West Fraser Mills v. United Steelworkers, Locals 1-424 and 1-425 (Long Term Disability Contributions Grievance), [2017] B.C.C.A.A.A. No. 125

British Columbia Collective Agreement Arbitration Awards

British Columbia

Collective Agreement Arbitration

Vancouver, British Columbia

Panel: David C. McPhillips (Arbitrator)

Heard: August 30 and 31 and October 27, 2017.

Award: December 7, 2017.

No. A-098/17

[2017] B.C.C.A.A.A. No. 125

IN THE MATTER OF an Arbitration under the Labour Relations Code of British Columbia, R.S.B.C. 1996 c.244 Between West Fraser Mills (Various Divisions) (the "Employer"), and United Steelworkers, Locals 1-424 and 1-425 (the "Union") (Long Term Disability Contributions Grievance)

(96 paras.)

Appearances

Counsel for the Employer: Donald J. Jordan, Q.C.

Counsel For The Union: Sandra I. Banister, Q.C.

AWARD

1 The parties are agreed this Board has the jurisdiction to determine this matter. This dispute involves the interpretation of Collective Agreement provisions dealing with employer and employee contribution levels related to the IWA - Forest Industry Long Term Disability plan.

FACTS:

2 The parties submitted an Agreed Statement of Facts as well as providing testimony from the following individuals: Mike Bryce, the Executive Director of CONIFER; Dean Dobinsky, former Manager, Human Resources for West Fraser; Gerry Smith, a former National Staff Representative for the United Steelworkers; Harvey Arcand, a former executive with the United Steelworkers and presently a Benefits Consultant; Bob Matters, a National Officer with the Union and Chair of the Wood Council (former IWA locals in the USW).

3 This matter is comprised of five grievances which were consolidated for this hearing. Each grievance was brought by a separate division of West Fraser, pursuant to the terms and conditions of its Collective Agreement. The five Grievors are 100 Mile House Lumber, Williams Lake Plywood, Williams Lake Planer and Quesnel Plywood (also known as Cariboo Division) and Fraser Lake Sawmills.

4 Three of the Grievors, 100 Mile House, Williams Lake Plywood and Quesnel Plywood were originally owned by Weldwood of Canada Limited. West Fraser became the successor employer in 2005. Williams Lake Planer was, at all material times, a member of the Council on Northern Interior Forest Labour Relations ("CONIFER").

5 Each of the Grievors are participants in the IWA-Forest Industry LTD Plan (the "Plan") which is referenced in each of the Collective Agreements. The Employers make contributions to the Plan based upon the hours worked by their employees who are covered by the Plan and the contributions made by the Employers are matched by the employees. Currently, each Employer and each employee contributes $0.60 per hour worked for a total of $1.20 per hour. The Plan is administered pursuant to the IWAForestry Industry LTD Trust Agreement ("Trust Agreement"). The Trust Agreement provides for the election or appointment of eight trustees, four of whom are elected or appointed by the United Steelworkers Union and four of whom are elected or appointed by the Employers, defined in the Trust Agreement to be Forest Industrial Relations Limited ("FIR" -- 2 trustees), Interior Forest Labour Relations Association ("IFLRA" -- 1 trustee) and Council on Northern Interior Forest Industrial Relations ("CONIFER" -- 1 trustee). The Trustees are not a party in the proceedings before this Board.

6 The Trust Agreement permits the Plan Trustees to set the benefit levels for the employees on the Plan but the contribution rates have always been set by the parties in collective bargaining.

7 The LTD Plan was created in 1982 and, from the outset, it faced financial issues with respect to appropriate funding levels to ensure ongoing benefits could be paid to claimants. Prior to the early 2000's, the parties had employed rather inexact financial analyses with respect to future liabilities with the result that by that time much uncertainty existed with respect to the financial soundness of the Plan.

8 During collective bargaining in 2003, it was decided to address that situation. The Agreed Statement of Facts stipulates, at point 11, that "At the commencement of the bargaining in 2003, the contribution level was $0.55 per hour ($0.275 by the employer and $0.275 by the employee). In bargaining the parties agreed to decrease the amortization period from 28 years to 10 years, anticipating that an increase of $0.25 per hour would achieve this result". Therefore, it was agreed that the contribution rate would be raised to $0.80 from $0.55 for each hour worked in the industry with the contributions continuing to be split on a 50/50 basis between the employer and the employee. As well, based on the advice of the Trustees, a 10 year amortization period would be used for assessing the viability on the Plan.

9 Mr. Matters testified that it was also hoped that with these additional contributions, and if all things went well, during the term of the Collective Agreement perhaps the entire increase in contributions would not be needed. As a result, a "discontinuance clause" was added to the Long Term Disability provisions. As an example, the Williams Lake Planer Mill Agreement with Local 1-425 contained the following provisions (with the discontinuance clause in bold):

> ARTICLE XIX -- LONG TERM DISABILITY

Effective July 1st, 1982, a Long Term Disability Plan be provided based on the following general principles:

a) The Plan to become effective July 1st, 1982

b) October 1, 2000, the contributions from both the Industry and the Employee will be increased by eight cents (8 cents) per hour per employee per hour worked of which the Industry will contribute twenty-seven and one half cents ($0.275) and the employee will contribute twenty-seven and one half cents ($0.275)

c) Effective July 1, 2004, contributions will be increased by 25 cents per hour to produce a total payment of 80 cents per hour per Employee per hour worked, of which the Industry will contribute 40 cents per hour and the Employee will contribute 40 cents per hour.

d) Effective September 1, 2010, contributions from both the Company and the Employee will be one dollar and twenty cents ($1.20) per hour, per employee per hour worked of which the Company will contribute sixty cents ($0.60) per hour, and the Employees will contribute sixty cents ($0.60) per hour.

e) If at any point during the term of the Agreement, the Plan Actuary should determine that the full amount of the increase in contributions is no longer required to amortize the unfunded liability over the ten year period contemplated by this Agreement, the excess contributions will be discontinued by each party accordingly.

f) Effective July 1, 2004, Employees who become disabled on or after July 1, 2004, shall be eligible to apply for LTD benefits after a 26 week qualifying period.

g) A Board of Trustees will be constituted with equal representation from the Union and the Industry, to be responsible for establishing the terms of the Plan and the ongoing administration.

h) The Trustees will select a qualified actuary to assist them and to ensure the establishment of actuarially sound reserves to fund the benefits provided by the Plan.

i) The Trustees will enter into a Trust Agreement which will include provision for a procedure to settle any major dispute that may arise with regard to the provisions of the Plan.

j) Protection Against Withdrawals Withdrawing employer to be assessed for both the employer and employee share of the unfunded liability in cases of negotiated withdrawal, decertification or relocation closure. The unfunded liability formula to be uniform and based on the Plan's unfunded liability divided by the total number of Plan members (at the time of the most recent Plan Valuation) multiplied by the number of Plan members affected by the withdrawal. The Plan Trustees are to be directed to amend the participation agreement accordingly.

10 The evidence is that the LTD Plan mostly performed as anticipated between 2003 and 2007 and the assumptions, particularly with respect to hours worked in the industry and investment returns on the funds, proved somewhat realistic. Then in 2008, a "perfect storm" arose when the financial recession occurred and a number of the actuarial assumptions ceased to be met. (For example, projected hours of work in the industry had been for approximately 29 million hours in 2009 but there were only 12 million hours worked; projected revenue had been estimated at $23 million for that year but it was only $9.6 million.) As well, in 2008, the Return on Investments in the Plan was a negative 16.8%.

11 This resulted in the "Funded Ratio" in the LTD Trust Fund being 0.413 whereas 1.0 indicates a situation where the fund's assets meet it future liabilities and a ratio of 1.5 is generally considered to be a conservative position. The evidence indicates the Fund was "bleeding" badly with expenses exceeding income by about one million dollars a month.

12 As a result, the Joint Board of Trustees undertook dramatic steps after consultation with the Plan Actuary. The Trustees decided to make significant reductions to the benefits levels to be paid to the claimants. First, there were "offsets" created for those claimants who reached the age of 55 which had the effect of reducing their pensions benefits. Second, claimants under 55 years of age had their benefits reduced by $100 a month. Third, collateral benefits such as EHB deductibles and reimbursements, acupuncture, naturopath and massage therapy were no longer covered and dental coverage was reduced. Mr. Bryce and Mr. Smith both discussed in their testimony how difficult it was to make these reductions to the benefits provided to these vulnerable individuals.

13 These changes were expected to save the Plan approximately $6.7 million a year. However, those reductions addressed only approximately 50% of the Plan's funding shortfall so it was also determined by the Trustees that contribution levels would have to be increased to $1.20 an hour during the 2009 round of collective bargaining.

14 As a result, the Plan Trustees created a presentation, including video and power point, which was presented to employees and employers within the industry and set out all of the above recommendations to ensure the Plan would not fall into insolvency. Bob Bishoff, the General Manager of the LTD Plan at the time, also prepared a package of material containing a letter, a proposed notice to be sent to employees, a Question and Answer transcript and a document setting out the changes and recommendations to all the bargaining participants (Associations, Employers and Union Locals).

