IN RE THE MATTER OF AN ARBITRATION
UNDER THE B.C. LABOUR RELATIONS CODE

BETWEEN:

INSURANCE CORPORATION OF BRITISH COLUMBIA

(the "Employer")

AND:

CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES UNION, LOCAL 378

(the "Union")

AWARD

(Overtime Grievance)

Board of Arbitration	Robert Diebolt, Q.C.
Counsel for the Employer	Peter Csiszar
Counsel for the Union	Allan Black, Q.C. Stephanie Mayor
Place of Hearing	Vancouver, B.C.
Dates of Hearing	January 6 and 7, February 3, 2014
Date of Award	February 27, 2014

I. INTRODUCTION

This is a Union policy grievance challenging the validity of a written Employer policy (the "Policy") respecting overtime. The parties agreed I am duly constituted as a board of arbitration with jurisdiction to hear and determine the matters in issue.

II. BACKGROUND

The text of the Policy reads:

> Purpose
>
> ICBC pays employees for work performed beyond regular working hours in an **equitable manner** and **in accordance with the applicable collective agreement**. It also strives to apply regulations and policies that ensure the sound and efficient management of its human resources and business operations.
>
> Objectives In accordance with the above principle, ICBC pursues the following objectives:
>
> - to keep overtime and additional work to a minimum
> - to establish rules governing hours of work and pay for hours of work
>
> Policy statement
>
> All overtime beyond an employee's regularly scheduled shift must be pre-authorized by management (or manager designate). Such requests must be made in writing to an employee's immediate manager for authorization.
>
> Only overtime hours explicitly and directly scheduled and approved by the immediate manager (or manager designate) are considered legitimate overtime hours and can be paid under the terms and conditions in this policy. Unauthorized or unscheduled hours worked by employees at their own discretion or for personal reasons will not be recognized as a legitimate form of overtime. Only in exceptional circumstances will unauthorized overtime be acceptable. Such exceptions must relate to a legitimate and immediate business need for which pre-approval is not possible.
>
> In the event that an employee, at their own discretion works outside their regular scheduled hours without pre-authorization, that employee:
>
> - Shall at the earliest opportunity report details of the hours the employee decided to work, what work was performed and why pre- authorization was not first sought and obtained; and
> - Will be subject to potential disciplinary action after a review of the circumstances related to the unauthorized work. Whether or not the employee will be paid for such work will be determined after the above review. All other terms and conditions of the company policies and Collective Agreement are in effect.
>
> Applies to

> This policy applies to all bargaining unit employees.
>
> Exceptions
>
> Any exceptions to this policy must be made in writing by management to Human Resources for consideration of leave from this policy. No exception may be made to this policy without the written consent of Human Resources.
>
> Responsibilities
>
> The Director of Compensation & Employee Relations is responsible for the interpretation of this policy. (bolding in original)

The Policy was implemented February 13, 2013 but it was not the Employer's first overtime policy. Previously, the Employer had implemented an unwritten policy requiring pre-authorization of all overtime. Despite that unwritten policy some claims adjusters worked overtime without prior authorization. This overtime fell into one of two general categories.

Overtime in the first category was generally worked due to performance issues. Employees chose to work overtime in an effort to keep up with their assigned caseloads. With respect to overtime in this category the Employer generally did not pay at overtime rates, or at all, on the ground the overtime had not been pre-authorized. Overtime in the second category was generally worked for reasons beyond the control of employees. For example, a customer might arrive without an appointment near the end of a claims adjustor's shift and the interview would extend beyond the end of the shift. Similarly, a customer might telephone near the end of an adjustor's shift and the call would extend beyond the end of the shift. The Employer generally authorized and paid the second category of overtime after it had been worked.

Union job stewards reported instances of unpaid overtime to managers but despite various management efforts to eliminate unauthorized and unwanted overtime the fact of unpaid overtime continued. Eventually the Union filed a policy and group grievance. In an arbitration before Colin Taylor, Q.C. the Union asserted the Employer

had: (1) violated Article 14.04 of the Collective Agreement; (2) not remitted appropriate Union dues for all hours worked by bargaining unit employees; (3) breached the *Employment Standards Act*, R.S.B.C. 1996, c. 133, and (3) failed to keep appropriate records of total hours worked for purposes of providing an accurate Record of Employment. It also alleged the unpaid overtime constituted an unjust enrichment. Article 14.04 of the collective agreement then in force read:

> 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.

Arbitrator Taylor allowed the grievance: *Insurance Corporation of British Columbia and Canadian Office and Professional Employees' Union, Local 378*, [2012] B.C.C.A.A.A. No. 112. He concluded the unwritten policy requiring pre-authorization as a condition of payment for overtime offended requirements set out in *KVP Co. v. Lumber & Sawmill Workers' Union of Canada, Local 2537 (Verneau Grievance)*, [1965] O.L.A.A. No. 2 (Robinson).

The first requirement in *KVP* is that a workplace rule be consistent with the governing collective agreement. Arbitrator Taylor concluded the unwritten policy was inconsistent with the express language of the collective agreement between the parties. In his view, Article 14.04 did not contemplate or require pre-authorization of overtime as a condition of entitlement to overtime payment. By requiring pre-authorization under the unwritten policy he concluded the Employer was adding words to and amending Article

14.04. He also found that the policy did not meet the sixth requirement in *KVP* because it was not consistently enforced.

Arbitrator Taylor made a number of declarations and orders:

> [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.

The Employer applied for review of the award under s. 99 of the *Labour Relations Code*, RSBC 1996, c. 244: *Insurance Corporation of British Columbia and Canadian Office and Employees Professional Union, Local 378*, BCLRB No. 207 (Vice Chair Saunders). It submitted it was denied a fair hearing and that the award was inconsistent with *Code* principles because the Arbitrator failed to make a genuine effort to interpret the collective agreement and failed to provide a reasoned analysis.

