relationship. They have negotiated numerous collective agreements since the Union was first certified in 1974. They know how to use the word "authorized". Had they intended to require overtime work and payment therefor to be pre-authorized, they would have said so in Article 14. The fact that a practice has developed of requiring overtime to be authorized does not assist the Employer in the face of the clear and unambiguous language of Article 14. Moreover, the practice is not a consistent practice and is open to admitted exceptions. Employees can submit and will be paid for overtime resulting from customer appointments and telephone calls extending beyond the end of a shift. In such cases, employees simply submit a claim and they are paid. Ms. Diver was paid for overtime which was not authorized (Exhibit 6(26)).**

**[88] There are several authorities which hold that it is the responsibility of the employer to enforce hours of work provisions within reasonable limits: *Hawker Siddley, supra; Canadian Union of Postal Workers v. Canada Post Corp.*, [1974] CLAD No. 401 (Jolliffe); *T-Line Services, supra*. The thrust of these cases is that it is for the employer to establish hours of work and a system which prevents unauthorized overtime being worked. If an employer does not wish employees to work overtime then it must not only order them to stop but see that they do. Otherwise, in the words of *T-Line Services*, "the employer runs the risk that through oversight or omission, workers are permitted to work overtime and thereby liability to pay overtime is triggered …" (para.33)**

**[89] I conclude that the Employer's defence that all overtime must be pre-authorized must be rejected. There is no such requirement in Article 14.04 of the Collective Agreement which provides compensation for all hours worked beyond regularly scheduled hours.**

## VII

**[90] Section 27 of the *Employment Standards Act*, RSBC 1996, c.113 (the "*Act*") requires that on every payday, an employer must give each employee a written statement for the pay period stating:**

> **(b) the hours worked by the employee**
>
> **.....**
>
> **(e) the hours worked by the employee at the overtime wage rate.**

**[91] It is clear from the evidence that the Employer has not complied with those provisions.**

**[92] Section 28(1)(d) of the *Act* requires that for each employee, an employer must keep records of:**

> **(d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis**

**[93] In this case, the Employer has not kept records of "the hours worked by the employee" beyond their regular scheduled hours.**

**[94] Compliance with those provisions is required whether or not the employee is covered by a collective agreement: *Ensign Chrysler Plymouth Ltd. and International Ass'n of Machinists & Aerospace Workers, Lodge 219*, [2002] B.C.C.A.A.A. No. 163 (Love).**

## VIII

**[95] Hours of work are used to determine if workers are entitled to receive Employment Insurance (EI) and for how long. The Record of Employment ("ROE") is the form that employers are required to complete for employees when they stop working or experience an interruption in earnings. The ROE provides information about the employee's work history, including insurable earnings and insurable hours. Insurable hours are the hours which an employee has worked and used to calculate insurable earnings and to receive benefits.**

**[96] By failing to record the actual hours worked by employees beyond their regularly scheduled hours, employees would not receive the appropriate insurable hours used to calculate insurable earnings for which an employee receives the appropriate EI benefits when laid off or terminated.**

## IX

**[97] Article 1.04 of the Collective Agreement requires the Employer to honour an employee's written assignment of wages for Union dues. Dues are based on one and one-half percent (1½%) of regular gross monthly earnings plus the same percentage for overtime pay earned and any compensation arising out of the employment**

**relationship paid pursuant to any agreement between the Union and the Employer.**

**[98] Had the employees been properly compensated for the hours worked beyond their regularly scheduled hours, the additional compensation would have resulted in additional dues paid to the Union consistent with the formula set out.**

## X

**[99] The Union also grounds its claim in unjust enrichment. The Union submits that, authorized or not, the Employer has been unjustly enriched as a result of receiving the benefit of the unpaid hours worked by employees beyond their regularly scheduled shifts and argues that the equitable principle of *quantum meruit* should apply in these particular circumstances. I do not find it necessary to analyze this submission in rich detail. It is sufficient to say that all of the essential elements for a finding of unjust enrichment are present in this case:**

**a) The employee has provided services to the Employer by performing its work.**

**b) Those services have benefited the Employer by the fact that the work was performed for the Employer's exclusive benefit.**

**c) Had the work been performed during the employee's scheduled hours of work or had the Employer directed that the work be performed, it would have been compensated.**

**d) The employee has suffered a loss corresponding to the benefit attained by the Employer.**

**e) There is no lawful reason why the work performed by the employee for the benefit of the Employer should not be compensated.**

