IN THE MATTER OF AN ARBITRATION UNDER THE BRITISH COLUMBIA *LABOUR RELATIONS CODE*, R.S.B.C. 1996, C. 244

BETWEEN:

COAST MOUNTAIN BUS CO.

(the “Employer”)

-AND-

CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES, LOCAL 378
(MoveUP or COPE)

(the “Union”)

(Article 23.01(e) Formal Investigation Process)

ARBITRATOR:	Ken Saunders
APPEARANCES:	Gabrielle Scorer and Kiran Mangat, for the Employer
	Brian Nelson, for the Union
DATE OF AWARD:	September 9, 2026

I. INTRODUCTION

1 The parties agreed in negotiations for their 2011-2015 Collective Agreement that all unresolved formal “Discrimination” complaints “will be jointly investigated” by Union and Employer representatives.

2 The parties recorded that agreement under Article 23.01(e). Among other things, that provision contemplates investigations of complaints involving Union members, exempt employees, and employees from other bargaining units. Confidentiality is expected, subject to disclosure on a “need to know” basis. There is explicit reference to a “joint investigation team.” A joint report with recommendations is generated. Disagreements under that report are resolved by reference to an investigator.

3 Apart from these key features, the language provides little guidance about the procedure by which investigations are to be conducted or how disagreements about that procedure are to be resolved. The present dispute involves a difference about those matters.

4 The Union grieves that the Employer has acted in violation of Articles 2.02 and 23.01 of the parties’ Collective Agreement on three main grounds. First, it contends that the Employer insisted on excluding Union investigators from interviews with exempt employees. Second, it claims that the Employer seeks to regulate the Union investigator’s distribution of the Report or to discuss details of the complaint with other Union members. Third, the Union also asserts that the Employer denied access to a formal investigation when a complainant disagreed with the outcome of the informal complaint resolution process.

5 The Union seeks consequential declaratory relief, a cease-and-desist order, as well as compensatory damages. The parties agreed to bifurcate the determination of compensatory damages from the interpretation issues.

6 The Employer submits that it has acted in accordance with the parties’ mutual intent as disclosed by the language of Article 23.01(e) and extrinsic evidence. The Employer points to what it says were reasonable assumptions when the language was negotiated and the parties’ practice under that provision. In the alternative, the Employer argues that the Union has acquiesced to the impugned measures, so it would be inequitable for the Union to rely on its strict rights without fair notice. The Employer adds that its “Outline of Process,” which prompted the dispute, is not a policy issued under its management rule-making authority. Rather, it simply communicated the Employer investigator’s understanding of the agreed-upon past practice to the Union investigator. The Employer says if it is such a policy, then the Employer was within its rights to promulgate it.

7 This award is based on the parties' written submissions, including attached documents. Although the parties differ in their characterization of the events, the material facts are not in dispute. The parties are content to have the matter decided based on their submissions and attached documents, save for the disputed admissibility of some grievance procedure communications, which I conclude do not impact the outcome in any event.

II. BACKGROUND

8 Article 23.01(e) appears under Article 23 - Personal Rights. Article 23 begins with a standard acknowledgement that employees have the right to work in an environment free from bullying and harassment. The article defines workplace bullying and harassment and includes an informal resolution procedure. The issues in the present case arise under Article 23.01(d) and (e), which read in relevant part as follows:

> 23.01 (d) Informal Complaint Resolution Process
>
> i) Filing a Complaint
>
> If an employee believes that they have been bullied and harassed on the basis of any of the grounds noted above, the employee should:
>
> - Tell the alleged harasser(s) to stop, if possible;
> - Document the event(s), complete with the time, date, location, names of witnesses and details of the event(s) if possible;
> - If the complainant does not feel able to approach the alleged harasser(s) directly, or if, after being told to stop, the alleged harasser continues, the complainant should contact the designated Union or CMBC representative and/or the CMBC confidential harassment telephone line.
>
> ii) Investigation
>
> The Company and the Union agree that in some cases, the Parties may try to resolve a harassment complaint informally without a full investigation, for example, when so requested by the complainant.
>
> 23.01 e) Formal Complaint Resolution Process for Discrimination
>
> Formal Discrimination complaints involving either two Union members or a Union member and an exempt employee or an employee from another jurisdiction will be jointly investigated. The Union, in consultation with the Company, will appoint Union

harassment investigators. The Union designate will ensure that the Union harassment investigators are fully trained and that investigations are distributed in an equitable manner among them as far as is practicable. In the event of a cross-jurisdictional complaint, the Company may appoint a neutral third party investigator and will involve a harassment investigator from each Union jurisdiction.

Discrimination complaints that are proceeding to the Formal Complaint Resolution step must:

i) Be submitted in writing to the CMBC Manager responsible for Discrimination issues, or designate, and copied to the designated Union harassment representative;

ii) Where the complainant is a woman and the complaint involves sexual harassment or gender discrimination, the joint investigation team may consist of female representatives, unless otherwise requested.

iii) It is the intention of the Union and the Company that the investigation will commence within fifteen (15) days of the lodging of the complaint. An extension of time limits may be granted by mutual agreement.

The interview timing and location will recognize the need to maintain confidentiality.

The identity of the complainant, the alleged harasser(s), and the nature of the complaint will be kept confidential and only persons with a need to know will be informed of the complaint.

Records of the investigation, including interviews, evidence and recommendations will be securely maintained by both Parties.

Upon completion of the investigation, the parties will prepare a joint report with the investigations findings and overall recommendations. The complainant and the respondent will be advised of the findings and recommended actions, if appropriate, that result from the investigation. Such actions will be implemented as quickly as possible. Where there is a disagreement between the parties an independent harassment investigator may be retained to make final recommendations.

The Company and the Union will share the cost for the investigator equally.

This process in no way precludes the complainant's rights to seek

9 I add as background that in addition to employees excluded from the Union's bargaining unit, the Employer employs two other bargaining units represented by Unifor and CUPE Locals. Hence the reference under Article 23.01(e) to employees from other "jurisdictions" or "cross-jurisdictional" complaints.

III. BACKGROUND

A. Negotiations for the 2011-2015 Collective Agreement

10 The Employer proposed in negotiations to renew the 2011-2015 Collective Agreement that the parties "…meet to amend and establish language regarding workplace harassment and the joint investigation process." The stated intent was to "…formalize the process for joint harassment investigations."

11 The Union provided a full counterproposal.

12 The Employer responded with language that tracked its agreements with Unifor (then CAW) and CUPE. It is common ground that the underlying intent was to promote consistency in dealing with bullying language and harassment across the respective units.