Vice Chair Saunders set out a succinct and helpful summary of the award. It reads:

> 5 The Award concerns a policy and group grievance filed by the Union. The Union grieved that the Employer had violated the Collective Agreement "by allowing Union

members to work longer than their negotiated hours of work" without compensation: (Award, para. 1).

6 The Employer responded that scheduling overtime is the exclusive right of management. The Employer added it had "...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": (Award, para. 2). The Employer further submitted that "employees cannot unilaterally elect to perform work outside their prescribed hours of work ... and claim compensation for such work at overtime rates": (Award, para. 2).

7 The Arbitrator found the evidence was "replete with written reminders to employees that overtime requires pre-authorization" by management: (Award, para. 10). Nonetheless, some employees continued to work unpaid overtime, even when told not to do so: (Award, para. 12). The Employer "recognized this as a problem": (Award, para. 15). The Union's concern with respect to employees working unpaid overtime was described by one of the Employer's witnesses as a "systemic issue": (Award, para. 16). There was evidence this was a problem not only at the Employer's 5th and Cambie location in Vancouver but also at Victoria, Prince George and Chilliwack: (Award, para. 19). Despite the steps taken by the Employer to discourage employees from working beyond their scheduled hours, including speaking to certain employees and raising the issue at numerous meetings between management and staff, it continued to occur: (Award, para. 24).

8 The Arbitrator found as a fact that management employees were aware that this was occurring, and that generally employees were not compensated for working beyond their scheduled shifts either at overtime rates or at all: (Award, para. 30). He characterized the issue in dispute as follows:

> 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? (Award, para. 31)

9 After summarizing and analyzing the Employer's arguments (Award, paras. 32- 50), the Arbitrator reviewed evidence regarding the Employer's efforts to discourage employees from working unauthorized overtime and its general practice of refusing the payment when they did: (Award, paras. 51-56). He concluded 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": (Award, para. 57).

10 The Arbitrator found the Collective Agreement (Article 14.04) required the payment of overtime rates when employees work more than their regular daily or weekly hours of work. There was no language qualifying that obligation on the basis that overtime must be pre-authorized: (Award, para. 63). With respect to the Employer's argument that it had an unwritten but well-advertised policy that overtime had to be authorized in advance, the Arbitrator concluded that the Employer's policy did not conform with arbitral requirements governing management's rule making authority, as set out in *KVP Co. Ltd. v. Lumber and Sawmill Workers' Union, Local 2537 (Veronneau Grievance),* (1965), 16 L.A.C. 73 *("KVP").* Specifically, he found the rule was inconsistent with "the express language found in Article 14.04 of the Collective Agreement" (Award, at para. 67), stating on this point:

> 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. (Award, para. 67) (Emphasis Added)

11 After considering additional arbitral authorities, the Arbitrator added:

> 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*. (Award, para. 73)

12 Earlier in the Award, (para. 51) the Arbitrator noted that the Employer did pay overtime in certain circumstances where it was not pre-authorized—when a customer arrived near the end of a shift or a meeting with a customer or a telephone call with a customer extended beyond the end of the employee's regular shift. In those circumstances, employees were not required to obtain permission to stay beyond their regularly scheduled shifts and were paid overtime on those occasions.

13 The Arbitrator considered the language of Article 14.04 in light of the extrinsic evidence presented by the parties (Award: paras. 74-83), and concluded that, "[t]he language of Article 14.04 admits of no ambiguity": (Award, para. 84). He also noted that, "[t]he language of the collective agreement overrides a practice that is inconsistent with the express language of the agreement" (Award: para. 85), and held that, "...a practice of requiring overtime to be authorized cannot create a "right" to one party inconsistent with the language of the Collective Agreement": (Award, para. 86). The Arbitrator added, "[t]hese are sophisticated parties with a mature collective bargaining relationship" and, "[h]ad they intended to require overtime work and payment therefor (sic) to be pre-authorized, they would have said so in Article 14": (Award, para. 87).

14 The Arbitrator found on the basis of arbitral authority that "...it is the responsibility of the employer to enforce hours of work provisions within reasonable limits...", and that, "[i]f an employer does not wish employees to work overtime, then it must not only order them to stop but see that they do": (Award, para. 88). Otherwise, the employer may be found liable where workers are permitted to work overtime: *ibid.* The Arbitrator concluded that the Employer's "...defence that all overtime must be pre-authorized must be rejected", because there was "...no such requirement in Article 14.04 of the Collective Agreement which provides compensation for all hours worked beyond regularly scheduled hours": (Award, para. 89).

15The Arbitrator found that, "...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": (Award, para. 103). He accordingly found the Union "...has made out a case for unjust enrichment" (Award, para. 105), adding:

> ... 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.
>
> 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*. (Award, paras. 105-106)

16 The Arbitrator accordingly held that the Union had established both that the Employer had violated Article 14.04 of the Collective Agreement "...by allowing employees to work longer than the negotiated hours of work without compensation therefor (sic)..." and "...a case of unjust enrichment": (Award, para. 107). The Employer was ordered to "...cease permitting or condoning employees performing unpaid work for the Employer either before or after their regular scheduled shift" and to "...take 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": (Award, para. 107). The Employer was further ordered to compensate the employees who worked unpaid overtime in 2010. The Arbitrator retained jurisdiction to address issues arising from the interpretation, application or implementation of the Award.

Vice Chair Saunders ultimately rejected the application without calling for a submission from the Union. He stated:

> 37 I am satisfied the Arbitrator's analysis meets the genuine effort test. I find the Award contains the facts, issues and a chain of reasoning resolving the grievance. That is sufficient to comprise reasoned analysis and satisfy the fair hearing standard applicable to arbitration awards under Section 99 of the Code. As set out above, the question before me is not whether I agree with the Arbitrator's interpretation of the collective agreement or his application of that interpretation to the facts before him: *Lornex*. I am satisfied the Arbitrator turned his mind to the relevant collective agreement provisions in the context of the facts before him, and rendered a decision which was not incongruous in light of the parties' arguments to him. I also find the Employer has not demonstrated the Award is based on a palpable and overriding error of fact or is otherwise inconsistent with Code principles.