15 First, his letter stated as follows:

> The LTD Plan has been serving the industry and its members since 1982. It currently provides benefits to approximately 1,400 disabled members and in 2008 paid in excess of $20 million in benefits to those members.
>
> The current downturn has negatively impacted the LTD Plan and its ability to continue to provide protection to those who are, or may become disabled.
>
> In order to deal with the funding shortfall, the Trustees of the LTD Plan have made a number of changes to the LTD Plan benefits which will save an estimated $6,750,000 per year. However, the long-term health of the LTD Plan requires an increase in the contribution rate and they are requesting the parties to the negotiations to effect an increase totaling an additional 40 cents per hour.
>
> Attached is a comprehensive list of the actions taken by the Trustees, as well as recommendations for further action. There is also a question and answer (FAQ) sheet that provides information on a number of questions you may have. We hope you find the information helpful.
>
> The LTD Plan will be contacting all disabled members shortly to advise them of the changes. While they are encouraged to contact the LTD Plan office, we expect that you may be contacted as well.

We appreciate that times are difficult for all employers and employees. On behalf of the LTD Plan and particularly those disabled members and their families, thank you for your understanding and assistance in resolving this difficult situation.

16 Of relevance for our purpose, the Question/Answer transcript contained the following two anticipated questions and the answers thereto:

...

11. Will these benefits ever be re-established?

The Trustees have agreed that the benefits will be reinstated when the Trustees receive advice from the Plan Actuary that the LTD Plan is stable and secure. It is estimated the Plan would be in a position to phase in reinstatement of benefits when 25 million hours are contributed annually, or when full funding of the Plan can be achieved in 10 years or less.

12. How long will the additional contributions be required?

The Trustees are committed to reducing the contribution level in a prudent manner and time frame as the benefits are re-established. All changes will be made on the advice of the Plan Actuary and by measuring the impact of the changes on the health of the Plan.

...

17 Finally, the Plan Changes and Recommendations document stated as follows:

The LTD Plan Actuary has advised the LTD Plan Trustees that the LTD Plan will become insolvent unless immediate improvements to funding levels take place and some benefit level reductions are applied. This is due to an unanticipated sharp decline in contributory hours worked and the uncertainty of return to normal market conditions.

Funding has traditionally been a product of Industry-Union negotiations. The LTD Trustees do not have the ability to increase contributions to the LTD Plan. In order to maintain the viability of the LTD Plan, the LTD Trustees are implementing a number of necessary changes to reduce the LTD Plan's costs. They are also making a joint recommendation to the industry and Union negotiators to negotiate increased contribution levels in the next round of industry collective bargaining.

The LTD Plan design changes to be implemented will significantly improve the LTD Plan's funding position but these changes alone are insufficient to restore the LTD Plan's financial health. Increased funding is essential to the viability of the LTD Plan.

A. LTD Plan Changes to be Implemented by the LTD Trustees, Effective July 31, 2009

1. LTD claimants aged 55 or over will, in addition to any offsets they may be subject to (e.g. CPP, WCB, ICBC, etc) have their benefit further offset by an amount equal to the IWA-Forest Industry Pension Plan ("Pension Plan") normal form (*) of early retirement benefit he or she would receive or would be entitled to receive upon applying for early retirement.

Claimants will continue to be eligible for collateral benefits between ages 55 and 60 as long as they continue to be disabled within the meaning of the LTD Plan.

2. The LTD benefit level for claimants under 55 years of age will be reduced by $100 per month. This reduction will be reinstated as part of the top up after age 55 as described in point 1 above.

3. Collateral Benefit package for LTD Claimants to be modified as follows:

a) EHB Annual Deductible increased to $75/year and $250/family.

b) EHB reimbursement level to be set at 80% for all EHB coverage.

c) EHB $5 per prescription deductible to be charged.

d) EHB Acupuncture, naturopath and massage therapy no longer covered.

e) Dental LTD Plan coverage under A, B, C all reduced by 10% to 70%, 50%, 50%.

f) Adult orthodontic coverage deleted.

g) Dental recall coverage extended to one year.

4. Changes 1, 2 and 3 above to be reinstated by the LTD Trustees contingent on the prudent advice received from the LTD Plan Actuary in the best interest of LTD Plan stability and security when 25 million hours annual contribution level or 10-year amortization is achieved.

B. Other Initiatives to be Undertaken by the LTD Trustees to Lower LTD Plan Costs

1. Subcommittee of Board to approach Federal Government authorities to seek amendment to provide longer duration EI Sickness Pay Benefit while forest industry downturn continues.

2. Board to require all claimants to be registered with BC Pharmacare and complete the income review for decreased family income. Board to establish a Sub-Committee to consider the adoption of a policy of mandatory member appeal to Pharmacare when prescription drugs are refused for coverage.

3. Subcommittee of Board to approach Provincial Government authorities to seek full premium relief on MSP premiums while forest industry downturn continues.

C. Changes Recommended by the LTD Trustees but to be Decided by Collective Bargaining

1. Increased contributions of a minimum of 40 cents per hour effective July 1, 2009 or the equivalent of 40 cents per hour effective July 1, 2009, if negotiated for an effective date later than July 1, 2009.

2. The LTD Plan Trustees to be given the authority from the LTD Plan Settlors to amend the contribution rates for both employers and employees where the LTD Plan Actuary's annual valuation indicates that such change is necessary to keep the LTD Plan in concert with a maximum 10-year amortization of any existing unfunded liability at the time of the valuation.

18 As noted above, the Plan Trustees themselves did not have the authority to increase the contribution levels themselves as that could only be done in collective bargaining. As a result, a presentation was also made to all the bargaining committees during the 2009 round of bargaining. These presentations

were made by Mr. Smith on behalf of the Joint Trustees and set out all the above information demonstrating the "dire straits" in which the Plan found itself.

19 The presentation identified the steps the Plan Trustees were undertaking to reduce the benefits and also made two recommendations to the bargaining parties. First, it was strongly recommended that the contribution levels should be raised from $0.80 to $1.20 per hour work. Second, the Trustees recommended that they be given the authority to set contribution rates in the future. In that regard, the power point presentation stated:

> The LTD Plan trustees to be given the authority from the Plan settlors to amend the contribution rates for both employers and employees where the Plan Actuary's annual valuation indicates that such change is necessary to keep the LTD Plan in concert with a 10 year amortization of any existing unfunded liability at the time of the valuation.

20 The evidence is that the bargaining parties never seriously considered allowing the Trustees to set contribution levels and that authority remains to the present time with the parties themselves.

21 Bargaining in the industry began in the middle of 2009. Mr. Matters stated that the Union bargained intermittently with each of CONIFER (which includes West Fraser's Williams Lake Planer Mill), Canfor, West Fraser and Interior Forest Labour Relations Association ("IFLRA" -- which at times included West Fraser's Chasm Division) over the next two years. He testified the Union engaged with each of them initially in order to choose the one where the Union felt it would most likely succeed and be able to set the "pattern". (The Union views this as "pattern bargaining" while the Employers takes the position that these are all independent agreements).

22 Negotiations commenced with CONIFER in July 2009 and then broke off in October, following which the Union's attention turned to Canfor and then West Fraser in late 2009 and very early 2010.

23 Due to the ongoing difficulties with the LTD Plan and the slow pace of negotiations, on January 22, 2010, Mr. Bishop wrote, to the "2009 -- 2010 Bargaining Participants" as follows:

> The Union and Management Trustees of the IWA-Forest Industry Long Term Disability Plan (the "LTD Plan") have previously requested that the parties to the bargaining process consider an increase to the funding of the LTD Plan to help offset the current decline in funding due to the downturn in the industry.
>
> The Trustees have taken steps to reduce costs in order to assist in the long term viability of the LTD Plan. In addition to the material previously provided, we offer the following in support of the request.
>
> We have included two cash flow sheets. The first (Simple Illustration -- No Increase in Contributory Rate and Expenditures) assumes no increase in contribution rates (i.e. remain at $0.80) but that the hours will be 14 million in 2010, 16 million in 2011 and 20 million in 2012. Interest earnings on net assets are assumed to be 6.25%. We assume all other expenditures will remain at current levels. As you will note, the LTD Plan could survive to 2013 (with virtually no room for adverse experience).
>
> The second sheet (Simple Illustration -- Increase in Contributory Rate to $1.20) assumes the $1.20 will start effective July 1, 2010. All other factors remain the same as the first illustration (i.e. hours go up, interest earnings are 6.25% and other expenditures remain the same). As you will

> observe, cash flows are positive in 2011 and the Net Assets Available return to the levels that we say as recently as 2007 and would continue to climb thereafter.
>
> It is important to note that when the LTD Board asked for the increase in contributions, it was with a view that as the health of the LTD Plan improved, benefit levels would be increased to the levels which were in place prior to the current reductions and contributions would be decreased to the $0.80 level, all on the advice of the actuary.
>
> We have also included material from the December 31, 2008 Actuarial Valuation titled (Sufficiency of Contributions". We draw your attention to the third paragraph and in particular the following: "In addition, it is anticipated that the Plan Assets will be exhausted in the short term. Accordingly, the total negotiated contribution rate of 80.0 cents per hour will not be sufficient to fund the benefit payments and non-investment expenses payable from the Plan".
>
> We can advise that currently there are over 1,300 members who are in receipt of some form of benefit from the LTD Plan.
>
> Also included in this package is a chart which shows the Net Assets Available for Benefits and LTD benefits paid, collateral benefits paid (extended health, dental and MSP) for the last ten years. You will note that over the last decade, the LTD Plan has paid out over $183 million dollars to disabled Plan members. You will also note LTD benefits paid have remained relatively flat. The decline in net assets available has been due to the decline in contributory hours, particularly in 2008 and most dramatically in 2009 ...