13 The Employer asserts that Union negotiators knew how its language proposal had been administered under the CAW and CUPE agreements. Further, it appears the Union and the Employer completed one joint investigation before that round. The Union does not contest its negotiators held that knowledge although the parties dispute its significance.

14 Although language consistency and formalizing the process for joint investigations were stated goals, the submissions do not disclose that Union or Employer negotiators endorsed a past practice or represented that the agreed-upon language was premised on adopting a past practice, whether it be between the Employer and the Union or under the Employer's respective Collective Agreements with Unifor and CUPE.

15 The parties do not appear to have discussed the specific issues that prompted the Grievance during collective bargaining. The Union did not specifically ask to depart from the practice followed to date, and the Employer did not specifically represent that its language proposal was premised on adopting that practice. The language settled upon was that complaints were to be "jointly investigated."

16 The parties finalized the agreement based on the Employer’s language proposal, subject to a few minor changes.

17 The 2011–2015 Collective Agreement was ratified on March 10, 2014.

18 Since the 2011-2015 round, the parties negotiated four agreements with no material changes to the language at issue.

B. Pre-2014 Joint Investigation with the Union – Before joint investigation language was in place.

19 The Employer asserts that the parties participated in joint investigations (plural) of discrimination complaints before the 2011-2015 Collective Agreement was renewed. However, it documents only one pre-2014 joint investigation by Union and Employer investigators. The report is dated March 7, 2012. It is titled “Joint Investigation Report.” The report records under the heading “Process” that the parties “…conducted an extensive joint investigation process. Joint interviews were held with all COPE members interviewed as part of the investigation. The Manager Employee Services independently interviewed all of the non-COPE members interviewed in association with this investigation.”

20 So, it appears that the pre-2014 investigation was conducted as per the Employer’s position in this proceeding. It is unclear whether the parties adopted that procedure by agreement in discussions leading to the investigation, or whether the Union acquiesced to the Employer's unilateral imposition of that procedure.

C. Pre-2014 Joint Investigations with Other Unions

21 The Employer provides two examples of pre-2014 investigations of discrimination complaints by Unifor (then “CAW”) and Employer investigators. The reports from those investigations indicate that the Employer independently interviewed the excluded employees.

D. Post 2014 Joint Investigations involving Exempt Employees

a) General

22 Since 2014, an Employer investigator independently interviewed exempt employees under Article 23.01(e) investigations. Both Union and Employer investigators interview Union members. The Employer submits that the Article 23.01(e) investigations continued to happen as follows:

(a) The CMBC Manager responsible for discrimination issues or their designate would receive the complaint and determine if it concerned discrimination-based harassment;

(b) If the CMBC Manager determined that the complaint concerned discrimination-based harassment, they would inform the Union of their determination and request assignment of a Union joint investigator;

(c) The CMBC joint investigator would then propose the logistics of the investigation to the Union joint investigator for their agreement;

(d) The CMBC joint investigator would prepare the interview questions for exempt employee and unionized employee interviews and send them to the Union joint investigator for their input and agreement;

(e) Exempt employees and non-COPE/MoveUP employees were interviewed only by the CMBC joint investigator;

(f) Union members were interviewed by both CMBC and Union joint investigators;

(g) After independently interviewing an exempt employee, the CMBC joint investigator would meet with the Union joint investigator to summarize the exempt employee's interview;

(h) Interview notes from exempt employee interviews were not shared with the Union joint investigator;

(i) The CMBC joint investigator and the Union joint investigator would then meet to discuss their findings and recommendations;

(j) The CMBC joint investigator would prepare an investigation report and send the report to the Union joint investigator for their review and sign off; and

(k) The CMBC joint investigator would then prepare investigation conclusion letters to the complainant and the respondent with a copy to the Union joint investigator (at para. 50).

23 I note parenthetically that the Employer refers to the investigators under Article 23.01 (e) as "joint investigators" throughout its submission. I further add, on a separate

note, that Union members are entitled to representation by their Shop Steward at the Article 23.01(e) investigation interview.

24 The submissions disclose three investigations of discrimination-based complaints where the Employer investigator independently interviewed exempt employees. Those investigations happened in 2017, March 2019, and April 2021. A 2024 complaint led to the present dispute but was not investigated for reasons described below.

25 The Union did not object to the Employer investigator independently questioning exempt employees until 2021—a topic I will elaborate below.

26 I now pause to observe several important points. First, the Union does not deny that the first three post-2014 investigations happened as the Employer describes in the excerpt above. Second, apart from the independent interviews, the records of the first three investigations do not reveal an *explicit* consensus between the parties at the level of detail and on the number of points the Employer proffers in the above-cited excerpt. Third, the Union did not register an objection until 2021. However, the Union submits that Article 23.01(e) is clear and, in any event, the Union's conduct shows how it decided to act on a case-by-case basis, not that it agreed to the Employer's interpretation of Article 23.01(e). The Union submits in part:

> 19. First, the Employer has not established any binding past practice that could narrow the jointly negotiated language. What the Employer describes is not a mutually agreed process, but simply their preferred way of managing investigations. *The fact that the Employer chose to interview exempt or confidential employees alone does not mean the Union ever agreed that this was the meaning of "joint investigation." At most, the historical record shows they made logistical and operational choices made on a case-by-case basis. It was not a shared, unequivocal interpretation or understanding between the parties. The documented objections by the Union in 2021 and again in 2024 confirm that any alleged practice was neither consistent nor unopposed, which defeats the essential requirement for a past practice to carry interpretive value or weight.*
>
> 20. Second, even if some investigations were previously conducted, as the Employer claims, a "practice" cannot override clear contractual language. Article 23.01 requires a joint investigation and a joint report. There is nothing in the collective agreement language that excludes the Union from

> participating in interviews with exempt or confidential employees, or that allows the Employer to divide the investigation process into "Union Interview" and "Employer Interview" streams. Implied restrictions that were never negotiated constitute a prohibited amendment to the collective agreement and must be rejected.
>
> 21. Third, the confidentiality demands and requirements go well beyond Article 23.01. The collective agreement already sets a reasonable, "<u>need-to-know</u>" confidentiality framework designed to protect privacy while allowing both Investigators to fulfill their duties and responsibilities. (emphasis added)

b) The 2021 Complaint

27 I now turn to the material features of the 2021 complaint investigation. This investigation concerned an Article 23.01 complaint filed by a Union member. The complaint named an exempt employee as respondent.