Returning to the background adduced in this grievance most, but not all, of the documentary evidence adduced in the Taylor arbitration was adduced in this arbitration. In addition some, but again not all, of the testimony given in the Taylor arbitration was given in this dispute. In a sense, albeit very much an abbreviated sense, and apart from events arising after the Taylor award, the evidence in this dispute was largely a repetition of that adduced in the Taylor arbitration.

The Taylor award was issued August 24, 2012. Moving to subsequent events, in the fall of that year the parties engaged in collective bargaining and ultimately entered into the present Collective Agreement. Article 14.04 of the Collective Agreement is identical to the language of Article 14.04 in the prior collective agreement interpreted by Arbitrator Taylor. The Employer did not seek to bargain changes to the contract language of this provision, whether respecting pre-authorization or otherwise.

In addition the Employer drafted the previously quoted Policy, making it effective as of February 13, 2013. Since that time, based on the documentary evidence, there has been a limited amount of unauthorized and unwanted overtime. By letter dated March 4, 2013, the Employer gave Mr. Alan Richer a written reprimand for working overtime on a weekend to fix a payroll malfunction. He had not received pre-authorization and in fact had been specifically directed not to proceed with the fix. That discipline was not grieved. By letter dated March 12, 2013 the Employer gave Mr. Jackie Ho, a claims adjuster, a written reprimand for overtime work performed without pre-authorization. That discipline was not grieved. In addition to these documented incidents there was oral testimony to the effect that unauthorized and unpaid overtime occurred after the introduction of the Policy but there was no quantification of the amount or identification of specific individuals.

III. THE PARTIES' POSITIONS

The Union's position was that the Policy is simply a codification of the unwritten policy before Arbitrator Taylor and is a therefore a "blatant disregard of that Award, its Reasons and Orders". The Employer, submitted the Union, is seeking to re-litigate in this arbitration the same matter that was adjudicated in the Taylor arbitration. Accordingly, it asserted the Policy constitutes a collateral attack on the Taylor award, is an abuse of process and attracts the doctrine of issue estoppel. As an independent position, the Union submitted the Policy does not meet the requirements of *KVP* and that any unpaid overtime worked under the Policy constituted an unjust enrichment.

The Union presented the following authorities, cited in order of their appearance in its brief of authorities: *Insurance Corp. of British Columbia v. Canadian Office and Professional Employees' Union, Local 378*, [2012] B.C.C.A.A.A. No.112 (Taylor); *KVP*

Co. v. Lumber & Sawmill Workers' Union, Local 2537, [1965] O.L.A.A. No. 2 (Robinson); *Insurance Corp. of British Columbia (Re)*, [2012] B.C.L.R.B.D. No. 207 (Saunders); *Nelson (City) v. Nelson Civic Employees Union, Canadian Union of Public Employees, Local 339*, [1982] B.C.C.A.A.A. No. 35 (Chertkow); *Rosewood Manor and Hospital Employees' Union, Loc. 180* (1990), 15 L.A.C. (4th) 395 (Greyell); *British Columbia (Workers' Compensation Board) and Compensation Employees' Union*, [1997] B.C.C.A.A.A No. 451; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44; *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52; *Board of School Trustees, School District No. 57, Prince George and International Union of Operating Engineers, Local 858*, November 16, 1976 B.C.L.R.B (Weiler); *Vancouver Island University v. Vancouver Island Faculty Assn.*, [2010] B.C.C.A.A.A. No. 76 (Love); *Re Canadian Johns-Manville and International Chemical Workers, Local 346*; [1976] O.L.A.A. No. 71 (Burkett); *Ford Electronics Manufacturing Corp. v. International Association of Machinists and Aerospace Workers, Local 2113*, [2000] O.L.A.A. No. 82 (Knopf); *Re British Columbia Hydro & Power Authority and International Brotherhood of Electrical Workers, Local 213*, [1987] B.C.C.A.A.A. No. 254 (Munroe); *British Columbia Nurses' Union v. Communications, Energy and Paperworkers Union of Canada, Local 444*, [2013] B.C.C.A.A.A. No. 54 (Germaine); *Delta School District No. 37 v. Canadian Union of Public Employees, Local 1091*, [2000] B.C.C.A.A.A. No. 239 (Hope); *Communications, Energy and Paperworkers Union, Local 1123 v. TFL Forest Ltd. (Elk Falls Lumber Mill)*, [2007] B.C.C.A.A.A. No. 145 (Dorsey); *BC Rail v. United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 170, Metal Trades Division*, [2004] B.C.C.A.A.A. No. 288 (Munroe); *Eurocan Pulp and Paper Co. v. Communications, Energy and Paperworkers Union of Canada, Local 298*, [2000] B.C.C.A.A.A. No. 226 (Hope); *Hertz Canada Ltd. v. Canadian Office and Professional Employees' Union, Local 378*, [2011] B.C.C.A.A.A.

No. 111 (Hall); *West Park Healthcare Centre and S.E.I.U., Loc. 1.ON*, [2005] O.L.A.A. No. 780 (Charney); *Re G.H. Noble Custom Cut Ltd. and United Steelworkers International Union, Local 1-3567* (2009), 177 L.A.C. (4th) 83 (Thorne), and *Re Westfair Foods and United Food and Commercial Workers, Local 401* (2009), 189 L.A.C. (4th) 314 (Price).

The Employer's position was that the Policy is a legitimate exercise of its management rights recognized in Article 0.10 of the Collective Agreement. The Policy, it asserted, was developed as a direct response to the Taylor award, to ensure that except in limited circumstances employees do not work without permission outside their regular working hours.

Focusing on *KVP*, the Employer submitted the Policy satisfies all of its applicable requirements. First, it submitted the Policy is consistent with Article 14.04 of the Collective Agreement. In making this submission the Employer asserted Article 12, which addresses hours of work, is relevant. It noted that under Article 12.10 the Employer is required to establish work schedules with "start/stop" times and submitted that employees are equally bound by that provision.