24 A Collective Agreement was reached with Canfor in February 20, 2010 and as far as the Union was concerned that was the pattern which would lead to the other agreements. Talks between the Union and the IFLRA began in March of 2010 and were not particularly successful. In August 2010, the USW returned to CONIFER and an agreement was reached, which according to Mr. Matters, included 90% of the Canfor deal being adopted without much discussion. With respect to the Long Term Disability Clause, the Memorandum of Agreement with CONIFER (just as it had with Canfor) stated:

> 10. Article XIX, Long Term Disability
>
> Effective September 1, 2010, contributions from both the Company and the Employee will be one dollar and twenty cents ($1.20) per hour, per employee per hour worked, of which the Company will contribute sixty cents ($0.60) per hour, and the Employees will contribute sixty cents ($0.60) per hour.
>
> The evidence is there was no discussion during the CONIFER bargaining about the LTD plan other than to agree to the raise in the contribution rate to $1.20 per hour.

25 Mr. Bryce, Mr. Dobinsky and Mr. Matters are all in agreement that there was never any discussion in the CONIFER or Canfor negotiations about the removal of the discontinuance clause and that was never included in any of the Union's proposals.

26 Neither were there any suggestions from the Employer that ceasing contributions in the future was a "live option" or that there would be a possibility of returning to a $0.55 contribution rate in the future. The testimony of the witnesses indicates the entire focus was to get the Plan to a state of being solvent and it was not even contemplated that the fund would get to a position where there was no unfunded liability using a 10 year amortization period.

27 Mr. Matters did testify that, during the IFLRA negotiations, that Association had made the following proposal to the Union on March 11, 2010:

> ARTICLE XIX -- LONG TERM DISABILITY
>
> Add as follows:
>
> Effective July 1, 2009, contributions will total eighty cents (80 cents) per hour per Employee per hour worked, of which the Industry will contribute forty cents (40 cents) per hour and the Employee will contribute forty cents (40 cents) per hour. Effective July 1, 2010, contributions from both the Company and the Employee will total one dollar and twenty cents ($1.20) per hour, per employee per hour worked, of which the Company will contribute sixty cents ($0.60) per hour, and the Employees will contribute sixty cents ($0.60) per hour.
>
> If at any point during the term of the agreement, the Plan Actuary should determine that the full amount of the increase in contributions is no longer required to amortize the unfunded liability over a ten year period, the excess contributions will be discontinued accordingly.

28 Mr. Matters testified he told the IFLRA representatives that the second paragraph would have to be removed as it no longer made any sense to include it. The evidence is that Mr. Dobinski of West Fraser was not in attendance at that point in time as West Fraser had removed itself from the IFLRA. In May 2010, West Fraser rejoined the IFLRA with respect to its Chasm Division.

29 Then in October, the IFLRA proposed language with respect to the LTD Plan which was adopted in an MOA:

> 10. Article XIX, Long Term Disability
>
> Effective November 1, 2010, contributions from both the Company and the Employee will be one dollar and twenty cents ($1.20) per hour, per employee per hour worked, of which the Company will contribute sixty cents ($0.60) per hour, and the Employees will contribute sixty cents ($0.60) per hour.

30 Mr. Matters testified that the Union ultimately took the CONIFER Agreement to West Fraser and again 90% of that Agreement was separately adopted at each of the five West Fraser sites. The only issue that was discussed with West Fraser concerning the LTD Article was a change to the effective date of the increase of the contribution rate to $1.20 an hour. Mr. Dobinski testified that the terms of the CONIFER Agreement were generally adopted, many (including the LTD provision) without any discussion. Mr. Matters testified he felt West Fraser must have been aware of the discussions in the ILFRA negotiations during which the discontinuance clause had been removed. However, Mr. Dobrinski testified he was unaware of the IFLRA's previous proposal or any of the discussions which had occurred around it when he was not in attendance. Mr. Bryce also testified under cross-examination that he was never made aware in the CONIFER negotiations that the discontinuance clause had been removed in the ILFRA Agreement.

31 Collective Agreements were ultimately reached and ratified with each of the Employers. As set out above, the 2009 -- 2013 CONIFER Agreement contains the discontinuance clause. The evidence is that the 2009 -- 2013 Canfor Agreement did as well. The IFLRA Agreement did not retain that provision. With respect to West Fraser, the discontinuance clause remained in each of the five Agreements (in bold print

below) but was placed in different locations in each of the Agreements. In some cases it appears that discontinuance clause might be linked only to the 2003 increase where in other of the Agreements it stands alone and appears to apply more generally. As can also be seen, the LTD Article in each of the five agreements also contained different levels of historical information with respect to the contribution rates that had been in effect over time. As well, there were different effective dates for the new contribution rate of $1.20 to take effect due to different ratification dates.

32 At West Fraser Mills -- 100 Mile House, the LTD clause stated:

> ARTICLE XX -- LONG TERM DISABILITY PLAN
>
> a) The Plan will become effective July 1, 1982.
>
> b) Effective July 1, 1993, the Plan to be funded 50/50 cost sharing basis with contributions of twenty-two (22 cents) cents per hour per employee per hour worked, of which the Industry will contribute eleven cents (11 cents) and the employee will contribute eleven cents (11 cents).
>
> Effective January 1, 1995 contributions from both the Industry and the employees will be increased by six cents (6 cents) per hour worked so that contributions will be thirty-four cents (34 cents) per hour per employee per hour worked of which the Industry will contribute seventeen cents (17 cents) and the employee will contribute seventeen cents (17 cents).
>
> Effective July 1, 1995, contributions from both the Industry and the employees will be increased by a further two and one-half cents (2 1/2) per hour worked so that contributions will be thirty-nine cents (39 cents) per hour per employee per hour worked of which the Industry will contribute nineteen and one-half cents (19 1/2) and the employee will contribute nineteen and one-half cents (19 1/2).
>
> Effective October 1, 2000, the contributions from both the Industry and the employee will be increased by eight cents (8 cents) per hour per employee per hour worked, so that the contributions will be fifty-five cents (55 cents) per hour per employee per hour worked of which the Industry will contribute twentyseven and one-half cents (27 1/2 cents) and the employee will contribute twentyseven and on-half cents (27 1/2 cents).
>
> Effective July 1, 2004, contributions will be increased by twenty0five cents (25 cents) per hour to produce a total of eighty cents (80 cents) per hour per employee hour worked, of which the Industry will contribute forty cents (40 cents) per hour.
>
> Effective November 1, 2010 after signing of the memorandum, contributions from both the Company and the Employee will be one dollar and twenty cents ($1.20) per hour, per employee per hour worked, of which the Company will contribute sixty cents ($0.60 per hour, and the Employees will contribute sixty cents ($0.60) per hour.
>
> **If at any point during the term of the Agreement, the Plan Actuary should determine that the full amount of the increase in contributions is no longer required to amortize the unfunded liability over the 10 year period contemplated by this Agreement, the excess contributions will be discontinued by each party accordingly.**
>
> c) A Board of Trustees will be constituted with equal representation from the Union and the Industry, to be responsible for establishing the terms of the Plan and the on-going administration.

d) The Trustees will select a qualified actuary to assist them and to ensure the establishment of actuarially sound reserved to fund the benefits provided by the Plan.

e) The Trustee will enter into a Trust Agreement which will include provision for a procedure to settle any major dispute that may arise with regard to the provisions of the Plan.

f) Protection Against Withdrawals:

Withdrawing employer to be assessed for both the employer and employee share of the unfunded liability in cases of negotiated withdrawal, decertification or relocation closure. Unfunded liability formula to be uniform and based on Plan Unfunded Liability divided by the total number of Plan members (at the time of most recent Plan Valuation) multiplied by the number of Plan members affected by the withdrawal. Trustees to be directed to amend the participation agreement accordingly...

33 At Fraser Lake Sawmills, the provision read:

ARTICLE XIX -- LONG TERM DISABILITY

Effective July 1st, 1982 a Long Term Disability Plan be provided based on the following general principles:

a) The Plan will become effective July 1, 1982.

b) Effective October 1, 2000, the contributions from both the Industry and the Employee will be increased by eight cents ($0.8) per hour per employee per hour worked so that contributions will be fifty-five cents ($.55) per hour per employee per hour worked of which the industry will contribute twentyseven and one half cents ($0.275) and the employee will contribute twentyseven and one half cents ($0.275).

c) Effective July 1, 2004, contributions will be increased by twenty-five cents ($0.25) per hour to produce a total payment of eighty cents ($0.80) per hour per Employee per hour worked, of which the Industry will contribute forty cents ($0.40) per hour and the Employee will contribute forty cents ($0.40) per hour.

d) Effective November 1, 2010, contributions from both the Company and the Employee will be one dollar and twenty cents ($1.20) per hour, per employee per hour worked, of which the Company will contribute sixty cents ($0.60) per hour, and the Employees will contribute sixty cents ($0.60) per hour.

e) If at any point during the term of the Agreement, the Plan Actuary should determine that the full amount of the increase in contributions is no longer required to amortize the unfunded liability over the ten year period contemplated by this Agreement, the excess contributions will be discontinued by each party accordingly.

f) Effective July 1, 2004, Employees who become disabled on or after July 1, 2004, shall be eligible to apply for LTD benefits after a 26 week qualifying period.

g) A Board of Trustees will be constituted with equal representation from the Union and the Industry, to be responsible for establishing the terms of the Plan and the on-going administration.

h) The Trustees will select a qualified actuary to assist them and to ensure the establishment of actuarially sound reserves to fund the benefits provided by the Plan.

i) The Trustees will enter into a Trust Agreement which will include provision for a procedure to settle any major dispute that may arise with regard to the provisions of the Plan.

j) Protection Against Withdrawals

Withdrawing employer to be assessed for both the employer and employee share of the unfunded liability in cases of negotiated withdrawal, decertification or relocation closure. The unfunded liability formula to be uniform and based on the Plan's unfunded liability divided by the total number of Plan members (at the time of the most recent Plan Valuation) multiplied by the number of Plan members affected by the withdrawal. The Plan Trustees are to be directed to amend the participation agreement accordingly.