28 The Employer investigator (Jenny Browning) told the Union investigator (Parm Sandhar) that they would interview the respondent independently because the respondent was an exempt employee. This was Mr. Sandhar's first Article 23.01(e) investigation. Ms. Browning emailed Mr. Sandhar that she would share what the exempt employee "…said during the interview." Mr. Sandhar asked why he would not attend the exempt employee's interview. Ms. Browning explained that procedure was the parties' practice. On February 17, 2024, Sandhar emailed then Senior Labour Relations Advisor, Tracy Ramlu (copy to Browning), as follows:

> Hi Tracy,
>
> I have an issue with this and I think you folks aren't following the language in 23.01(e). Jenny has advised me that I cannot sit in on the interview with the exempt manager. That makes no sense as I am a part of the joint investigation committee. No where in the language in 23.01(e) does it say that the Union is excluded from the interview process in JIC with an exempt employee
>
> Do I need to initiate a grievance on this matter????
>
> Jenny I'm sorry I'm not trying to be a pain, but the language in the CA must be followed. I am going to request that this investigation be put on hold until we get this issue worked out. I am requesting that

> as member of the Joint Investigation Committee I get to sit in the interview with the exempt manager, this is a best practice of conducting investigations. You folks aren't following the CA language and are messing with the integrity of the investigation.

29 Tracy Ramlu replied to Mr. Sandhar as follows:

> Hi Parm,
>
> There is no language requiring the Union joint investigator to be involved in the interview of management. Rather, the Union joint investigator only sits in the interviews with their own members. The Management investigator interviews exempt staff and shares the information with the Union investigator following the interview(s).
>
> I am not sure if you can reach previous MoveUP Representatives, but Unifor 111 and 2200 Executives can confirm this long-standing practice. You would also see this noted in the many reports we have issued over the years, maybe even decades.
>
> Jenny will be interviewing the manager. She will advise you what was said in the interview and it will be documented in the final report, which I believe you participate in.

30 The Employer provided an internal email authored by Tracy Ramlu dated February 19, 2021. That email records her conversation with Parm Sandhar, in which Sandhar acknowledged an established practice of independently interviewing exempt employees, and Mr. Sandhar represented that he would provide notice in bargaining to end it. The email reads in part:

> I talked to Parm about this yesterday and he acknowledged that we have established a practice here. Apparently BC Transit has the same language and the Unions participate in the interviews of exempt staff there, so Parm intends to give us notice at bargaining that we should be doing the same.

31 The Union does not dispute the truth of the contents of the email above, apart from its submission disputing the significance of Mr. Sandhar's conduct (reproduced in part above).

32 The 2021 investigation was concluded without further dispute and in accordance with the Employer independently interviewing the exempt employees.

33 The Employer submits (at paragraphs 176 and 177) that Mr. Sandhar had acted as a Union joint investigator in the 2017 complaint and had represented the Union in collective bargaining. However, it is unclear if that includes the round at which the disputed language was agreed to (his signature does not appear on the 2011-2015 agreement). This submission is not contested, albeit I cannot find Mr. Sandhar's name on records of the 2017 investigation.

34 In the next round of bargaining for the 2023 - 2026 Collective Agreement, the Union did not raise Mr. Sandhar's concerns or notify the Employer that it was terminating practices concerning the administration of Article 23 generally or Article 23.01(e) specifically.

C) The 2024 Complaint

35 The 2024 investigation involved HR Services Manager Christine Nontell acting as the Employer investigator and Andrew Cheverie acting as the Union investigator. This was Mr. Cheverie's first participation in an Article 23.01(e) complaint.

36 On or about August 27, 2024, Ms. Nontell notified Mr. Cheverie by email that an Article 23.01(e) investigation was unnecessary because the complaint did not disclose a case of Discrimination. The Employer was nonetheless prepared to retain a third party to investigate. Mr. Cheverie disagreed with Ms. Nontell's assessment and insisted that a joint investigation proceed.

37 On September 6, 2024, Ms. Nontell reiterated her stance in an email to Mr. Cheverie. Attached to Ms. Nontell's email was the following memorandum titled "Bullying and Harassment Joint Investigations Outline of Process." Ms. Nontell explained the attachment as follows:

> As we have not done a joint investigation together, I have included a document that outlines the joint investigation process and the role/responsibilities of the person identified as the Union investigator.

38 The attached memorandum that prompted the present dispute reads as follows:

> Bullying and Harassment Joint Investigations
>
> Outline of process
>
> 1. Once a complaint from a unionized employee has been received and CMBC HR has determined it is discriminatory, HR will contact the appropriate Union representative of the complainant.

2. The Union, in consultation with the Company, will appoint a Union harassment investigator. Only fully trained investigators will be involved in an investigation. All investigators will remain consistent throughout the investigation to ensure consistency and confidentiality.

3. CMBC HR will meet with the identified Union Investigator to review and discuss the complaint, including interview scheduling, location etc.

4. CMBC HR will draft questions for the complainant, and a copy will be given to the Union investigator before interview(s).

5. Meeting Formalities:

- Joint interviewers sit side by side.
- The Union Investigator is a Joint Investigator; Union Joint Investigator explains their role in the investigation process and that they are an impartial investigator in the process.
- Unionized employees being interviewed during the joint investigation will be provided with Union representation. The complainant should have a Union rep that is different than the representative(s) representing any other employees during the investigation.
- Representatives representing employees during the investigation do not have access to the Investigators' information, including advance questions, evidence, recommendations, etc.
- Management Investigator typically takes the lead asking questions, but the Union Investigator will also be asking questions (which is why the Investigators are sitting side by side as partners throughout this process).

6. Union Investigator does not attend/participate when interviewing exempt employees. CMBC HR can provide a summary of the interview afterwards but will not share the notes.

7. Once all interviews have been completed, the Joint Investigators meet and discuss the investigation and recommendations.

8. CMBC HR will draft the findings report with recommendations. This report is shared with the Union Investigator to agree and sign off on.

- The Union Investigator is encouraged to not distribute the report but may be required to share it with the Union President <u>only once the report is signed off on</u> <u>and finalized</u> (i.e. if that is the Union's required process).

9. CMBC HR files a copy of the report and drafts closure letters for the complainant and respondent (templates). The letter to the complainant advises that a thorough investigation was completed, whether there were findings of bullying and harassment (or misconduct if applicable) or if there was no evidence or findings of bullying and harassment.

10. Depending upon the circumstances, the Joint Investigators may decide to meet with the Complainant to advise of the conclusion.