More generally, the Employer submitted that it can not be that employees are entitled to unilaterally elect to work unauthorized overtime and that the Taylor award does not stand for that proposition. The essence of his award, it submitted, is that compensation must be paid in two cases. The first is where the work is beyond the control of an employee and pre-authorization is not practicable. The second case is where the employee unilaterally elects to work overtime in circumstances where the Employer knowingly allows it to be worked, or ought to know it is being worked. That, said the Employer, constitutes "knowing and active" violation of the Collective

Agreement and triggers compensation at overtime rates. Under the Policy, it asserted, condonation has been eliminated.

Moving to the second *KVP* requirement, the Employer submitted the Policy is reasonable because, in response to a pervasive problem, it falls within a range of possible, acceptable outcomes.

Finally, the Employer submitted the sixth *KVP* requirement relied on by Arbitrator Taylor, namely, that a policy be consistently enforced, is not relevant in a policy grievance in which a policy is being challenged *ab initio*. The last three requirements, it submitted, are only relevant in individual grievances challenging the imposition of discipline.

Responding to the Union's submissions respecting issue estoppel, abuse of process and collateral attack, the Employer's primary position was that the Policy is not inconsistent with the Taylor award and consequently these doctrines are inapplicable. In the alternative, it submitted they do not prevent the Employer from arguing that the Taylor award was wrongly decided and ought not to be followed. It submitted if the Taylor award is found to stand for the proposition that work performed beyond regular hours must always be compensated, even if contrary to direction and in the absence of Employer knowledge, then it is wrongly decided.

The Employer presented the following authorities, cited in order of their appearance in its briefs of authorities: *Insurance Corporation of British Columbia and Canadian Office and Professional Employees' Union, Local 378*, unreported, August 24, 2012; *Re Lumber & Sawmill Workers' Union, Local 2537 and KVP Co. Ltd.*, [1965] L.A.C. 73 (Robinson); *Fording Coal Ltd. v. United Steelworkers of America, Local 7884*, [2002] B.C.C.A.A.A. No. 9 (Hope); *Re Vancouver Island Health Authority and British*

Columbia Nurses' Union (2004), 132 L.A.C. (4th) 102 (Munroe); *Communications, Energy and Paperworkers Union of Canada, Local 30*, 2013 SCC 34; *Dunsmuir v. New Brunswick*, 2008 SCC 9; *Minister of Citizenship and Immigration v. Sukhvir Singh Khosa*, 2009 SCC 12; *Zenner v. Prince Edward Island College of Optometrists*, 2005 SCC 77; *Canada Safeway Ltd. and United Food and Commercial Workers, Local 1518*, [1998] B.C.C.A.A.A. No. 378 (Kelleher); *Health Employers Association of British Columbia ("HEABC") representing Employers Bound by the Collective Agreement between HEABC and HSPBA and Health Sciences Association ("HAS") on behalf of Health Science Professionals Bargaining Association of British Columbia ("HSPBA")*, unreported, October 23, 2013 (Diebolt); *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63; Brown & Beatty, *Canadian Labour Arbitration*, 2:3220; *Re Government of Province of British Columbia and British Columbia Government Employees' Union*, [1987] B.C.A.A.A. No. 134 (Hope), and *Cariboo Pulp and Paper Co. v. Communications, Energy and Paperworkers Union, Local No. 1115*, [2006] B.C.C.A.A.A. No. 194 (Moore).

IV. ANALYSIS AND DECISION

It is necessary first to address what the Taylor award decided. His findings, orders and declarations have been quoted earlier herein. In addition I have quoted Vice Chair Saunder's helpful summary of the award. So it is not necessary to recount exhaustively his factual findings or chain of reasoning in this section of the Award. Instead the initial focus will be on two matters which in my view are central to the disposition of this grievance.

First, under the Taylor award when does overtime attract compensation and at what rates? I believe his disposition of this issue was clear and unambiguous. He

concluded that when overtime is worked it must be compensated and compensated at the overtime rates in Article 14.04. In subparagraph A of paragraph 107 of his award, Arbitrator Taylor declared that the Employer is in breach of Article 14.04 when it permits or condones employees performing unpaid work beyond the employee's regular scheduled shift. In subparagraph B he ordered the Employer to cease permitting or condoning employees performing unpaid work before or after a regular shift. In subparagraph C he ordered the Employer to 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."

In short, he decided that regardless of the Employer's directions or efforts to ensure adherence to regular shifts, employees must be paid for overtime that is in fact performed and paid in accordance with the Collective Agreement. I am not persuaded by the Employer's submission that the Taylor award stands for the proposition that unauthorized overtime within the control of an employee is only compensable if the Employer knowingly allows such work to be performed or ought to know it is being performed. It is true that Arbitrator Taylor, in the opening passage of paragraph 107 found that the Employer "knowingly and actively violated...Article 14.04 by allowing employees to work longer than the negotiated hours of work without compensation." But those words cannot plausibly be construed to constrain or limit the clear scope of the following orders in that paragraph.

In sum on this issue, I construe Arbitrator Taylor's award as deciding that overtime work attracts compensation at the rates provided in the Collective Agreement, whether or not that work has been authorized or condoned. That said, as explained below, I do not construe his award as standing for the proposition that employees are

entitled to unilaterally elect to perform overtime, especially in the face of an explicit instruction not to do so.

The next issue concerns authorization in the context of overtime. Under the Taylor award what role, if any, can authorization have? Arbitrator Taylor unambiguously decided the Employer is not entitled to require authorization of overtime as a condition of entitlement to compensation. Such a requirement, he said, would constitute an impermissible amendment, by way of addition, to the contract language of Article 14.04

It remains to be considered, however, whether under his award authorization can play some role in relation to overtime. There are some passages in the award that, isolated from context, might be read as suggesting that authorization has no permissible role whatever in respect of overtime. For example, paragraph 87 reads:

> 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, t**hey 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)). (emphasis added)

The emphasized words in the quoted passage, read in isolation, might conceivably be read disjunctively, to mean that pre-authorization is not permissible either with respect to the doing of the work or as a condition of entitlement to compensation for that work. But read in the context of the passage as a whole, in my view, the Arbitrator was considering whether authorization could be required as a condition of entitlement to

payment under Article 14.04. In my view his observations do not engage the question of whether authorization can be required for purposes other than entitlement to compensation.

