IN THE MATTER OF: **Policy grievance 07-51 dated May 23, 2007 alleging improper overtime compensation contrary to the terms of the collective agreement.**

BETWEEN:

WINNIPEG REGIONAL HEALTH AUTHORITY,
HEALTH SCIENCES CENTRE SITE,

Employer,

- and -

CANADIAN UNION OF PUBLIC EMPLOYEES,
LOCAL 1550,

Union.

AWARD

Appearances

Keith LaBossiere, Counsel for the Employer

Kathy McIlroy, Counsel for the Union

Background to the issues in dispute

Overtime pay for part-time employees has been a contentious issue at the Health Sciences Centre ("HSC") in Winnipeg since the filing of the present grievance (Ex. 2) on May 23, 2007. The matter was referred to arbitration before me in December 2008. Through an intensive process of negotiation, aided by several case management sessions and disclosure orders, the parties have succeeded in resolving most of their points of disagreement. A Consent Order was issued on July 30, 2010 upholding the grievance in part, outlining the

detailed manner in which part-time pay would henceforth be administered under the collective agreement and setting forth terms for retroactive reimbursement back to March 27, 2007. This award addresses the remaining issues.

The grievance as filed in 2007 was as follows:

> I/We the undersigned claim that the Employer has violated Articles 3, 19, as well as, any other relevant articles of the Collective Agreement. The Employer has engaged in a policy of improperly compensating overtime to employees who work more than their regular hours.
>
> Therefore I/We request that
>
> 1) The Employer cease and desist their violation of the Collective Agreement.
>
> 2) The Employer retroactively redress any employee negatively impacted as a result of the Employer's violation of the Collective Agreement.

As is evident, the grievance was broadly cast. Article 3 is the Management Rights clause. Article 19 is the Overtime clause and includes the following provision:

> 1902(c)
>
> Overtime worked on any scheduled day off shall be paid at the rate of two (2) times the employee's basic salary.

A note at the beginning of Article 19 states as follows: "Also refer to Article 31 - Special Provisions re. Part-time Employees."

Article 31 addresses a variety of benefits (income protection, vacation, general holidays, overtime, bereavement leave, assignment) and sets forth the manner in which part-time

employees will be treated. In particular, Article 3106 states as follows:

> 3106 Overtime
>
> Part-time employees shall be entitled to overtime rates when authorized to work in excess of the daily or bi-weekly hours of work as specified in Article 18.

Article 18 states different regular hours for clerical and non-clerical employees, but for convenience in this case, the parties agreed to refer to the non-clerical hours (7.75 hours per day; 77.5 hours per bi-weekly period), recognizing that the agreement (Ex. 1) covers both groups.

When the substantive hearing opened on November 25, 2010, the Union position was that part-time employees who work overtime hours on a scheduled day off are entitled to a double time rate of pay, in accordance with Article 1902(c). The Employer position was that the concept of a "scheduled day off" has no relevance to part-time employees and that Article 1902(c) was not intended to apply beyond the full-time staff complement. The Union answered that shift schedules must be posted four weeks in advance (Article 1805) and once the schedule is posted, even part-time employees have scheduled days off, as the term is used in Article 1902(c). If a part-time employee picks up additional shifts and works either daily overtime or biweekly overtime (exceeding the 77.5 hour threshold) on a scheduled day off, the double pay rate applies.

The Employer asserted that by long past practice, part-time employees do not have scheduled days off and do not get double time under Article 1902(c). Therefore the Union is estopped from asserting a claim under this provision for overtime pay at the higher rate. In reply, the Union said that it admitted the past practice. Article 1902(c) has not been applied to part-time employees at HSC. However, during the 2008 round of collective bargaining, the Union

gave notice at the table to end the practice. The Employer denied that clear and sufficient notice had been provided and insisted that an estoppel must be enforced until the end of the current agreement (Ex. 1-A, April 1, 2008 to March 31, 2012). It was agreed that extrinsic evidence would be received without objection subject to an ultimate determination of the issues.

Two interim awards were issued leading up to the substantive hearing. On February 27, 2010, I denied an Employer motion to tender privileged documents from the grievance and arbitration settlement process: [2010] M.G.A.D. No. 26. The Employer was seeking to prove that the parties never contemplated double time pay under Article 1902(c) as an issue within the scope of the current grievance.

On April 16, 2010, I ruled that double time pay under Article 1902(c) was within the scope of the grievance as filed and could be pursued by the Union: [2010] M.G.A.D. No. 18. The parties stipulated that the Union did not notify the Employer of its double time claim until February 2, 2010. In this regard, I held as follows (at para. 50):

> In the circumstances of the present case, it is preferable to deal with the equities at the remedial stage of the case, should it be reached. There is a strong argument for denying any relief under Article 1902(c) for the period prior to February 2, 2010. As for defining the scope of the grievance, I accept the Union's position that the analysis should be conducted without regard to the parties' confidential discussions or lack of same.