Confidentiality

- Investigators must treat allegations, investigations, and interviews as strictly confidential.
- Every effort must be made to keep the details of the complaint confidential; **investigators are not to discuss or release details of the investigation with anyone while the investigation is in process**.
- Employee's confidentiality must always be protected; names or other identifying factors of the complainant, respondent or witnesses should not be disclosed
- Keep meetings & interview dates/times private and discreet in calendars
- Investigators must maintain confidentiality of investigation details
- Union Investigators are not to discuss the investigation with other union members or representatives. Following closure of the investigation, and issuing of the report, the Union Investigator may share the final report with their President ONLY.
- Confidentiality of documentation: statements, meeting notes, Interview questions must be kept confidential and are not to be shared or discussed with anyone other than co-investigators.

Roles and Responsibilities of Investigators in a Joint Investigation

- Each investigator must be impartial and have no direct involvement with the matter under investigation.
- The investigator must be able to consider the allegations openly.
- Ensure investigator independence: how the investigation is conducted or what conclusions are reached is determined by those conducting the investigation, not any other parties. "Other parties" includes Employer or Union representatives not acting as a Joint Investigator.

- Impartiality: the investigator must not have a personal stake in the outcome of the investigation. Conclusions are based on an unbiased assessment of the information available during the investigation. An investigator must be impartial and ensure they act in a way that does not provide the perception that the investigator is representing anyone's interests.
- Investigators must also ensure the investigation is conducted in as timely a manner as possible. Timeliness will depend on the circumstances, including the number and availability of witnesses, the complexity of the issues, and the number of factual issues in dispute.
- Thoroughness: the investigators must support a thorough investigation, but not exceed the terms of reference for the investigation. For example, thoroughness does not require that the investigator interview a witness if the information suggests that the individual would not have any direct knowledge of issues relevant to the allegations. In other words, thoroughness does not require that an investigator turn over every stone. It only requires the investigator turn over stones that might cover information pertinent to the allegations.

39 Mr. Cheverie objected by email dated September 12, 2024. He objected to the Employer's decision not to investigate, any restriction on a Union investigator sharing their notes or relevant documents and the independent interviews of exempt employees. Mr. Cheverie wrote in part as follows:

> Thank you for preparing the list of investigators.
>
> I've given this proposal consideration and taken it away for discussion. The union is not agreeable to the employer's proposal to have this matter investigated by a third party.
>
> Thank you for providing the Bullying and Harassment Joint Investigations document that you have prepared.
>
> Regarding the section on confidentiality, I can assure you that the union will attempt to silo this investigation to the fullest extent possible. I can also assure you that a job steward's right to escalate matters to a union representative and share their notes and any other relevant documents will not be fettered by an employer policy and any attempt by the employer to do this will be promptly resisted via the grievance process and beyond.
>
> The union's expectation is that this matter, in its entirety, be jointly investigated. The union's investigator will attend and participate when interviewing exempt employees. If the employer wishes to assert that the union does not have the right to attend, the employer may do this at a grievance meeting. Please note that past practice can act as an interpretive aid. The union has previously participated in investigations in which exempt personnel were named as respondents pursuant to Article 23 and will rely on supporting evidence.
>
> If the employer wishes to train the selected job stewards, the union fully supports this. If the training contains content that suggests they cannot seek the advice of their Union Representative or suggest their right to escalate concerns is in some way limited, the union will grieve.
>
> In summary:
>
> - The union does not agree to use a third party and expects this matter to be jointly investigated
> - The employer will not attempt to limit the union investigator's right to seek counsel or escalate concerns to their Union Representative
> - The union will be present while exempt employees are being interviewed.
> - The employer may train union investigators. This training may not suggest the investigators and stewards are in some

> way limited in their ability to seek counsel or escalate concerns to their Union Representative.
>
> - The employer will change the Bullying and Harrassment Joint Investigations document accordingly or will refrain from distributing it.
>
> …

40 The Union filed the Grievance on September 25, 2024.

IV. SUMMARY OF THE PARTIES' POSITIONS

A. The Union

41 As noted above, the Union's central thesis is that the Employer's interpretation of Article 23.01(e) and the impugned "Outline of Process" restricts the Union's participation in ways that are unsupported by the language of that provision. It says that finding otherwise would amount to amending the parties' bargain. The Union submits that the language admits no ambiguity, as the investigation is a joint exercise without qualification. The Union submits in part:

> 56. […] The alleged "silence" in Article 23.01 does not create ambiguity, nor does it authorize the Employer to rely on extrinsic evidence to rewrite the jointly negotiated requirement that discrimination complaints "will be jointly investigated." Broad contractual language is not a gap; it is a deliberate allocation of shared responsibility. The absence of step-by-step mechanics does not diminish the clear obligation that both parties participate fully in the investigation, including all witness interviews.

42 Further, the Union argues that the "need to know" confidentiality proviso is not offended if the investigator communicates with Union representatives further to the discharge of their statutory role.

43 Accordingly, the Union argues that past practice has no bearing as an aid to interpretation, as it can only clarify an ambiguity, not create rights or contradict the Collective Agreement. It says that the Union's knowledge of how other unions administered similar language when it was adopted, or how it agreed to conduct the pre-2014 and the post-2014 investigations, does not disclose its agreement to the Employer's interpretation, and that the Union is not estopped from asserting its rights to participate at interviews of exempt staff or its other claims.