The conclusion I have reached is this. The Taylor award does not preclude the Employer, in the exercise of its management rights, from requiring authorization to work overtime, albeit such work is compensable under Article 14.04 absent such authorization. The consequence of non-compliance with a direction not to perform overtime without authorization might, depending on the circumstances, attract discipline, provided employees had been clearly advised of such a potential consequence. My reasons follow.

I begin with the proposition that employees cannot have an unfettered right to unilaterally elect to work overtime. Indeed, Arbitrator Taylor noted that the Union expressly disclaimed any such right. Further, he recognized that the Employer is entitled to protect itself against unwanted overtime, stating:

> [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.

The Union in fact proposed to Arbitrator Taylor a series of six measures the Employer could employ to control unwanted overtime. Among them were the following two:

> 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.
>
> 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.

In my view there is no material difference between these measures and a directive to employees not to work overtime unless they receive authorization to do so. Standing over an employee at the end of the shift and directing the person to stop working is essentially the same as clearly communicating in advance to that person not to work overtime. The only difference is temporal and in my view that is not a material difference. Moreover, it is important to note there are claim centers in the province that do not have managers on site.

Next, and in my view of particular importance, is the fact that Arbitrator Taylor's orders do not mention authorization. The focus is on unpaid overtime. Indeed, the Employer is specifically ordered to take the steps necessary to ensure that no work beyond a regular shift occurs. A direction not to perform unauthorized overtime is a natural and practical element of a program to comply with that order.

Finally, it is relevant to have regard to the root cause of the grievance that lead to the Taylor arbitration, namely: unpaid overtime being performed by bargaining unit employees.

In sum on this issue, I do not interpret the Taylor award as precluding the Employer from exercising a management right to direct employees not to work overtime without authorization and to communicate that non-compliance could potentially attract discipline. But to be abundantly clear, if overtime is worked despite such a direction compensation is nonetheless payable under Article 14.04. Given that entitlement to compensation, any justifiable discipline could not include forfeiture of an accrued right to compensation under that Article.

The foregoing is sufficient to dispose of the authorization issue, but before leaving the issue I will comment on the following award relied on by the Union: *British Columbia Nurses' Union v. Communications, Energy and Paperworkers Union of Canada, Local 444*, [2013] B.C.C.A.A.A. No. 54 (Germaine).

Briefly, the facts were these. The Communications, Energy and Paperworkers Union ("CEP") represented Labour Relations Officers ("LROs"), Coordinators, Negotiators, and Education and Finance Department employees who serviced the membership of their employer, the British Columbia Nurses Union ("BCNU"). These employees were expected to work long hours and to do so with a degree of autonomy. In recognition of this fact the collective agreement contained a lieu time provision under which they accrued 35 hours of paid time off in each calendar quarter. The collective agreement also contained an overtime provision, Article 5.03. The part of that provision litigated before Arbitrator Germaine was Article 5.03(a)(ii) which reads:

> Two (2) hours for attendance at meetings with members after hours. Meetings will include, but not be limited to, LRB, Arbitrations, Negotiations, Regional Meetings and Conferences.

The BCNU sought to reduce its overtime costs and broaden the operation of the lieu time provision by stating in bargaining that in the future early morning meetings would be considered lieu time, not overtime under Article 5.03(a)(ii), unless attendance was pre-approved by a manager.

The dispute raised a number of issues, including estoppel, which need not canvassed here. The part of the award the Union relied on in this arbitration addressed pre-approval of attendance at meetings contemplated in Article 5.03(a)(ii). It should be noted that in the arbitration the BCNU conceded that this provision, properly construed, did not require pre-approval of overtime. That concession, however, did not end the

dispute because the BCNU asserted it had the right not to assign the LROs to meetings contemplated in Article 5.03(a)(ii):

> 73 No final decision is required in respect of either of these issues. This is because, despite quibbling over these points, the BCNU, as I have recorded, acknowledges there is no pre-approval requirement for after-hours overtime under Article 5.03(a)(ii). But the BCNU submits that nothing in Article 5.03(a)(ii) or in any other provision of the collective agreement can be construed to mean that the BCNU has relinquished its management right to direct the workforce and, more specifically, to direct the workforce in a manner intended to reduce overtime costs. Under the collective agreement, the BCNU submits, it has the authority to make the work assignments and, if it assigns the LROs or other employees to attend the meetings contemplated by Article 5.03(a)(ii), or if it knowingly permits them to attend such meetings, they will be entitled to the two hours at the overtime rate without any need for pre-approval. The critical implication of this position is of course that the BCNU's work assignment authority can be used to direct the employees to not attend such meetings. The absence of any need for pre-approval, it is submitted, does not give the LROs the authority to unilaterally schedule paid overtime.