34 At West Fraser Mills (Cariboo Division) the clause read:

ARTICLE XXI -- LONG TERM DISABILITY PLAN

a) The Plan has been in effect since July 1st, 1982.

b) The Plan to be funded on a 50/50 cost sharing basis. Effective the first of the month following ratification, contributions from both the Company and the Employee will be one dollar and twenty cents ($1.20) per hour, per employee per hour worked, of which the Company will contribute sixty cents ($0.60) per hour, and the Employees will contribute sixty cents ($0.60) per hour.

If at any point during the term of the Agreement, the Plan Actuary should determine that the full amount of the increase in contributions is no longer required to amortize the unfunded liability over the 10 year period contemplated by this Agreement, the excess contributions will be discontinued by each party accordingly.

c) A Board of Trustees will be constituted with equal representation from the Union and the Industry, to be responsible for establishing the terms of the Plan and the ongoing administration.

d) The Trustees will select a qualified actuary to assist them and to insure the establishment of actuarially sound reserves to fund the benefits provided by the Plan.

e) The Trustees will enter into a Trust Agreement which will include provision for a procedure to settle any major dispute that may arise with regard to the provisions of the Plan.

f) Protection against Withdrawals -- Withdrawing employer to be assessed for both the employer and employee share of the unfunded liability in cases of negotiated withdrawal, decertification or relocation closure. Unfunded liability formula to be uniform and based on Plan Unfunded Liability divided by the total number of Plan member (at the time of most recent Plan Valuation) multiplied by the number of Plan members affected by the withdrawal. Trustees to be directed to amend the participation agreement accordingly.

West Fraser and United Steelworkers will jointly consider plan modifications that will improve the delivery of Rehabilitation within the Long Term Disability Plan, and will encourage and

facilitate the development and establishment of Disability Management systems in participating employer's operations.

35 At the Williams Lake Planer Division, the provision stated:

ARTICLE XIX -- LONG TERM DISABILITY PLAN

Effective July 1st, 1982, a Long Term Disability Plan be provided based on the following general principles.

a) The Plan to become effective July 1st, 1982.

b) October 1, 2000, the contributions from both the Industry and the Employee will be increased by eight cents (8 cents) per hour per employee per hour worked so that contributions will be fifty-five cents (55 cents) per hour per employee per hour worked of which the Industry will contribute twentyseven and one half cents ($0.275) and the employee will contribute twentyseven and one half cents ($0.275).

c) Effective July 1, 2004, contributions will be increased by 25 cents per hour to produce a total payment of 80 cents per hour per Employee per hour worked, of which the Industry will contribute 40 cents per hour and the Employee will contribute 40 cents per hour.

d) Effective September 1, 2010, contributions from both the Company and the Employee will be one dollar and twenty cents ($1.20) per hour, per employee per hour worked, of which the Company will contribute sixty cents ($0.60) per hour, and the Employees will contribute sixty cents ($0.60) per hour.

e) If at any point during the term of the Agreement, the Plan Actuary should determine that the full amount of the increase in contributions is no longer required to amortize the unfunded liability over the ten year period contemplated by this Agreement, the excess contributions will be discontinued by each party accordingly.

f) Effective July 1, 2004, Employees who become disabled on or after July 1, 2004, shall be eligible to apply for LTD benefits after a 26 week qualifying period.

g) A Board of Trustees will be constituted with equal representation from the Union and the Industry, to be responsible for establishing the terms of the Plan and the ongoing administration.

h) The Trustees will select a qualified actuary to assist them and to ensure the establishment of actuarially sound reserves to fund the benefits provided by the Plan.

i) The Trustees will enter into a Trust Agreement which will include provision for a procedure to settle any major dispute that may arise with regard to the provisions of the Plan.

36 At the Williams Lake Plywood Division, the LTD provision read:

ARTICLE XIX -- LONG TERM DISABILITY PLAN

a) The Plan will become effective July 1, 1982.

b) Ef fective July 1, 1993, the Plan to be funded 50/50 cost sharing basis with contributions of twenty-two (22 cents) cents per hour per employee per hour worked,

of which the Industry will contribute eleven cents (11 cents) and the employee will contribute eleven cents (11 cents).

Effective January 1, 1995, contributions from both the Industry and the employees will be increased by six cents (6 cents) per hour worked so that contributions will be thirty-four cents (34 cents) per hour per employee per hour worked of which the Industry will contribute seventeen cents (17 cents), and the employee will contribute seventeen cents (17 cents).

Effective July 1, 1995, contributions from both the Industry and the employees will be increased by a further two and one-half cents (2 1/2 cents) per hour worked so that contributions will be thirty-nine cents (39 cents) per hour per employee per hour worked of which the Industry will contribute nineteen and on-half cents (19 1/2 cents) and the employee will contribute nineteen and one-half cents (19 1/2 cents).

Effective October 1, 2000, the contributions from both the Industry and the employees will be increased by eight cents (8 cents) per hour per employee per hour worked, so that the contributions will be fifty-five cents (55 cents) per hour per employee per hour worked of which the Industry will contribute twentyseven and one-half cents (27 1/2 cents) and the employee will contribute twentyseven and one-half cents (27 1/2 cents).

Effective July 1, 2004, contributions will be increased by twenty-five cents (25 cents) per hour to produce a total of eighty cents (80 cents) per hour per employee hour worked, of which the industry will contribute forty cents (40 cents) per hour and the employee will contribute forty cents 940 cents) per hour.

Effective the first month following ratification, contributions from both the Company and the Employee will be one dollar and twenty cents ($1.20) per hour, per employee per hour worked, of which the Company will contribute sixty cents ($0.60) per hour, and the Employees will contribute sixty cents ($0.60) per hour.

If at any point during the term of the Agreement, the Plan Actuary should determine that the full amount of the increase in contributions is no longer required to amortize the unfunded liability over the ten (10) year period contemplated by this Agreement, the excess contributions will be discontinued by each party accordingly.

c) A Board of Trustees will be constituted with equal representation from the Union and the Industry, to be responsible for establishing the terms of the Plan and the ongoing administration.

d) The Trustees will select a qualified actuary to assist them and to insure the establishment of actuarially sound reserves to fund the benefits provided by the Plan.

e) The Trustees will enter into a Trust Agreement which will include provision for a procedure to settle any major dispute that may arise with regard to the provisions of the Plan.

f) Protection against Withdrawals -- Withdrawing employer to be assessed for both the employer and employee share of the unfunded liability in cases of negotiated withdrawal, decertification or relocation closure. Unfunded liability formula to be uniform and based on Plan Unfunded Liability divided by the total number of Plan member (at the time of most recent Plan Valuation) multiplied by the number of Plan members affected by the withdrawal. Trustees to be directed to amend the participation agreement accordingly.

37 Mr. Matters testified that the inclusion of the discontinuance clause in these Agreements was simply the result of "sloppy editing" in many of the Locals as the MOA's had often been reviewed by individuals who were not at the bargaining table. The MOA's contained no reference to the discontinuance clause and so it was simply left in the Collective Agreement. In his opinion, the clause was no longer needed as it applied to the increase in the 2003 Agreement when it was thought there was a realistic possibility that the full increase from $0.55 to $0.80 may not be needed and that the increase might only be of a temporary nature. Mr. Matters stated that was certainly not the case in 2009 when the LTD was facing insolvency ("dire straits") and a new contribution rate ($1.20) was required.

38 These Collective Agreements were all renegotiated in 2013 and the term of those Agreements ran from July 1, 2013 to June 30, 2018. The Long Term Disability Plan provisions in the Union's agreements with CONIFER and West Fraser were not discussed and remained unchanged. The evidence of Mr. Matters is that in the Canfor Agreement the discontinuance clause was removed but there had been no discussion of it at the bargaining table and he was uncertain as to how or why it was removed. The IFLRA Agreement remained unchanged from 2009 -- 2013 with the discontinuance clause not included.

39 For a number of years, matters proceeded with reduced benefits being paid to LTD claimants and contribution levels set at $1.20 per hour. However, the Plan Trustees had always been anxious to reinstate the previous benefit levels as soon as it was practical to do so. The evidence is the state of the Plan slowly improved due to the stability of hours worked, the ending of some "legacy claims" and fewer new claims being made. As a result, at the end of 2014, the Trustees commissioned an Actuarial Report (as at December 31, 2014) to assess the financial status of the Plan. They received a draft report in the Spring of 2015 and the final copy was issued in September 2015.

40 The purposes of the report were described as follows:

* to present information on the financial position of the plan on a going concern ("GC") basis;
* to present information on the financial position of the plan on an aggregate entry age normal ("AEAN") basis;
* to present information on the financial position of the plan on a hypothetical windup ("HWU") basis; and
* to review the sufficiency of the contributions expected to be remitted to the plan to provide the benefits expected to be paid by the plan.

41 The Report determined that, based on the existing contribution rate of $1.20 (no other rates were considered) and 16 million hours worked in the industry, there would be $19.2 million in ongoing annual contributions and the Plan would have a surplus of approximately $34.5 million at the end of 2014.