44 The Union cites the following authorities in support of its position, all of which I have considered: *KVP Company Limited v. Lumber and Sawmill Workers Union, Local 2537* (1965), 16 L.A.C. 73 (Wren, Robinson and Hicks) ("KVP"); *Fording Coal Limited v. USWA Local 7884 [2002] B.C.C.A.A.A. 9* (Hope); *Irving Pulp and Paper Limited v. CEP, Local 30* [2013] SCC 34; *Pacific Press v. Graphic Communications International Union, Local 25–C*, [1995] B.C.C.A.A.A. 637 (1995), (Bird) ("Pacific Press"); *Health Employers Association of British Columbia v. Hospital Employees Union*, [2002], B.C.C.A.A.A. 130 (Gordon); *Insurance Corporation of British Columbia v. Canadian Office and Professional Employees Union, Local 378* (Article 12.07(e)), [2015], B.C.C.A.A.A. 74 (Keras), at paragraph 26 and 27; *Mountain Equipment Co-operative v. Retail Wholesale Union, Local 580 (Xu)*, [2015], B.C.C.A.A.A. No. 18, 122 C.L.A.S. 155 (Keras); *Southern Railway Limited v. Canadian Union of Public Employees, Local 7000*, [2010], 198 L.A.C. (4th) 283 (Germaine); *Vancouver Island University and Vancouver Island University Faculty Association (Thiessen)*, [2013], B.C.C.A.A.A. 93 (McConchie); *Board of School Trustees, School District 57 (Prince George) v. International Union of Operating Engineers, Local 858,* BCLRB 41/76 (Baigent); *University of British Columbia and Canadian Union of Public Employees, Local 116,* [1977] 1 CLRBR 13 (Weiler); *Nanaimo Times Limited and Graphic Communication International Union, Local 525–M,* BCLRB B40/96 (Hall); *Federated Co-operatives Limited and International Woodworkers of America - Local 1-417,* BCLRB B39/94 (Bruce); *Andres Wines (B.C.) Ltd. and United Brewery and Distillery Workers, Local 300*, (1978), 16 L.A.C. (2d) 422 (P.C. Weiler) (B.C.L.R.B.); *University of British Columbia and Canadian Union of Public Employees, Local 116,* (1976) 1 CLRBR 13 (Weiler); *University of British Columbia and Canadian Union of Public Employees, Local 116,* BCLRB 42/76, [1977] 1 CLRBR 13; *Nanaimo Times Limited and Graphic Communication International Union, Local 525-M,* BCLRB B40/96 (Hall) ("Nanaimo Times"); *Federated Co-operatives Limited and International Woodworkers of America - Local 1-417*, BCLRB B39/94 (Bruce); *Insurance Corporation of British Columbia v. Office and Professional Employees Union, Local 378*, (2002), 72 C.L.A.S. 87 (Germaine); *Insurance Corporation of British Columbia and Canadian Office and Professional Employees Union, Local 378 (Unpaid Overtime Claim*), [2012], B.C.C.A.A.A. No. 112, 112 C.L.A.S. 36, 223 L.A.C. (4th) 306 (Taylor); *Insurance Corporation of British Columbia v. Canadian Office and Professional Employees Union, Local 378*, [2014] (Diebolt); *John Bertram & Sons v. International Association of Machinists, Local 1740 (Greenwood Grievance)*, 1967 O.L.A.A. No. 2 (Weiler) ("John Bertram"); and *Okanagan College v. Federation Post Secondary Educators (FPSE)*, [2023] B.CC.A.A.A. 147 (Saunders) [2023] C.L.A.S. 970 ("Okanagan College").

B. The Employer

45 The Employer submits that the impugned "Outline of Process" did not introduce a new policy. Rather, it recorded the parties' practice in administering Article 23.01(e) since its adoption. Accordingly, the document is not eligible for arbitral review under

the *KVP* criteria and, if it were, the Employer's position is both consistent with the Collective Agreement and reasonable.

46 The Employer observes that Article 23.01(e) provides few details about how it is to be applied and that extrinsic evidence concerning the surrounding circumstances at the time the language was adopted, and the parties' practice, reveals a consensus about how the provision is to be applied.

47 The Employer emphasizes that although the language provides for a joint investigation, it does not flesh out how that joint investigation is to be conducted. The Employer submits in part:

> 136. The Employer says that the fact the investigation process referred to in Article 23.01(e) is described as "joint" is insufficient for the Arbitrator to determine what the parties intended the joint investigation process to entail and which investigators would be involved in which parts of the process and in what manner. In particular, the Employer says the language on its face is insufficient to allow the Arbitrator to find that the parties intended and agreed that both investigators would attend and participate in interviews of exempt and non Union employees as asserted by the Union.
>
> 137. The language of the provision at issue does not clearly and unequivocally establish whether the Union and Employer investigators will interview non Union and exempt employees together or not. In these circumstances, it is appropriate for the arbitrator to consider extrinsic evidence.

48 The Employer further argues that the Union knew Union investigators did not participate in the interviews of exempt staff at the pre-2014 joint investigation and that if the Union wanted that right it could have raised it when Article 23.01(e) was bargained. Further, the language that was ultimately agreed to was openly intended to promote consistency across the Employer's bargaining units. The Employer observes that the language of those other agreements does not say which investigators will attend the interviews of exempt employees. The Employer submits, in part:

> 152. It is also the case that when the parties negotiated the language, joint investigations had been conducted by CMBC and CAW 2200 and COPE 378 and CMBC. In these joint investigations, CMBC's joint investigator interviewed exempt employees alone. These are the investigations referred to at

> Tabs 11 and 12 of the Employer's Book of Documents. The Union and the Employer were aware of how the joint investigation process was being conducted when they negotiated the language of Article 23.01(e).

49 The Employer also points to the fact that the post-2014 investigations followed the procedure outlined above. It argues that past practice sheds light on what was mutually intended.

50 In summary, the Employer argues that evidence of past practice discloses that the parties mutually intended Article 23.01 to operate as it contends: *Greater Victoria School District No. 61 v. British Columbia Teachers' Federation (Piasentin Grievance)*, 2010 B.C.C.A.A.A. No. 137 (Gordon) and *John Bertram*. It submits that the words of that provision do not clearly establish which investigator will attend interviews with exempt staff—no language spells that out. Further, the Employer submits that responsible Union representatives (present at bargaining) and Employer representatives conducted the investigations in accordance with the Employer's process outline. Accordingly, it says the Union acquiesced to the Employer's interpretation. The Employer adds that the Union has not identified a single instance in which a Union investigator attended an interview with exempt employees.

51 The Employer also points in support to what it characterizes as the work environment, labour relations realities and common-sense considerations. It says that allowing a Union representative to question an exempt employee would be contrary to reasonable expectations and be so unusual as to require the clearest language. It adds that the parties likely intended that both the Union investigator and the Employer investigator maintain confidentiality. Further, the Union's position on confidentiality and disclosure violates the "need to know" threshold recorded under Article 23.01(e). It says the Union's position is flawed insofar as it equates the role of the Union investigator to that of a job steward when in fact, the investigator is expected to adopt a nonpartisan stance.

52 The Employer also contends that adopting its interpretation does not amend the agreement. Rather, it gives effect to the parties' mutual intent for the operation of the disputed language and that granting the Union's interpretation would confer it important rights that were never bargained. See *Vancouver (City) Fire and Rescue Services v. Vancouver Fire Fighters' Union, Local 18 (Driver's License Medical Exams Grievance),* [2016] B.C.C.A.A.A. No. 21 (McPhillips), at para. 104.