After setting out the parties' positions, Arbitrator Germaine engaged in an analysis that merits extensive quotation:

> 80 The parties' conflicting positions suggest an absence of engagement. Both rely on the plain meaning of the words of the collective agreement and the interpretation of each is apparently sound. As the BCNU concedes, the CEP's insistence that pre-approval is not a requirement of overtime under Article 5.03(a)(ii) is correct. And, as the CEP concedes, the BCNU retains the right to direct the workforce under Article 2.01.
>
> 81 Similarly, both parties draw support from an award cited by the CEP. In *Insurance Corporation of British Columbia and COPE, Local 378*, [2012] BCCAAA No. 112 (Taylor), the trade union claimed overtime for employees who worked beyond their regular hours despite the employer's attempts to prevent them from doing so. Although management was aware of employees working longer hours, the employer argued the grievance must fail because the overtime was not pre-authorized. This defense failed because the employer's pre-authorization policy was contrary to the collective agreement, which rendered past practice irrelevant. In coming to this conclusion, Arbitrator Taylor relied on the language of the overtime clause in the collective agreement which provided that hours worked in excess of regular hours "shall be paid at overtime rates" and did not include any reservation of an exclusive or discretionary right to schedule overtime.
>
> 82 The BCNU would have me conclude the *ICBC* award recognized the employer's right to direct the employees to not work overtime. On this view of the award, the grievance succeeded only because the employer did not exercise this management right. This is correct, in the sense that, had the employer taken steps to enforce its directions to the employees not to work overtime, there would have been no grievance. But this does not diminish the significance of the parallel between the relevant contract language in *ICBC* and the language of Article 5.03(a).

> 83 I agree with the CEP that the language of Article 5.03(a) is categorical. Overtime at time and a half "will be paid" in the circumstances defined in clauses (i) to (iii) and this is reinforced by the definition of normal hours of operation in Article 5.01. As in *ICBC*, there is no specific reservation of the management right to schedule the after-hours meetings. Nor does it expressly reserve for management the discretionary authority to give directions regarding which of those meetings the employees are entitled to attend. As discussed above, Article 5.03(a)(ii) itself identifies which meetings with members
>
> 84 I also agree that the evidence of the CEP's witnesses in this regard is not helpful. The question is the parties' mutual intention, as expressed in the language on which they agreed. The opinion of a witness in this regard is neither relevant nor material. Further, while the guidelines and memorandum to BCNU stewards in 1996 were aimed at controlling the cost of overtime under Article 5.03, they did not reflect a mutual understanding that LROs could be prohibited from attending after-hours meetings. Neither of those measures contained such a direction to CEP members.
>
> 85 The more specific question, then, is whether Article 5.03(a)(ii) constitutes a sufficiently clear expression of a limitation on the management right in Article 2.01 to direct the workforce, such that it prevents the BCNU from prohibiting attendance by the LROs at after-hours meetings. Again, the context is critical. Article 5.01 recognizes that the LROs are expected to perform their work independently, according to their "individual workloads". This is consistent with – indeed, it is necessitated by – their collective responsibility to represent the BCNU's large and geographically dispersed membership. In my view, the same considerations explain the parties' agreement that pre-approval is not required for overtime pursuant to clauses (i) and (ii) while it is for a claim under clause (iii). The parties expected the LROs to be called to attend meetings with BCNU members and estimated that two hours at time and a half would not cover all the hours these meetings would entail. They were also confident that no control over this after-hours work was needed.
>
> 86 Further, I do not accept that construing Article 5.02(a)(ii) as a clear limitation on management's right to direct the workforce is tantamount to giving the employees the right to self-schedule overtime. That would be so only if they were free to organize and schedule these meetings themselves. But I have already concluded that such meetings must be similar in nature to those specifically referenced in the definition of "meetings" in the clause. With limited exceptions, the meetings are not scheduled by the LRO. In other words, the criteria expressed or implied in the language of Article 5.03(a)(ii) prevents the employees from scheduling their own overtime. (emphasis added)

Arbitrator Germaine does cite the Taylor award with approval. But the underlined passage in para. 82, in my view, suggests he considered the failure of ICBC to enforce its directions not to work overtime to have justified the grievance, not the direction per se.

Further, para. 85 of the award discloses that his analysis very much depended on the context in which Article 5.03(a)(ii) was being assessed. He described that context as "critical". He noted that LROs were expected to work independently and had to

represent a large and geographically dispersed membership. Importantly, he concluded this paragraph with the statements that "The parties expected the LROs to be called to attend meetings...They were also confident that no control over this after-hours work was needed".

Finally, and in my view importantly, in para. 86 Arbitrator Germaine did not accept that his interpretation of the contractual provision would be "...tantamount to giving the employees the right to self-schedule overtime" because, "...with limited exceptions, the meetings contemplated in Article 5.03(a)(ii) were not scheduled by the LRO." He concluded, "In other words, the criteria expressed or implied in the language of Article 5.03(a)(ii) prevents the employees from scheduling their own overtime."

In my view the nature of Article 5.03(a)(ii) and the factual context in which it operated distinguish *British Columbia Nurses' Union v. Communications Energy and Paperworkers of Canada, Local 444* from this dispute. Unlike Article 5.03(a)(ii) in that award, except in the two cases outlined at the beginning of this award, bargaining unit employees are not expected to work overtime under Article 14.04 as a normal part of their duties. Also unlike Article 5.03(a)(ii), there is nothing expressed or implied in the language of Article 14.04 that prevents employees from scheduling their own overtime. Indeed, the evidence before Arbitrator Taylor established that there was a systemic problem of unwanted overtime.

For all of the foregoing reasons, therefore, I am unable to derive assistance from the Germaine award.

I move now to the following question. Should I follow and apply the Taylor award? I have reviewed the Employer's application under s. 99 for a review of his award and Vice Chair Saunder's dismissal of that application. His ruling, however, is not a

direction to an arbitrator as to whether the Taylor award should or should not be followed. The relevant principles are set out in a number of arbitral authorities and texts. Following are extracts from some of the authorities the parties presented.