**[100] In *Cominco Ltd. and United Steelworkers of America, Local 651,* [1990] BCLRBD No. 4 (McDonald), the IRC concluded that the concept of *quantum meruit* or unjust enrichment is available to arbitrators.**

**[101] *Re Ontario Hydro and Canadian Union of Public Employees, Local 1000* (1983), 11 L.A.C. (3d) 404 (Shime) assigned a rate of pay based on *quantum meruit,* commenting at p.5:**

> **That concept [*quantum meruit]* which requires a person to be paid what he or she reasonably deserves may be useful in this kind of wage case since it has long been a principle of law that: "If one bid me do work for him and do not promise anything for it, in that case the law implieth the promise and I may sue**

> **for the wages", Sheppard, *Action on the Case*, 2nd ed., p.50; Cheshire and Fifoot, *Law of Contracts*, 8th ed. (1972), pp.651-4.**

**[102] Compensation based on *quantum meruit* was awarded to teachers who performed extra work because maximum class sizes were exceeded: *Leeds Grenville County Board of Education and Ontario Secondary School Teachers' Federation (Class Size Grievance)*, [1999] OLAA No. 160 (Kaplan).**

**[103] In *Brantford (City) v. Canadian Union of Public Employees, Local 181 (Godden Grievance)*, [2000] OLAA No. 844 (Armstrong), the arbitrator concluded there had been an agreement or arrangement to compensate employees for overtime work and also held that the employee should be entitled to overtime on the basis of a second, relevant principle, namely *quantum meruit*:**

> **… Put simply, this doctrine means that where work is done or service performed and the benefit of the work or service is accepted by the employer or contractor, there is a presumption that the provider of the work or service will be paid – and where the amount of payment is not stipulated, that it will be based on a calculation that is fair and reasonable … (para.39).**

**In the present case, whether authorized or not, the Employer has benefited from the work performed by employees beyond their regular shifts but the employees have suffered a loss, i.e. no compensation for the work performed.**

**[104] *Belanger v. Quick Silver Transport Ltd.*, [2001] CLAD No. 154 (Connaghan) involved a trainee driver who did not receive payment for work done in the yard. It was held that work was provided and accepted by the employer and the employer should pay for the benefit received on a *quantum meruit* basis.**

**[105] I find that the Union has made out a case for unjust enrichment. The Employer failed to have a system in place to ensure that employees did not perform work beyond their regularly scheduled hours even though the Employer knew that certain employees continued to work beyond their scheduled hours even after being told not to do so.**

**[106] If employees had not performed the unpaid work, it would have to be performed during regular hours or by other employees. It is no defence to say the work was unauthorized. The Employer knowingly allowed the work to be done and received a benefit. The employees are entitled to claim the corresponding benefit, i.e. compensation for the work performed on the basis of *quantum meruit*.**

# XI

**[107] In conclusion, I find that the Union has made its case on two grounds. First, the Employer knowingly and actively violated the Collective Agreement, specifically Article 14.04, by allowing employees to work longer than the negotiated hours of work without compensation therefor. Second, the Union has made out a case of unjust enrichment. The grievance is allowed and the following Orders are made:**

**A. A declaration and order that the Employer is in breach of the Collective Agreement and, specifically Article 14, when it permits or condones employees, who in this case are Claims Adjusters, performing unpaid work for the Employer beyond the employees' regular scheduled shift.**

**B. An order that the Employer cease permitting or condoning employees performing unpaid work for the Employer either before or after their regular scheduled shift.**

**C. An order that the Employer take the steps necessary to ensure that no work beyond an employee's regular shift occurs, but if it does,**

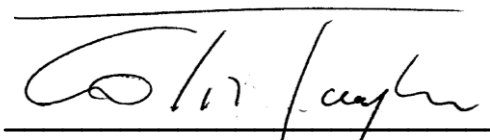
**that the employee is paid overtime in accordance with the Collective Agreement.**

**D. Nothing precludes the variation of the hours of work of a shift pursuant to Article 13.06 of the Collective Agreement as long as such variation does not result in unpaid overtime.**

**E. An order that employees who have performed unpaid overtime for the year 2010 be compensated and that the Union be paid the additional appropriate dues based on the additional compensation paid to members.**

**[108] I retain jurisdiction to deal with any issues arising out of the interpretation, application or implementation of this Award.**

**DATED at Vancouver, British Columbia, this 24th day of August 2012.**



**Colin Taylor, Q.C.**