42 The "Actuarial Certification" in the Report stated:

> Based on the results of the actuarial valuations, we hereby certify that, in our opinion, as at December 31, 2014:
>
> * The GC actuarial surplus, determined by comparing the GC actuarial liability to the GC value of assets, is $34,536,000.

* The AEAN actuarial surplus, determined by comparing the AEAN actuarial liability to the AEAN value of assets, is $61,680,000.

* The HWU surplus, determined by comparing the HWU actuarial liability to the HWU value of assets, is $12,396,000.

* The total negotiated contribution rate is $1.20 per contributory hour and is sufficient to fund expected future benefits incurred during the three year period following the valuation date, on both a going concern basis and an aggregate entry age normal basis. The contributions in excess of the normal actuarial costs will generate an actuarial surplus.

* In accordance with Canadian Institute of Actuaries' *Practice-Specific Standards for Post-Employment Benefit Plans*, the next actuarial valuation should be performed with an effective date not later than December 31, 2017.

43 As a result, the Plan Trustees determined that the benefits which had been reduced in August, 2009 could now be reinstated on a "going forward" basis only. There was some discussion of making the claimants whole for the losses over the prior number of years but that idea was rejected as it was estimated that action would cost the Plan in the neighbourhood of $36 million.

44 On July 23, Derrick Johnstone, the General Manager of the Industry LTD Plan, sent out the following letter to Employers, Associations and Union Locals:

> We are very pleased to announce that the Trustees of the LTD Plan ("Trustees") have approved the reinstatement of benefits that were in effect prior to August 1, 2009, for the current members of the LTD Plan.
>
> The monthly payment improvements go into effect on July 1, 2015, and the extended health and dental benefits improvements on August 1, 2015. Attached is an information sheet with the details.
>
> In August of 2009, reductions were made to the benefits in the LTD Plan due to the economic downturn in the forest industry. At that time, the Trustees agreed that the benefits would be reinstated when the Trustees received advice from the Plan Actuary that the LTD Plan was stable and secure. Since the LTD Plan has now become financially secure, and the long-term health of the Plan looks very good, the Trustees have approved the reinstatement of these benefits going forward.
>
> The LTD Plan will be mailing letters to all members in receipt of LTD benefits to advise them of the benefit changes. While they are encouraged to contact the LTD Plan directly if they have any questions, we expect that you may be contacted as well.

45 Accordingly, in late 2015 the benefits were reinstated for the claimants at the level they had been back in 2009.

46 Then, by 2016 an even larger surplus had materialized in the Plan and the Trustees determined that it was their fiduciary duty (the Employer Trustees sought legal advice to that effect) to improve benefits to the claimants. As a result, it was decided that the employees covered by the LTD Plan would receive an extra $500 (gross) monthly, moving those payments from $1,800 to $2,300. As well, there was a new card drug plan implemented.

47 This benefit increase, which was the first one in twenty years, was described in a letter from Mr. Johnstone to the various parties on July 19, 2016. It stated:

> Re: Improvements to your IWA -- Forest Industry LTD Plan
>
> As a Participating Employer of the IWA -- Forest Industry LTD Plan, we're writing to notify you about an increase in member benefits.
>
> Due to the financial strength of the LTD Plan, the Board of Trustees has approved an increase in the amount of Long Term Disability payments to members. **Effective immediately, the gross monthly LTD payment will increase by $500.**
>
> This benefit increase will be included with all July 2016 LTD benefit payments to members. However, please note that each member's net benefit increase depends on any existing offsets they may have (for example, CPP Disability benefit or WCB awards; plus applicable taxes withheld.)
>
> All members currently receiving an LTD benefit will be notified by mail about this increase. Members can also expect a further announcement regarding improvements to the ancillary benefits of the LTD Plan. Please feel free to circulate this letter as appropriate and visit the Plan website at www.iwafibp.ca for more information about the LTD Plan improvements.
>
> Please direct any questions about this benefit increase, or any other LTD concerns, to the Plan Office ...
>
> (emphasis in original)

48 This notification caused quite a negative reaction within the West Fraser operations. On August 3, Al Caputo, the Human Resources Manager, Operations, wrote to Mr. Matters and each of the Union Locals as follows:

> Re: Improvements to the IWA-Forest Industry LTD Plan
>
> Dear Sirs:
>
> On July 19, 2016, we received a letter from the IWA-Forest Industry LTD Plan at our West Fraser Williams Lake Planer Mill Division informing us, effective immediately, the trustees of the Plan have approved an increase of five hundred dollars ($500.00) to the monthly benefit. We are pleased to find out the Plan is now healthy enough, presumably without an unfunded liability, to be able to provide an increase to the benefit of our disabled employees.
>
> In our collective agreements at Chasm Sawmills, 100 Mile House Lumber, Williams Lake Plywood, Williams Lake Planer, Quesnel Plywood and Fraser Lake Sawmills there is language in the Long Term Disability Article which states this (or something very close to this); "If at any point during the term of the Agreement, the Plan Actuary should determine that the full amount of the increase in contributions is no longer required to amortize the unfunded liability over the ten year period contemplated by this Agreement, the excess contributions will be discontinued by each party accordingly".
>
> The improvement in benefit appears to be at odds with the requirements of the Collective Agreement to discontinue excess contributions once the plan is funded.

Can you explain this?

Also, could you provide the date the Plan Actuary should have determined that the full amount of the increase in contributions was no longer required?

Please consider this letter as notice of our concern that there may be a violation of our Collective Agreements in this regard. We look forward to further discussion.

49 Mr. Matters, on behalf of the Union, replied to Mr. Caputo by email on August 12. He stated:

Thank you for your letter of August 3, 2016.

Let me say respectfully that the only relevant facts regarding the contributions to the LTD Plan are the provisions most recently negotiated.

In reference to LTD funding, the most recent bargaining was for the 2009 -- 2013 Collective Agreement.

That language states:

> Effective November 1*, 2010, contributions from both the Company and the Employee will be one dollar and twenty cents ($1.20) per hour, per employee hour worked, of which the Company will contribute sixty cents ($0.60) per hour, and the Employees will contribute sixty cents ($0.60) per hour.

You will note and undoubtedly recall that the Plan at the time of that set of Negotiations was underfunded and the trustees jointly recommended to the Negotiators, that they negotiate a new contribution rate of $1.20.

The Parties did just that, negotiated a new rate, establishing a new contribution rate of $1.20 (with no qualification as was done in 2004).

Without blaming or offending anyone, when the actual collective agreement were drafted references to prior contribution levels should have been removed from the collective agreement.

I kept this response brief, if you have any questions, please feel free to give me a call.

*The effective date was different in some Collective Agreements.

50 Discussions between these parties as well as with executives at CONIFER followed over the next few months concerning the apparent overfunding in the Plan but no resolve was reached. As a result, these five grievances were filed by West Fraser in February 2017 on behalf of each of its operations. As an example, the grievance at 100 Mile House stated:

This letter shall serve as the Company's grievance alleging a breach of Article XX -- Long Term Disability. More particularly, the Company relies upon the language that:

If at any point during the term of the agreement, the Plan Actuary should determine that the full amount of the increase in contributions is no longer required to amortize the unfunded liability over the ten (10) year period contemplated by this Agreement, the excess contributions will be discontinued by either party accordingly.

It is apparent from the recent increase in the LTD monthly benefits, as reference in the LTD Plan's letter of July 10, 2016, that the excess contributions are no longer required to amortize the unfunded liability of the LTD Plan.

> On August 3, 2016, we wrote to the Union seeking to be advised of the date that the excess contributions were no longer necessary to amortize the unfunded liability of the LTD Plan. We have yet to receive a formal response.
>
> The Company's position is that the collective agreement language referred to above entitles it to the information regarding the date at which the excess contributions were no longer required to amortize the unfunded liability of the LTD Plan. Failure to be provided with that information is a breach of the collective agreement.
>
> As a remedy, we will ask the arbitrator to instruct the Union to join with the Company in instructing the Trustees to have the Plan Actuary provide a contribution rate that will support the current benefit and discontinue the excess contributions by both parties. Further, we will seek to have the arbitrator instruct the parties to obtain from the Actuary the date upon which excess contributions were no longer required and in order that both parties be reimbursed for overpayments to the Plan.

51 The Union formally responded to West Fraser on February 8, 2017 by setting out the contents of Mr. Matters' email from the previous August 12.

52 Mr. Bryce testified that CONIFER has never filed any grievance with respect to this contribution rate and does not intend to do so although the Union and the Employers have been in discussions over the last few months.

53 The evidence of a number of the witnesses is that based on conversations among various individuals, it is estimated that at the present time the contribution rate needs to be in the $0.88 - $0.92 range in order for the Plan to be solvent and that would not include any "cushion". An Actuarial Report on the state of the Plan as of December 2017 (with the contribution rate set at $1.20) has been commissioned by the Trustees with a view to the commencement of bargaining in March, 2018.

AWARD:

54 To begin, the parties are agreed that the Employer can properly file policy grievances under these Collective Agreements despite the absence of a provision in these Agreements acknowledging such grievances: *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967.

55 In these five grievances, the Employer submits that effect must be given to the "discontinuance clause" which is included in each of the Collective Agreements between West Fraser and the United Steelworkers.

56 As to remedy, the Employer seeks the following:

a) A declaration that, as of January 1, 2015 at the latest (the date at which the evidence indicates that the Plan no longer had any unfunded liabilities) the increases in the contribution rate should have been discontinued and the rate of $0.55 per hour (set in the 2003 -- 2009 collective agreement) should have been reinstated.

b) Due to the fact that both employers and employees have overpaid, the Employer seeks an equitable remedy whereby employers and employees stop making contributions until the Trustees advise that the ongoing lack of contributions means that the benefits cannot

> be sustained in an actuarially sound manner. In other words, the Employer is asking for a contribution holiday from the date of this decision until the accumulated surplus is reduced to an actuarially sound level.