In *Re Canadian Johns-Mansville and International Chemical Workers, Local 346*, [1976] O.L.A.A. No.7 Arbitrator Burkett stated:

> 7. The grievance raises two basic issues which were present in both the Brown award and the second Weiler award; the first concerns the appropriate remedy for a lost overtime opportunity and the second relates to the precedential value of arbitration awards within a bargaining relationship. It is acknowledged that the doctrine of *stare decisis* does not apply in labour arbitrations; one board of arbitration is not bound by the decision of another as it relates to the same issue even if that issue has been decided within the context of the same bargaining relationship. This is not to say, however, that arbitrators are not and should not be persuaded by prior decisions dealing with similar situations. In a general sense arbitral jurisprudence plays a constructive role in the collective bargaining process and performs a positive directory function. A series of decisions which lend a consistent interpretation to a piece of contract language fix the meaning of that language in its labour relations context and provide the parties with a high degree of certainty as to the precise meaning of the language which they are incorporating into a collective agreement thereby minimizing both the possibility of future disagreement and future "litigation". In this general sense arbitral jurisprudence also underscores the consequences of not including certain language in a collective agreement (*i.e.*, contracting out) which also minimizes the possibility of future disagreement. In a more specific sense, arbitrators are acutely sensitive to the need for consistency and predictability within a particular collective bargaining relationship and are therefore loathe to upset the award of a predecessor board dealing with an identical issue between the same parties unless the predecessor board has been wrong. A previous finding on the same issue imparts an obligation to an arbitrator who wishes to depart from it to clearly analyze the shortcomings of the previous award and lay a solid foundation for the departure (see Re Air Canada and Canadian Air Line Employees Assoc. (1975), 10 L.A.C. (2d) 113 (O'Shea); Re Electric Reduction Co. of Canada Ltd. and Office & Professional Employees Int'l Union (1973), 3 L.A.C. (2d) 87 (Hartt); Re R.C.A. Ltd. and Int'l Union of Electrical Workers, Local 542 (1973), 2 L.A.C. (2d) 143 (Rayner)); to do otherwise undermines the binding nature of the adjudication, creates uncertainty and encourages resort to arbitration as an alternative to negotiation. Although the doctrine of stare decisis does not apply to labour arbitration, previous awards which have decided the same issue between the parties are, in the absence of an inherent flaw in law or reasoning, at least persuasive if not conclusive. (See the second Weiler award which refers to Re Amalgamated Meat Cutters, Local 125 L, and Wickett & Craig Ltd. (1963), 13 L.A.C. 363 (Arthurs); Re United Electrical Workers and Northern Electric Co. Ltd. (1971), 23 L.A.C. 241 (Gorsky); and Ontario Hydro and Canadian Union of Operating Engineers (1974), unreported (Brandt).)

In a similar vein, in *Ford Electronics Manufacturing Corp. v. International Association of Machinists and Aerospace Workers, Local 2113*, [2000] O.L.A.A. No. 82 Arbitrator Knopf wrote:

> 24 ... Arbitrators have long recognized that the purpose of the labour arbitration process itself is to encourage resolution of grievances in a speedy and expeditious manner. Further, the object of the exercise is to give parties guidance on the interpretation, application and administration of their collective agreement so they can avoid similar disputes in the future. Arbitrators routinely give deference to previous arbitration awards, not out of a sense of collegiality to other members of the arbitrators' league, but out of a sense of respect for the parties' need for predictability, order and stability. However, the system allows arbitrators to interfere with and/or decide to decline to follow previous awards where it can be shown that the earlier decision was "manifestly wrong". This is consistent with the concept that the parties are entitled to due process and ought not to be saddled with a decision that does not serve the purposes of labour relations.

In *Cariboo Pulp and* Paper *Co. v. CEPU*, [2006] B.C.C.A.A.A. No. 194 Arbitrator Moore stated:

> 19 The court, however, recognized that the doctrines of res judicata and issue estoppel have not universally been found to be applicable to labour arbitrations. The Supreme Court of Canada in MFCW, Local 832 v. Canada Safeway Ltd., [1981] 2 S.C.R. 180 appears to accept the principle, stated in dissent in the court below, that the doctrines were not applicable in the context of labour arbitrations. In this jurisdiction the issue was addressed by the Labour Relations Board ("LRB") in Board of School Trustees, School District No. 57, Prince George -and- IUOE, Local 858, BCLRB No. 79/76 [1977] 1 C.L.R.B.R. 45 ("Prince George School District"). In that case the LRB indicated that by virtue of statute, common law principles such as res judicata could not bind an arbitrator as a matter of law. Rather, it expressed the view that arbitrators should consider the matter from the point of view of appropriate labour relations principles in the context of the arbitral process. While leaving those principles to be developed in the arbitral jurisprudence the LRB did note such considerations as the need for finality and the availability of collective bargaining in suggesting that arbitrators should generally consider themselves bound by earlier decisions between the same parties. At the same time the LRB observed that exceptions to that general approach may arise including when the second arbitrator felt that the earlier award "deviated from the established consensus of arbitrators" (at p. 51). This latter approach was considered in Government of British Columbia -and- BCGEU, (1988) 29 L.A.C. (3d) 150 (Hope, MacPhail & Hunter - B.C.) by reference to a test akin to one employed in the judicial review of inferior tribunals of "clearly or patently wrong" (see CN/CP Telecommunications -and- CACAW, (1985) 18 L.A.C. (3d) 78 (M. Picher - Can.)) and the much earlier iteration of "clear conviction that the first award was wrong" of Professor Laskin, as he then was, in United Brewery Workers -and- Brewers' Warehousing Co. Ltd., (1954) 5 L.A.C. 1797.

Finally, in Brown & Beatty, *Canadian Labour Arbitration* the following appears:

> It is accepted by many arbitrators that the doctrines of *res judicata* and issue estoppel can apply in labour arbitration, as can the doctrine of abuse of process. But because the relationship of the parties to a collective agreement is a continuing one and because the same clause in an agreement may be the subject of interpretation and application on successive occasions, the doctrines have been qualified to some extent. So unless the collective agreement expressly provides that an arbitration decision binds the employer in future cases involving identical circumstances, the prevailing view is that the doctrine of *res judicata* does not apply, nor is the arbitrator strictly bound by a prior award as to the construction of the agreement. Rather, it is said that the prior award should be followed as a matter of principle unless the arbitrator has a clear conviction that the earlier interpretation is wrong. Indeed, it has

> been suggested that a previous finding on the same issue imposes an obligation on an arbitrator who wishes to depart from it to analyze the shortcomings of the previous award clearly, and to lay a solid foundation for the departure. In the same vein, another arbitrator has stated that the mere assertion that a prior award was wrong is insufficient to permit an arbitrator to hear a second grievance. Moreover, this approach has been followed in arbitration cases whether it is the same language in the same agreement or the same language in a subsequent agreement that is in issue a second time.