53 Alternatively, the Employer submits that if I accept the Union's interpretation, the Union is estopped from asserting its strict rights due to the Union's acquiescence to the Employer's practice, including Mr. Sandhar's conduct: *Interior Forest Labour*

Relations Assn. and United, Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied and Industrial Service Workers International Union, Local Unions 1-417, 1-424, and 1-405 (Dues and Remittances Grievance) [2020] B.C.C.A.A.A. No. 119 (Fleming) at para. 149-153 ("ILFRA"); *ICBC and Move-Up Together*, [2018] B.C.C.A.A.A. 10 (McEwen). The Employer submits, in part:

> 214. The law of estoppel in the labour relations context is well settled. To establish estoppel, there must be: (1) a representation by words or conduct; (2) reasonable reliance on that representation; and (3) unfairness if the party were permitted to resile.
>
> 215. Each of these elements is satisfied here. For more than a decade, the Union's joint investigators consistently accepted a process in which CMBC interviewed exempt employees alone, later sharing the results with the Union and providing the first draft of the investigation report. Even Mr. Sandhar acknowledged the practice and vowed that the Union would raise the issue during the next round of collective bargaining.
>
> 216. The Union's conduct over many years amounts to a clear representation by conduct that the Union regarded the procedure as consistent with Article 23.01(e). CMBC relied on this representation, in particular, by not attempting to bargain language which would have expressly stated that only the CMBC joint investigator would interview exempt and non Union employees during investigations of complaints which alleged human rights based discrimination.
>
> 217. At no time between the 2011-2015 round of bargaining and the Grievance did the Union put the Employer on notice it wished to revert to what it now says is the correct interpretation and application of Article 23.01(e). The Employer has been prejudiced by the loss of an opportunity to bargain language regarding the joint investigation process. It is a well-established principle of arbitral jurisprudence that the lost opportunity to bargain constitutes the detrimental reliance necessary to establish the equitable concept of estoppel: see for example, Port Moody (City) v Port Moody Fire Fighters Union (International Association of Firefighters, Local 2399), 2012 B.C.C.A.A.A. No. 9 (Burke) at para 52; and Canadian Paperworkers' Union, Local 298 v. Eurocan Pulp and Paper

> Co. (Meal Ticket Grievance), 1990 B.C.C.A.A.A. No. 23 (Hickling) at para 69.

…

V. ANALYSIS AND DECISION

A. General Principles

54 My task is to determine the parties' difference based on their mutual intent, as disclosed by the language of the Collective Agreement, read in accordance with the canons of interpretation. See *Pacific Press v. Graphic Communications International Union, Local 25-C*, [1995] B.C.C.A.A.A. No. 637 (Bird). An instructive restatement of interpretive principles also appears in *HEABC and HEU (Rothenburger Grievance),* [2013] B.C.C.A.A.A. No. 21 (Gordon), at para. 82, as follows:

> The primary resource for interpretation is the collective agreement. The search for the purpose of a particular provision may serve as a guide to interpretation. Significant benefits and obligations are likely to be clearly and unequivocally expressed in the language used by the parties. When interpreting two provisions, a harmonious interpretation will be preferred to a conflicting one. Where possible, all words and provisions should be given meaning. Words in the agreement should be viewed in their normal and ordinary sense unless that would lead to some uncertainty or inconsistency with the rest of the collective agreement or unless the context establishes that the words were used in another sense. The words used in the agreement should be read in the context of the phrase, sentence, provision and collective agreement as a whole. When faced with a choice between two linguistically permissible interpretations, the reasonableness and administrative feasibility of each may be considered. Additionally, the parties are presumed to be aware of the relevant jurisprudence.

55 The Employer relies on *Sattva Capital Corp v Creston Moly Corp,* 2014 SCC 53 ("Sattva") as authority for the proposition that the interpretation of Article 23.01(e) must be informed by the surrounding circumstances known to the parties at the time that language was agreed to. It relies on the Court's observation that "Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning." (*Sattva,* at para. 47)

56 I hasten to add, however, that the Supreme Court discussed the consideration of surrounding circumstances as a tool to interpret the contract language. Thus, the goal is to maintain fidelity to the words the parties chose to describe their bargain. The Supreme Court described the interpretive exercise as follows:

> 57 While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B. C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).

57 As I observed in *Okanagan College,* the approach enunciated by the Court in *Sattva* coincides with the longstanding policy mandated under Part 8 of our *Labour Relations Code, R.S.B.C. 1996, c. 244* (the "Code"). See Section 82(2) of the Code. The direction to read language with due regard for its collective bargaining context was discussed in an early policy decision of our Labour Relations Board in *Simon Fraser University*, [1976] 2 Can. L.R.B.R. 54 (p. 5 of 9 Quicklaw) ("*SFU*"):

> But the major premise of Section 92(3) [now 82(2)] is *legislative recognition of the special character of the interpretation of collective agreements.* A seriously contested dispute about the meaning of such an agreement can rarely be settled simply by the literal construction of the language on the face of the document. *The practical features of collective bargaining produce a distinctive cast to collective agreements; in turn, this requires a complementary approach by the arbitrator to the task of interpretation.* (emphasis added)

58 The "complementary approach" described by Chair Weiler in *SFU is* also captured by arbitrator McPhillips' summary of interpretive principles in *BC Hydro and Power Authority and IBEW, Local 258 (TNC Wage Adjustment)* 2018 B.C.C.A.A.A. No. 83, at para. 60:

> 60. In *UBC* and *CUPE, supra*, the B.C. Labour Relations Board stated that "it is important in industrial relations that the arbitrator 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."*

59 Our Labour Relations Board's decision *i*n *Nanaimo Times Ltd. and GCIU, Local 525-M,* BCLRB No. B40/96, at paras. 28-32, provides a useful and often cited restatement of principles guiding an arbitration board's consideration of extrinsic evidence as an aid to interpretation. To summarize, such evidence may be considered, along with the words of a disputed provision, both to determine if the words are ambiguous and to resolve any resulting ambiguity, but only to find the parties' mutual intent behind the words of their bargain. If no ambiguity is found, the language governs the outcome. The goal is to decipher the parties' mutual intention for the disputed words, given the extrinsic evidence, including surrounding circumstances and the exchange of bargaining proposals. Therefore, extrinsic evidence may be a useful aid but only to disclose the parties' mutual intent behind the language, not to contradict it.

60 Past practice can also aid interpretation. The classic statement of guiding principles is found in *John Bertram & Sons v. International Association of Machinists, Local 1740 (Greenwood Grievance)*, 1967 O.L.A.A. No. 2 (Weiler) at paras. 12-13. In that case, it was held that past practice can be a valuable tool when the following conditions are met: 1) the language is ambiguous; 2) there is conduct by one party unambiguously based on a particular interpretation; and 3) there is acquiescence to the conduct (express or constructive) by opposite persons with authority to administer the agreement: *John Bertram & Sons v. International Association of Machinists, Local 1740 (Greenwood Grievance)*, 1967 O.L.A.A. No. 2 (Weiler) at paras. 12-13.