57 In that respect, the Employer argues that extensive remedial authority rests with an arbitration board: *Nor-Man Regional Health Authority Inc., v. Manitoba Association of Health Care Professionals*, [2011] 3 S.C.R. 616; *Alberta and AUPE*, 273 L.A.C. (4th) 149 (Wallace); *Communication, Energy and Paperworkers Union, Local 444*, 219 L.A.C. (4th) 213 (Dorsey); *Vancouver School District No. 39*, 92 L.A.C. (4th) 182 (Dorsey); *Westech Information Systems Inc.*, [1997] B.C.C.A.A.A. No. 101 (Bird).

58 For its part, the Union submits that an arbitration board's remedial authority can be somewhat limited in certain circumstances: *Doman Forest Products*, [1982] B.C.A.A.A. No. 97 (Bird); *MTM Enterprises Ltd.*, [2013] B.C.C.A.A.A. No. 117 (Sullivan); Brown and Beatty, *Canadian Labour Arbitration in Canada*, Fourth Edition, Canada Law Book, para. 4:1610; *Re: Canadian Canners Limited*, 4 L.A.C. (2d) 59 (Schiff); *International Forest Products Ltd*. [1989] B.C.C.A.A.A. No. 478 (McKee).

59 This is, at its roots, an interpretation case in which the various rules of contract interpretation will apply: *Simon Fraser University*, [1976] 2 Can L.R.B.R. 54; *Pacific Press Ltd.*, [1985] B.C.C.A.A.A. No. 637 (Bird); *West Fraser Lake Sawmill Division*, [2015] B.C.C.A.A.A. No. 63 (McPhillips); *West Fraser Mills Ltd. 100 Mile House Lumber Division*, [2016] B.C.C.A.A.A. No. 91 (McPhillips); *Grand & Toy Ltd.*, [2003] B.C.C.A.A.A. No. 159 (Foley); *Catalyst Paper Corporation (Port Alberni Division)*, [2010] B.C.C.A.A.A. No. 49 (Germaine); *B.C. Ferry Service Inc.*, [2014] B.C.C.A.A. No. 157 (Sullivan); *Catalyst Paper Corporation (Port Alberni Division)*, [2010] B.C.C.A.A.A. No. 49 (Germaine); *Carrier Lumber Ltd.*, 248 L.A.C. (4th) 258 (Sullivan).

60 The focus of this interpretive exercise, as has often been repeated in the authorities, is to determine the mutual intention of the parties and the primary source of that intention is the language contained in the Collective Agreement. Further, it is not appropriate for an arbitration board in a rights dispute to don the mantel of an interest arbitrator and impose new terms on the parties, regardless of whether the arbitration board might think those are just and fair nor to decline to give effect to terms because they may seem burdensome or advantageous to one party.

61 A number of legal issues have been raised by the parties and need to be explored. The first is whether a "gap analysis" is appropriate in these circumstances: *Andres Wines (B.C.) Ltd.*, 16 L.A.C. (2d) 422; *Northwood Pulp*, [1991] B.C.C.A.A.A. No. 42 (Munroe); *West Fraser Lake Sawmill Division, supra; Commonwealth Construction Co. Ltd.*, B.C.L.R.B. Letter Decision #36/80; *Douglas Inc.*, [1987] B.C.L.R.B.D. No. 156.

62 In *Douglas Inc., supra*, the Labour Relations Board stated:

> In Commonwealth Construction, BCLRB No. L36/80, the Board also cautioned that the license afforded arbitrators in Andres Wines to search for this hypothetical intent of the parties does not give arbitrators carte blanche to add to the collective agreement provisions that may seem sensible to remedy unforeseen problems. While arbitrators can recognize an implied term in the process of fulfilling their mandate of discovering the intention of the parties, the exercise of that power is qualified by the requirement that arbitrators do not offend the prohibition against altering, amending or adding to the collective agreement. The Board also drew the distinction between "filling a gap" in the sense of merely providing for the lack of a definition of a vague term or the

> application of general language to a peripheral problem and "filling a void" in the sense of adding a term due to the complete lack of a collective agreement provision. In the circumstances of that case, the Board found the arbitrator to have exceeded the permissible bounds of the arbitral process by going beyond interpretation to the forbidden realm of the addition of a new provision.
>
> As the cases indicate, the line to be drawn permissible interpretation of the wording of the collective agreement and the forbidden addition of contract language is sometimes very subtle. However, after considering these authorities and reviewing this award in light of the principles set out in these decisions, we have determined that it was appropriate for the majority to conclude that it had the authority to recognize an implied term. We are satisfied that the circumstances of this case fall more into the category of "filling a gap" rather than "filling a void". We are also satisfied that the circumstances of this case satisfy the requirement of a new and unusual fact situation not contemplated at the time the contract was entered into. While the possibility of a plant closure may have been an eventuality foreseen in the earlier set of negotiations, the arbitrator has found that the parties have not specifically addressed the "narrow issue" of the entitlement to vacation pay in the event of termination or layoff.

63 In my opinion, the present situation is not one where such a "hypothetical intent" can be reconstructed based on the nature and purpose of the contract such that it can be determined what the negotiators would have reasonably included if they had addressed the issue. In this case, there is specific language in the Agreement and the issue here is what does that provision mean -- there is no gap to be filled. Indeed, to do so would result in this Board adding additional terms and imposing this Board's view of what is reasonable or equitable rather than applying the mutual intention of the parties.

64 We turn now to the "discontinuance clause" itself which appears in various places within the LTD provision in each of the five West Fraser Collective Agreements. Once again, it states:

> If at any point during the term of the Agreement, the Plan Actuary should determined that the full amount of the increase in contributions is no longer required to amortize the unfunded liability over the 10 year period contemplated by this Agreement, the excess contributions will be discontinued by each party accordingly.

65 The Union has asserted that this provision was incorrectly included in the basis of a common or mutual mistake and that these Collective Agreements should be rectified by having this provision removed. In other words, the Union claims that the inclusion of the discontinuance clause in the 2009 and 2013 Agreements is simply an error.

66 The parties have submitted a number of authorities dealing with this area of law: *Vernon First Union*, [1976] B.C.L.R.B.D. No. 55; *Western Forest Products Inc.*, [2012] B.C.C.A.A.A. No. 42 (McPhillips); *Slocan Group*, 109 L.A.C. (4th) 133 (McPhillips); *Fraser Health Authority (Eagle Ridge Hospital*, [2008] B.C.C.A.A.A. No. 64 (Burke); *Open Learning Agency*, [2000] B.C.C.A.A.A. No. 637 (Kelleher); *Emergency Health Services Commission*, [2000] B.C.C.A.A.A. No. 40 (Ready).

67 This jurisprudence is clear that arbitration boards have the authority to "rectify" or "correct" a collective agreement in order to accurately reflect the actual agreement that was made by the parties. In order for the doctrine to apply, however, it must be demonstrated that the negotiators agreed to something different than what was written down. (The doctrine is not applicable when it is a case of one of the parties intending something different.) It is not the contract itself that is amended but rather the incorrectly recorded document in order to precisely reflect the agreement which was actually reached by

the parties: *Western Forest Products Inc., supra; Teck Cominco Metals Ltd.*, 154 L.A.C. (4th) 161 (Taylor). Therefore, to conclude there was a mutual mistake, an arbitration board must be able to "predicate with certainty" what the actual contract was intended to be.

68 In *Vernon Fruit Union, supra*, the B.C. Labour Relations Board adopted the following comments concerning rectification from *Rose v. Pim* (1953) 2 ALL E.R. 739:

> Rectification is concerned with contracts and documents, not with intentions. In order to get rectification, it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly. And in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties -- into their intentions -- any more than you do in the formation of any other contract. You look at their outward acts, i.e., at what they said or wrote to one anther in coming to their agreement, and then compare it with the document which they have signed. If you can predicate with certainty what their contract was, and that it is, by a common mistake, wrongly expressed in the document, then you rectify the document. But nothing less will suffice. It is not necessary that all the formalities of the contract should have been executed so as to make it enforceable by law; but, formalities apart, there must have been a concluded contract ... There could be no certainty at all in business transactions if a party who had entered into a firm contract could afterwards turn round and claim to have it rectified on the ground that the parties intended something different. He is allowed to prove, if he can, that they agreed something different; but not that they intended something different.

69 In my opinion, that is not the case in the present circumstances. The evidence indicates that during both the 2009 and 2013 collective bargaining sessions between West Fraser and the Union, this discontinuance clause was never mentioned. That statement is also accurate with respect to the CONIFER and Canfor negotiations. (However the discontinuance clause was discussed in the 2009 ILFRA negotiations and removed from their collective agreement). There were certainly no proposals during West Fraser bargaining to remove the clause nor is there any language contained in the MOA's indicating it should be removed.

70 As a result, there is no basis to conclude that these parties were ever in agreement that the clause was to be removed. The best that can be said on the evidence is that the Union felt the clause no longer had any application. The Union asserts that the inclusion of the discontinuance clause in 2009 made no sense in that the parties would not have agreed to a "clawback of contributions" when the Plan was in such dire straits. While the Union's position may have logical attraction, it does not form the basis for the application of the doctrine of mutual mistake. There is absolutely no indication that the Employer was of the same view or, in fact, ever considered the clause at all.