The Union submitted the foregoing principles should cause me to defer to and follow the Taylor award. As noted earlier, the Employer, as its primary position, asserted that the Policy is consistent with the Taylor award. In the alternative, however, it submitted that if the award "is found to stand for the proposition that time spent providing services beyond regular hours must always be compensated, even where the Employer has directed that the work not be performed, and had no real or constructive knowledge that it was being provided, the Award is, in the words of the applicable test, "clearly wrong" and should not be followed".

In my view, this dispute raises the same issue as that before Arbitrator Taylor, the parties are the same and the contract language is the same. Accordingly, on the foregoing authorities, deference should be given to his award unless it is "manifestly", "patently" or "clearly" wrong. It is not necessary for me to indicate whether I would have arrived at the same interpretation of Article 14.04 as Arbitrator Taylor did. That is not the test. Applying the tests in the authorities reviewed I am unable to conclude that his Award is manifestly, patently or clearly wrong. He engaged in a chain of reasoning which I am unable to conclude is inherently flawed and I was not presented with a body of arbitral authority showing that he deviated from the established consensus of arbitrators. Accordingly I propose to defer to and follow the Taylor award, interpreted as I set out earlier herein.

Moving to the content of the Policy, the Union submitted it is simply a codification or reduction to writing of the Employer' prior unwritten policy that was before Arbitrator Taylor. Based on the content of the Taylor award and the evidence adduced in this arbitration, I agree with the Union's position. Accordingly, to the extent it is inconsistent with and disregards the Taylor award, the Policy cannot stand.

In one respect, compensation for overtime worked by bargaining unit employees, the Policy clearly conflicts with the Taylor award. As I concluded earlier herein, his award stands for the proposition that overtime worked attracts compensation in accordance with Article 14.04, even if there has been a direction not to perform unauthorized overtime and there is no authorization. To repeat a conclusion expressed earlier, I have rejected the Employer's submission that liability to compensate an employee depends on the Employer knowingly permitting or condoning the performance of the overtime.

The Policy disregards the Taylor award by qualifying and limiting entitlement to compensation for overtime that is worked. For example it states:

> Only overtime hours explicitly and directly scheduled and approved by the immediate manager (or manager designate) are considered legitimate overtime hours and can be paid under the terms and conditions in this policy. Unauthorized or unscheduled hours worked by employees at their own discretion or for personal reasons will not be recognized as a legitimate form of overtime. Only in exceptional circumstances will unauthorized overtime be acceptable. Such exceptions must relate to a legitimate and immediate business need for which pre-approval is not possible.

In my view there is no material difference between the above quoted terms of the Policy and the content of the unwritten policy that Arbitrator Taylor vitiated. The Policy is an attempt to continue to insist on authorization as a condition of entitlement to compensation for overtime. To the extent, therefore, that the Policy seeks to limit or deny compensation for overtime worked it cannot stand.

There is an element of the Policy, however, that does withstand scrutiny. Earlier, I interpreted the Taylor Award to permit the Employer to direct employees not to perform unauthorized overtime and to advise employees that non-compliance could potentially attract discipline. I will not repeat here the reasoning for that interpretation, but in the exercise of its management rights to direct the workforce it can direct employees not to work unauthorized overtime. However, overtime worked despite such a direction must be compensated in accordance with Article 14.04. Further, as stated earlier, if such work should merit discipline it could not take the form of forfeiture of an accrued right to overtime payment because that would effectively finesse the obligation to compensate.

I turn now to the matter of unjust enrichment. Arbitrator Taylor found that the claim before him had been made out because: (1) the employees had provided services; (2) those services had benefited the Employer; (3) the employees had suffered a loss corresponding to the benefit obtained by the Employer, and (4) there was no lawful reason why the work should not be compensated. He added that it was no defence to say the work was unauthorized, because the Employer had knowingly allowed the work to be done and received a benefit.

In this arbitration the Union also submitted that the Policy permits unjust enrichment and that if it is left to stand, it would encourage violation of the principle of quantum meruit. To use the words of the Union, "a policy contemplating unpaid overtime and requiring authorization for overtime and its payment will no doubt result in an unjust enrichment".

I have concluded that the Policy is invalid to the extent it conditions entitlement to compensation on authorization of the overtime. Overtime worked must be compensated in accordance with the Collective Agreement. So, to respond to the Union's position, unjust enrichment ought not to occur because Article 14.04 compels compensation. In

other words, there is no legal necessity to resort to *quantum meruit* because a contractual right to compensation flows from the application of Article 14.04.

To this point, the Union's submissions respecting collateral attack, issue estoppel and abuse of process, and the Employer's responses have not been addressed. In my view, given the conclusions already reached, it is not necessary to address these submissions and I therefore do not propose to do so.

V. CONCLUSION

I have concluded compensation in accordance with Article 14.04 must be paid for all overtime worked, even if there has been a direction not to perform unauthorized overtime and such overtime has not been authorized. But I have also found the Employer is entitled, as an exercise of its management rights, to direct employees not to work unauthorized overtime and that non-compliance with such a direction might, depending on the circumstances, justify the imposition of discipline. Any justifiable discipline, however, could not include forfeiture of an accrued right to overtime payment because that would effectively finesse the obligation to compensate.

Accordingly I declare the Policy null and void to the extent it conditions entitlement to compensation upon prior authorization to work overtime. The parties have agreed to defer consideration of monetary remedies until a date after this Award has been published. Accordingly, I will remain seized.

The grievance succeeds, therefore, to the extent indicated. IT IS SO AWARDED.

"Robert Diebolt, Q.C."
Robert Diebolt, Q.C.
Single Arbitrator