61 As noted under the non-exhaustive restatement of interpretive principles in *Pacific Press,* past practice and other forms of extrinsic evidence are helpful if it reveals the parties' mutual intention behind the disputed language, not to contradict or add to those words. The general rule is that "missing" words should only be implied when necessary to implement the parties' mutual intention when the words chosen are ambiguous, and two interpretations are plausibly available, or to harmonize the agreement with the minimum legislative requirements, such as employment standards or human rights legislation. See *Rio Tinto Alcan Inc. v. Unifor, Local No. 2301*, 2015 B.C.C.A.A. No. 80 (McConchie), at paragraph 70; citing *Canroof Corp. and TC, Local 230 (Group Grievance)*, (2013), 114 CLAS 288, 231 L.A.C. (4th) 418 (Surdykowski), at paras. 4-5.

B. Interpretation

62 I begin with my conclusions about the meaning of the disputed language of Article 23.01(e), having considered the agreed-upon language, and the parties' positions

concerning the extrinsic evidence. I will address my interpretive findings, followed by my consideration of the extrinsic evidence and the Employer's alternative application for equitable relief.

63 One will recall that Mr. Cheverie and Ms. Nontell differed about whether the 2024 complaint was eligible for investigation under Article 23.01(e).

64 The language of Article 23.01(e) is clear in that all unresolved formal “Discrimination” complaints “will be jointly investigated.” “Discrimination” is a defined term: Article 23.02(a). The language says there “will” be a joint investigation. This clearly indicates that the parties did not intend a joint investigation to be an optional response to unresolved formal complaints, provided they concern “Discrimination.” See also the last sentence of Article 23.01(d)(ii).

65 Given the required joint nature of the process, a dispute about whether a complaint qualifies for investigation under this language is not a matter to be unilaterally decided by either Investigator. Absent agreement to an alternative dispute resolution process, differences about whether a complaint meets the prerequisites to begin a joint investigation are ultimately subject to resolution by grievance arbitration.

66 In my judgement, the preceding declarations under this first point are sufficient at this stage of the adjudication to provide the parties with guidance concerning the difference between Mr. Cheverie and Ms. Nontell about whether the 2024 Complaint met the prerequisites for joint investigation.

67 I now address the question about whether the Employer is entitled to independently question exempt employees and whether the “need to know” confidentiality provision permits the Investigators to consult outside counsel or resources independently.

68 Article 23.01(e) defines the scope of its application to complaints involving Union members, exempt employees and employees from other jurisdictions (bargaining units). The commitment to investigate such complaints is recorded in plain, unencumbered terms: they “will be jointly investigated.” I note that the parties refer to the “joint investigation team” under Article 23.01(e)(2).

69 Although the parties chose not to spell out the procedure for an Article 23.01(e) investigation, I find that provision clearly sets out its defining elements. At a minimum, the investigation procedure is a joint exercise by the two investigators working as a team to achieve their assigned mandate under Article 23.01. Thus, an Article 23.01(e) joint investigation contemplates non-partisan cooperation by trained individuals acting reasonably in a quasi-adjudicative capacity. The agreed-upon process is inquisitorial and, apart from listed restrictions, the language defining the

"Formal Complaint Resolution Process for Discrimination" was intentionally cast in the following broad terms: "jointly investigated." It necessarily follows that whatever process is adopted must result from joint decision-making between the two investigators, working as equals, lest the investigation lose its joint character. Simply put, a "joint" investigation does not admit latitude for the Investigators to impose procedural details unilaterally. I find the language is unambiguous in these key respects.

70 Article 23.01(e) refers "a disagreement between the parties" to an independent harassment investigator, but it appears that measure is reserved for a disagreement between the Investigators in their report containing "findings and overall recommendations." So, absent agreement to an alternative process, an impasse about the investigation procedure leading to that report is ultimately subject to resolution by grievance arbitration. I express no conclusion about the applicable standard of arbitral review.

71 I now turn to the question of confidentiality. As set out above, Article 23.01(e) contemplates a joint investigation by two trained investigators working as a non-partisan team in a quasi-adjudicative role to fulfill the assigned mandate. It is quasi-adjudicative because the process requires producing a report applying Article 23. 01 to the evidence. The individual complainant and respondent are entitled to their own union representation. The joint, team-based nature of this process precludes the investigators from acting as advocates in a representative capacity.

72 In this context, the "need to know" confidentiality proviso operates to maintain the integrity of the joint investigation process. Although it may seem obvious, "need to know" sets necessity as the threshold to justify disclosure. This is a very high bar.

73 In view of the preceding considerations, I find it contrary to the joint, team-based character of the process for either investigator to decide to make disclosures under the confidentiality proviso unilaterally. Whether a disclosure is made, for what purpose and to what extent, and whether the procedure will entail individual consultations with outside parties must result from transparent, joint decision-making between the two trained investigators, working in a relationship of equals. Otherwise, the investigation loses its agreed-upon joint, team-based character. As set out above, a "joint" investigation does not admit latitude for unilateral decision-making about procedural details. As a corollary, the Article 23.01(e) process does not permit an investigator to unilaterally expand the inquiry to include secret communications, secret advice, or other forms of individual information gathering. I find the language is unambiguous in these key respects.

74 In my judgement, the preceding declarations are sufficient at this stage of the adjudication to provide the parties with guidance concerning the difference between

Mr. Cheverie and Ms. Nontell about whether the investigation procedure permits individual interviews and individual decision-making under the confidentiality proviso.

C. Article 2.02

75 Having set out my interpretive conclusions, I now address the Union's claim that the Outline of Process violates Article 2.02 of the Collective Agreement. Article 2.02 reads as follows:

> 2.02 Policies and Procedures
>
> In cases where the Employer's policies and procedures conflict with the terms and conditions of the Collective Agreement, the Agreement will prevail.

76 Article 2.02 is a type of "inconsistency clause." It declares the arbitral rule that the Employer policies issued under its right to manage are subordinate to the Collective Agreement. I question whether such a declaratory provision can be the subject of a freestanding violation. Of course, the Union is correct that management policies consistent with the Collective Agreement may be subject to arbitral review. But a dispute of that nature concerns the Employer's exercise of the management rights clause, not Article 2.02. See *KVP.* In any event, I do not find that the Outline of Process is fairly characterized in context, as an Employer policy or procedure as contemplated under Article 2.02.

77 As noted above, Mr. Cheverie and Ms. Nontell stand in a relationship of equals. They were responsible for jointly developing a procedure for the 2024 Complaint. Neither was entitled to impose procedural terms unilaterally. In this context, I find Ms. Nontell's Outline of Process is her proposed method of proceeding, based on her understanding of how the process had unfolded in the past. It bears repeating that Ms. Nontell presented the Process Outline in precisely that vein:

> As we have not done a joint investigation together, I have included a document that outlines the joint investigation process and the role/responsibilities of the person identified as the Union investigator.