71 This is not a situation where, for example, the MOA's indicated that the discontinuance clause was to be removed and that had been simply overlooked by those who were proofreading the collective agreement language. Rather, the MOA at West Fraser only makes reference to a change in the contribution rate from $0.80 to $1.20 an hour and that was included in the Agreement.

72 Another factor that makes it difficult to conclude that the parties made an inadvertent error in recording their 2009 agreement is that the same "mistake" was then repeated in 2013. If it had been truly an error to leave the clause in the Agreement in 2009, it would seem this "mistake" would have been noticed at some point during the four year term of the West Fraser and USW 2009 -- 2013 Collective

Agreement and "corrected" during the 2013 negotiations (which is what may or may not have happened with respect to the Canfor Agreement).

73 Therefore, in my opinion, to apply the doctrine of rectification in the present circumstances would be to exceed the jurisdiction of this Board. It would involve changing the Collective Agreements based on an assumption that this is what the parties must have intended rather than merely rectifying a mistake to represent what they had clearly agreed upon.

74 The next matter involves the Union's assertion that the doctrine of estoppel should be applied. The parties are generally in agreement with the principles to be applied: *British Columbia and British Columbia Crown Counsel Association*, [2014] B.C.C.A.A.A. No. 124 (Hall); *Hallmark Containers Ltd.*, [1983] O.L.A.A. No. 4 *(Burkett)*; British Columbia Transit, *[1994] B.C.C.A.A. No. 313 (Bird); Pacific Press Ltd., supra; City of Penticton*, [1978] B.C.L.R.B.D. No. 26; *Nor-Man Regional Health Authority Inc., supra; District of Maple Ridge*, [2001] B.C.L.R.B.D. No. 209; *Crestbook Forest Industries*, [1996] B.C.C.A.A.A. No. 626 (Hickling); *Mainland Mid-Island Contracting Ltd.*, [2001] B.C.L.R.B.D. No. 336.

75 The Union claims that the doctrine of estoppel has application in this situation in that during the 2009 negotiations the Union made it quite clear to the Employer what was intended and that the Union remained silent without seeking clarification or disagreeing in any way. The Union also submits that if the Employer believed the clause applied to the new contribution level set in the 2009 negotiations and that it was to have an ongoing effect, there was an obligation on it to raise that matter.

76 The arbitral law with respect to estoppel is very succinctly stated in *Hallmark Containers Ltd, supra*, wherein Arbitrator Burkett observed, at para. 24:

> 24 Just as union silence in response to a company practice which does not conform to the union understanding of the collective agreement may constitute a representation by the union that it is waiving its strict legal rights, so also, and for the same reasons, company silence at the bargaining table, after a full explanation as to the union's understanding of the language at issue has been made, may constitute a company representation to the effect that it agrees with the union interpretation. Where, as in this case, the company silence is followed by a written acceptance we have no doubt that a representation exists. The company, for whatever reason, acted in a manner designed to convey to the union its acceptance of the union's interpretation of the language at issue. The company, although it may not have accepted the union's interpretation, acted in a manner designed to cause the union to believe that it had. The union relied on the representation and did not push for any further revision or amendment with the result that the language was incorporated into the agreement as it had been proposed by the union. Although the parties to a collective bargaining relationship may from time to time incorporate language into the collective agreement which is purposely vague and will necessarily be fleshed out at arbitration, this is not such a case. The company in this case, contrary to the statutory scheme designed to promote full, frank and honest discussion at the bargaining table, misled the union with respect to its understanding of the disputed language. The conduct of the company had the effect of denying the union the opportunity to clarify or rewrite the language to reflect its understanding of the meaning of the clause.

77 The B.C. Labour Relations Board adopted the same approach in *District of Maple Ridge, supra*. There the Board stated, at paras. 28 -- 30:

28 The issue of whether the modern doctrine of estoppel requires some form of unequivocal representation was addressed by the Board in Conventions Unlimited, BCLRB No. B487/99. It is noteworthy that that decision was rendered by Vice Chair John Hall. He had earlier chaired the three person panel that rendered the decision in B.C. Rail. In Conventions Unlimited, Vice-Chair Hall, after noting that the "modern doctrine of estoppel" had been reviewed in B.C. Rail, went on to state that:

...while reliance is assessed from the perspective of the party raising the estoppel, there must still be unequivocal conduct. ...

* * *

...The doctrine [of estoppel] requires some form of "unequivocal conduct" by one party, as assessed from the perspective of the other party, which makes it inequitable for the former to enforce its strict legal rights. ... (paras. 5 and 21, emphasis added)

29 We endorse Vice Chair Hall's statement with the following qualification. When the Board assesses a party's words or conduct to determine whether it is estopped, its fundamental concern is whether, from the perspective of the party alleging an estoppel, it was reasonable to rely on those words or conduct. As the Board stated in Kelowna Daily Courier, A Division of Thomson Canada Limited/Thomson Canada Limitee, BCLRB No. B363/2000:

> ...While an estoppel may flow from an agreement (estoppel by convention), it is well established that it may also be founded upon conduct or behaviour that leads the other party reasonably to believe that an undertaking or commitment has been given. ... (para. 119, emphasis added)

30 Equivocal words or conduct do not give rise to an estoppel because it would not be reasonable for a party to rely on words or conduct of that character. Moreover, the context of the words or conduct may sometimes be important in determining whether it was reasonable for a party to believe that an another party had given an undertaking or commitment. It is not unfair or unjust to permit a party to resile from a representation on which it was not reasonable for another party to rely.

78 The Labour Relations Board also thoroughly reviewed the issue of "passive acquiescence" in *City of Cranbrook*, B.C.L.R.B. No. B 294/2001 and its position was reiterated in *Mainroad Mid-Island Contracting Ltd., supra*. In *City of Cranbrook*, the Board stated:

... Passive acquiescence by one party in the face of a statement of position by the other may constitute implied acceptance and give rise to an estoppel: see Barnard Management, supra, at p. 3. However, as District of Chilliwack, supra, pointed out, an obligation to alert the other side that it does not accept a particular interpretation or practice will not necessarily arise every time one side advises the other of a position it intends to take. It will do so where the only reasonable inference that could be drawn is that the advising party's position was accepted and it committed itself on that assumption (District of Chilliwack, supra, at p. 8 and Re Vancouver Police Board, supra, at p. 231).

80 In the last mentioned case, Arbitrator Hope provides some useful insights into the circumstances in which a party charged with an estoppel is under an obligation to speak by referring to two decisions of the Court of Appeal, namely The District of Saanich Police Board and Saanich Police Association (1983), 43 BCLR 132 and B.C. Government Employees' Union and

> Queen in the Right of British Columbia (1986), 4 BCLR (2d) 232. The first of those cases is of particular interest in that it dealt with a situation in which one side was acting under a unilateral mistake as to the effect of a proposed clause of a collective agreement. The employer's representative originally rejected a clause proposed by the union on the grounds that it conferred substantial benefits with respect to statutory holidays. During the course of the negotiations, the employer's negotiator suddenly agreed to the clause on the basis that it did not confer any benefits but was simply a harmless confirmation of other clauses dealing with statutory holidays. The employer did not seek or invite the union's position. The union's negotiator remained silent. Its position had not changed. After the collective agreement was signed, it asserted its entitlement to what was described as "an extraordinary lucrative pyramided benefit". The employer argued before the arbitrator that the agreement ought to be rectified by deleting the clause or alternatively, that the union was estopped from relying upon it because of its knowledge of the employer's mistake. The arbitrator found in favour of the union, noting that it had not mislead the employer's negotiator. It had not suggested the erroneous meaning to him. It was his own mistake. Upon review, the Court of Appeal found no basis for rectification, holding that there was no sharp practice. The reasoning in the case only pertains to the issue of rectification, but it will be noted that the court also upheld the arbitration board's conclusion that there was no basis for an estoppel either.
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> 81 Whether the failure of a party to alert the other to its position rises to the level of unfairness or injustice depends upon the facts. It may be much easier to establish unfairness where one party to negotiations for a new agreement fails to inform the other of its intention to adopt, after the new agreement is concluded, a different interpretation of a provision than it had consistently followed in the past. That was the position in the second of the cases cited by Arbitrator Hope. See also Re Queen in the Right of British Columbia and Registered Psychiatric Nurses' Association of British Columbia et al., (1977) 17 L.A.C. (2d) 1; and Price MacKenzie and International Woodworkers of America, Local 1-85 v. MacMillan Bloedel (Alberni) Ltd. [1977] 4 W.W.R. 311.
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> 82 While the case law does not require that a party's position be put to the other side in a formal manner, the context of the words or conduct may be relevant in determining if a party has, by its silence, made an unequivocal representation on which the other can safely rely. If a party remained silent when it was reasonable to expect a reply, an arbitration board may properly conclude that the failure to speak amounted to a representation; for a recent case which the panel found no such representation, see Corporation of the District of Maple Ridge, BCLRB No. B209/2001 (Leave for Reconsideration of BCLRB No. B295/2000).

79 Therefore, in the appropriate fact situation, a misrepresentation can occur by one party remaining silent in a situation where it is required that that party clearly establish that it disagreed with the other party's stated position. It should be noted that is precisely the situation which occurred in the ILFRA negotiations where the proposed MOA did contain the discontinuance clause and Mr. Matters objected to it.