78 Thus, the document was identified as an outline intended to inform the Union of how Ms. Nontell believed *the parties had agreed to proceed in the past*, not as a unilateral dictate or management policy. It was an outline. The subjects made sense insofar as they represent matters a reasonable investigator might want to settle upon before proceeding. Mr. Cheverie was free to object or counter with his own suggestions as

he was certainly not bound by what Ms. Nontell had to say. If the parties ultimately reached an impasse, the Union could refer the matter to arbitration, as has occurred.

79 I find it unnecessary to reach additional conclusions about the contents of the Outline of Process as the parties are both ultimately unsuccessful concerning its contested aspects. As set out above, I find that Article 23.01(e) requires joint decision-making about the investigation procedure to be adopted in each case, including whether a disclosure is made and whether the Investigators will consult outside parties individually. And as explained below, the Union is estopped from insisting that the Employer refrain from independently interviewing exempt employees.

D. Extrinsic Evidence

80 I have considered the circumstances surrounding the parties' original agreement to Article 23.01(e) in reaching the preceding interpretive conclusions. I have also considered the parties' practice in administering that provision.

81 It appears the parties knew, from administering a joint investigation between themselves (absent applicable language) and from the practice under the Employer's other collective agreements, that the Employer independently interviewed exempt employees under equivalents to Article 23.01(e) investigations.

82 Considered from an objective standpoint, I find this evidence is at best equivocal as an aid to determining whether the parties mutually agreed that this practice is the procedure invariably dictated by the language of Article 23.01(e). As the Union essentially points out, given the required joint character of such investigations and the absence of explicit procedures, this practice is reasonably understood from an objective standpoint as the product of a joint consensus about how best to proceed on a case-by-case basis. No one explicitly discussed at the bargaining table that this practice is required or incorporated as a requirement under the agreed-upon provision. Moreover, the language is clear insofar as the "Formal Complaint Resolution Process for Discrimination" is "joint" and team-based" in character. The authorities direct that surrounding circumstances and other forms of extrinsic evidence can clarify, but not go so far as to contradict, the unambiguous meaning of the text.

83 The Employer submits that it is unlikely it would agree to have a Union investigator attend interviews of its exempt staff. I find the Employer bargained for this potential outcome given that Article 23.01(e) expressly contemplates a joint investigation involving exempt staff.

84 The parties' conduct in administering Article 23.01(e) during the post-2014 investigations submits to the same analysis above regarding surrounding

circumstances. To reiterate, from an objective standpoint, I find that until the 2021 Complaint, the parties' conduct was at best equivocal as an aid to determining whether the language admits ambiguity or the parties mutually agreed that the procedure adopted for each investigation is what the language of Article 23.01(e) invariably dictates for every future investigation. As set out in *John Bertram,* the past conduct must be unambiguously based on a particular interpretation of the provision to be a useful aid to interpretation. I do not find that conclusion can be sustained in the present case.

E. Estoppel

85 The Employer stands on firmer ground with its estoppel claim.

86 Arbitrator Hall set out the elements of the doctrine of estoppel in *ICBC v. OPEIU, Local 378* [2002] B.C.C.A.A.A. No. 109 (Hall), at para. 40, as follows:

> The purpose of the modern doctrine of estoppel is to avoid inequitable detriment. An estoppel may arise where: (a) intentionally or not, one party has unequivocally represented that it will not rely on its legal rights; (b) the second party has relied on the representation; and (c) the second party would suffer real harm or detriment if the first party were allowed to change its position. The requirement of unequivocal representation or conduct is a question of fact, and may arise from silence where the circumstances create an obligation to speak out. The notion of reliance must be assessed from the perspective of the party raising the estoppel. In the labour relations context, the element of detriment may be satisfied by a lost opportunity to negotiate: *Versatile Pacific Shipyards*, supra, at pages 270 – 71.

87 I have no difficulty concluding that the Employer has made out the above-noted elements based on Mr. Sandhar's conduct in handling the 2021 Complaint. Mr. Sandhar was a responsible Union official. He objected to the Employer interviewing the exempt employees individually. His objection was explicitly based on a reading of Article 23.01(e). When informed of the Employer's position that the parties were bound by past practice in that regard, he unequivocally represented that the Union would not rely on its rights under Article 23.01(e) by not acting on that objection, instead leaving the message with the Employer that he would provide notice of the Union's position in the next round of bargaining. Considered from the Employer's standpoint, I find that the Employer reasonably relied from that point forward on the Union's acceptance of that practice as invariably governing the Article 23.01(e) procedure, subject to notice in collective bargaining. Had the Union spoken up to terminate that representation at the subsequent round of collective bargaining, the Employer would have had a fair chance to bargain language securing its preferred position. That lost opportunity to bargain amounts to inequitable detriment in the present circumstances.

88 For these reasons, I find that the Union is estopped from enforcing Article 23.01(e) regarding the Employer investigator's individual interview of exempt staff. Specifically, the Union is estopped from asserting its strict right to participate in the joint determination of that aspect of the Article 23.01(e) procedure. The Union is estopped until bargaining concludes for the renewal of the parties' 2023-04-01 to 2026-03-31 Collective Agreement. This period will restore the Employer's lost opportunity to bargain for different or clarifying language.

VI. CONCLUSION

89 I have deliberately limited this award to the above declaratory rulings to allow the parties to bargain in the current round with a full understanding of their default rights and responsibilities. In summary:

1. The language of Article 23.01 (e) is clear that all unresolved formal "Discrimination" complaints "will be jointly investigated." Absent agreement on an alternative process, differences over whether a complaint meets the prerequisites to begin a joint investigation are ultimately resolved by grievance arbitration.

2. Article 23.01(e) requires joint decision-making about the investigation procedure to be adopted in each case, including whether Investigators will consult outside parties individually and what disclosures are made under the "need-to-know" proviso. Whatever process is followed must result from joint decision-making between the two investigators, working in a relationship of equals, lest the investigation lose its joint, team-based character. No latitude exists for unilaterally imposing procedural details.

3. The Union is estopped until the conclusion of the current round from asserting its right to participate in the joint determination of whether the Employer may individually interview exempt employees under the Article 23.01(e) procedure.

90 I encourage the parties to completely resolve these matters in negotiations to renew the current Collective Agreement and retain jurisdiction to complete this award.

Ken Saunders

Ken Saunders, Arbitrator

Dated September 9, 2026, in Vancouver, British Columbia.