80 However, in the case of the West Fraser negotiations there was no obligation to "speak out" on the part of the Employer because the Union never presented anything which required denunciation or disapproval. To borrow a phrase from the *Hallmark Containers Ltd*. excerpt above, this is not a situation where the Company remained silent "after a full explanation as to the Union's understanding of the language at issue has been made". Put another way, there is no evidence of what the Union was actually relying on because nothing was ever discussed. This is not a situation where a "reasonable bystander"

would have concluded the Employer had an obligation to have disagreed with the Union's interpretation because that was never expressed.

81 As an aside, it could be as easily argued that the experience at the ILFRA table should have made the Union aware of the impact of the discontinuance clause and so there was an obligation on the Union to have it removed in the other agreements.

82 In the result, there is no evidence that either party ever said anything or remained silent improperly which was intended to affect the legal relationship between the parties. As a result, there was no unequivocal representation and could be no acquiescence. In this case, both parties were on "equal footing" and neither party ever expressed to the other what its view of the world was and thus, this is not a proper situation in which to apply the doctrine of estoppel.

83 The ultimate issue in this case then, given that the discontinuance clause continues to exist in the Collective Agreement, is the meaning to be attributed to the provision as the jurisprudence requires that all words in a collective agreement must be given effect. As well, it is accepted that Collective Agreements must be interpreted in a manner that does not produce impractical or unintended results: *Penticton and District Retirement Services, supra; Pacific Press Ltd., supra*. Also to be taken into account is the purpose of the clause which in this case was to ensure the financial integrity of the Plan and also protect against unnecessary contributions being made.

84 For ease of reference, the clause states:

> e) If at any point during the term of the Agreement, the Plan Actuary should determine that the full amount of the increase in contributions is no longer required to amortize the unfunded liability over the ten year period contemplated by this Agreement, the excess contributions will be discontinued by each party accordingly.

85 There are two related issues to be addressed in attempting to give meaning and purpose to this clause. The first involves to the meaning to be attributed to the phrase "excess contributions". To do that, it is important to note the difference in the clauses between the 2003 and 2009 Agreements with respect to contributions levels. To use the Williams Lake Planer Division as an example, the contribution clause read as follows:

> 2003:
>
> Effective July 1, 2004, contributions will be increased by 25 cents per hour to produce a total payment of 80 cents per hour per Employee per hour worked, of which the Industry will contribute 40 cents per hour and the Employee will contribute 40 cents per hour.
>
> 2009:
>
> Effective September 1, 2010, contributions from both the Company and the Employee will be one dollar and twenty cents ($1.20) per hour, per employee per hour worked of which the Company will contribute sixty cents ($0.60) per hour, and the Employees will contribute sixty cents ($0.60) per hour.

86 As can be readily seen, the 2003 Agreement expressly refers to a specific increase of 25 cents (from $0.55 to $0.80) while the 2009 Agreement does not refer to an increase at all and simply establishes a

revised contribution level of $1.20. The evidence indicates that in 2003, the parties had hoped the increase (or some part thereof) from $0.55 to $0.80 would be temporary.

87 Even under the 2003 language, however, the discontinuance clause states that "excessive contributions will be discontinued" and that is linked to the "increase" of $0.25 that was expressly identified. That does not mean that under the 2003 Agreement the full $0.25 would be the amount to be necessarily discontinued but rather only the actual amount which constituted an "excessive contribution" over and above what was needed for the Plan to be financially sound.

88 Further, the 2009 clause then created further uncertainty with respect to the application of the discontinuance clause. It is difficult to say what was the clear intention in 2009 with respect to the increase from $0.80 to $1.20. It could be argued that the contribution rate would be returned to $0.55 (which would involve an actual $0.65 reduction or some percentage thereof) which is what the Employer is asserting in its grievances. Another possibility is that the "excess contribution" under the 2009 Agreement refers only to the 25 cents (or part thereof) which was added in 2003; therefore, the contribution rate could be reduced to somewhere between $1.20 to $0.95 although that would involve quite a tortured (and likely disingenuous) analysis to arrive at the conclusion that this was the actual intention of the parties in 2009. A third possibility is that the "excess contribution" implicitly refers only to the 40 cents increase (or part thereof) in the contribution rate from $0.80 cents to $1.20 made in the 2009 Agreement.

89 Therefore, as can readily be seen, considerable uncertainty exists as to the application of the clause. The removal of such uncertainty appears to be precisely what the parties were attempting to accomplish when they included language requiring that before any discontinuance of contributions the Plan Actuary must "determine that the full amount of the increase in contributions is no longer required to amortize the unfunded liability over the 10 year period".

90 The difficulty here is that this condition precedent has never been invoked. The only actuarial analysis that has been done was in 2014 and that related solely to a consideration of whether there could be a restoration of benefits. Further, that analysis was based only on a contribution level of $1.20 and no reference was made to a 10 year amortization period.

91 Indeed, there is no evidence (then or even now) to establish that, if the contribution rate was to be rolled back to $0.55 or any other level, there would in fact be an unfunded liability in the Plan which is a necessary condition to activate any reduction of the "excess contributions". Based on the anecdotal evidence of the witnesses, it appears that the proper level of contributions may be in the $0.88 -- $0.92 range. It should also be noted that this estimate predates the events of the summer of 2017 (forest fires, NAFTA concerns) and may not be accurate at the present time.

92 The language of these Collective Agreements makes it very clear that the parties intended that a proper study by the Plan Actuary would have to be completed before any reduction of rates pursuant to this discontinuance clause would occur and that has not been done. A case with a similar issue is the arbitration award of Arne Pelz in Manitoba Teachers' Society, [2008] M.G.A.D. No. 13. In that decision there was a dispute with respect to Article 15.01(b) of that Agreement:

> (b) For Administrative Staff members not designated by the Lieutenant Governor in Council as eligible employees for the purposes of the Teachers' Pension Act (sic), the Society shall pay to the Manitoba Teachers' Society Staff Pension Plan such amounts as are certified by the

> actuary for the fund as being necessary to provide the cost of the pension benefits accruing to the member (sic) during the current year pursuant to the Manitoba Teachers' Society Staff Pension Plan.

93 Arbitrator Pelz discussed the effect of the requirement that the amounts in question must be "certified" by an actuary. He stated, at paras. 191 -- 195:

> 191 In terms, the obligation is to pay to the Plan "such amounts as are certified by the actuary for the fund as being necessary to provide the cost of the pension benefits accruing" to non-TRAF members of ASA. This sum has never been certified or even calculated by the actuary, according to the evidence. In the last filed valuation (ex. 6, as at December 31, 2003), membership data used in the valuation were aggregated for the full Plan membership (Appendix C, p. 31-34). It is not clear that an arbitrator has jurisdiction to order the actuary to produce a certification, although I make no definitive ruling on the point here.
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> 192 In addition, Article 15.01(b) refers to the certified cost of pension benefits accruing "during the current year". The grievance was filed in November 2006 but there is no actuarial certification for any year beyond the time frame of the last valuation (2003 -- 2006). While ASA argued that the preliminary actuarial results (Ex. 7, Ex. 12) provided to the trustees for discussion should be taken as constituting certification for purposes of Article 15.01(b), this is inconsistent with the clear words of the article. To accede to this invitation would be a violation of the fundamental precept that an arbitrator shall not amend the terms of the collective agreement.
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> 193 I appreciate Mr. Deeley's point that under the new Plan, certification only takes place once the trustees have put the Plan in financial balance. He suggested it would be anomalous if the Employer could thwart the grievance by refusing to pay and thereby impeding certification. The problem is real. The language of Article 15.01(b) reflects the operation of the old Plan whereby the Employer was fully liable for the cost of accrued benefits. It does not fit with the circumstances of the new Plan. However, it was the Association's choice to advance the present grievance based on outdated collective agreement provisions. Clearly the wording of Article 15.01(b) resulted from the mistake of MTS, if not both parties. ASA asked for enforcement of the collective agreement as written and must therefore take the language as it exists.
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> 194 As for certification of the new Plan as a MUPP under the Act, I do not find that question to be germane. In the first instance, MTS liability must be established by ASA in proof of its grievance. Failing such proof, there is no Employer liability and the issue of statutory relief does not need to be answered.
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> 195 In summary, it is not possible to grant the order sought by ASA in the present grievance because there is no certification by the actuary of the cost of benefits accruing to the relevant members.

94 In my view, that approach commends itself to the facts of the present situation. There is good reason to have and enforce such a formal assessment of the Plan as it ensures that any decisions are made are with as many objective facts and assumptions as possible in hand. In our case, without that actuarially induced step in place, the amount of the "excessive contribution", if there even is one, is impossible to calculate. That is undoubtedly why the parties included a requirement within the discontinuance clause that the Plan Actuary make such a determination and, in my view, that express intention must be respected and given effect.

95 On that basis, the grievances filed by West Fraser on behalf of its five Divisions are denied. The appropriate place for the concerns of the Employer to be addressed is at the bargaining table to which the parties are returning in early 2018.

96 As an aside, from a practical point of view, it might be sensible for an actuarial report to be commissioned as at the end of 2017 with a view to establishing the financial viability of the Plan at various contribution levels rather than just at $1.20 which it appears is what is being presently done. However, this Board is not in a position where it can make such an order to the Plan Trustees who are an independent third party: *Atco Lumber Ltd.*, [2006] B.C.J. No. 707; *639385 B.C. Ltd. (Central Park Manor)*, [2007] B.C.C.A.A.A. No. 210 (Somjen). The Plan Trustees have not consented to be a party to these proceedings and, therefore, remain beyond the jurisdiction of this Board.

AWARD

For all of the above reasons, these five Employer grievances are dismissed.

Dated this 7th day of December, 2017.

David C. McPhillips
Arbitrator