The parties further stipulated that daily overtime (work over 7.75 hours in one day) as a basis for double payment was only raised by the Union on the day prior to the opening of the substantive hearing, *ie*, on November 24, 2010. Until then, pre-hearing discussion between the parties focused on work in excess of 77.5 hours biweekly.

Notwithstanding the above, the Union claimed full redress for failure to pay double time rates under Article 1902(c). For its part, the Employer urged that any remedy must be restricted based on the Union's delay in raising these issues.

The substantive hearing took place on November 25, 26 and 29, 2010.

Provisions of the collective agreement (Ex. 1)

ARTICLE 3: MANAGEMENT RIGHTS

301 The Union recognizes the sole right of the Employer, unless otherwise provided in this agreement, to exercise its function of management, under which it shall have, without limiting the generality of the foregoing:

- the right to maintain efficiency and quality patient care;

...

ARTICLE 7: DEFINITIONS

701 An employee is a person employed by the Employer and covered by this Agreement.

702 Regular employment status shall be defined as:

(a) A "full-time" employee is one who regularly works the hours specified in Article 18.

(b) A "part-time" employee is one who regularly works less than full-time hours, but not less than seven and three-quarters (7 3/4) hours in a bi-weekly period.

ARTICLE 18: HOURS OF WORK

Also refer to Article 31 – Special Provisions re. Part-time Employees.

1801 Regular hours of work for all full-time non-clerical employees will be:

(a) seven and three-quarters (7 3/4) hours per day excluding meal periods and including rest periods; and

(b) thirty-eight and three-quarters (38 3/4) hours per week;

©) seventy-seven and one-half (77 ½) hours biweekly.

Regular hours of work for full-time clerical employees will be:

(a) seven and one-half (7 ½) hours per day excluding meal periods and including rest periods; and

(b) thirty-seven and one-half (37 ½) hours per week, excluding meal periods and including rest periods.

©) seventy-five (75) hours biweekly.

...

1804 This article shall not preclude implementation of modified daily or biweekly hours of work by mutual agreement between the Union and the Employer. Any such agreement shall take the form of an addendum attached to and forming part of this agreement.

1805 Shift schedules for each employee shall he posted in an appropriate place at least four (4) weeks in advance. Once posted, the shift schedule shall not be changed without the knowledge of the employee except as provided for in 1302©). Where seven (7) calendar days of such notice is not given to the employee, she shall receive payment at the applicable overtime rate for all such work performed. [Arbitrator's note: Article 1302©) is not material in this case. It relates to time off due to surgery.]

...

ARTICLE 19: OVERTIME

Also refer to Article 31 – Special Provisions re. Part-time Employees.

1901 Overtime shall be the time worked in excess of the daily and biweekly hours of work as specified in Article 18, or in excess of the normal full-time hours in the shift pattern in effect in the department, such time to have been authorized in such manner and by such person as may be authorized by the Employer. Overtime hours extending beyond the normal daily shift into the next calendar day shall continue to be paid at the overtime rates in accordance with Article 1902.

1902 (a) Employees shall receive 1 ½ times their basic rate of pay for the first 3 hours of authorized overtime in any one day.

(b) Employees shall receive 2 times their basic rate of pay for authorized overtime beyond the first 3 hours in any one day.

©) Overtime worked on any scheduled day off shall be paid at the rate of two (2) times the employee's basic salary.

(d) All overtime worked on a General Holiday shall be paid at two and one-half (2 ½) times the employee's basic rate of pay.

(e) Part-time employees will not be provided preference for additional hours during the employee's scheduled vacation period.

...

1906 Overtime and on-call shall be divided as equally as reasonably possible among the employees who are qualified to perform the available work. No employee shall be required to work overtime against her wishes when other qualified employees within the same classification are available and willing to perform the required work.

ARTICLE 31: SPECIAL PROVISIONS RE. PART-TIME EMPLOYEES

...

3106 Overtime

Part-time employee shall be entitled to overtime rates when authorized to work in excess of the daily or bi-weekly hours of work as specified in Article 18.

...

3109 (a) Part-time employees who indicate in writing to the Employer that they wish to work additional hours shall be offered such work when available providing they are able to perform the required duties. Part-time employees will not be provided preference for additional hours during the employee's scheduled vacation period. Such additional hours shall be divided as equitably as possible amongst those employees who have requested additional hours. It is further understood that such additional hours shall be offered only to the extent that they do not incur any overtime costs to the Employer.

...

ARTICLE 32: SPECIAL PROVISIONS RE: EMPLOYEES OCCUPYING MORE THAN ONE POSITION

3201 Part-time employees shall be eligible to apply for and be awarded more than one (1) part-time position. Where it is determined that it is not feasible for the successful applicant to work in more than one position, the successful applicant will have the option of assuming the position applied for and relinquishing her former position. If approved it is understood that at no time will the arrangement result in a violation of this Agreement or additional cost to the employer.

3202 At no time shall the sum of the positions occupied exceed the equivalent of one (1) EFT.

3203 Where the sum of the positions occupied equals one (1) EFT, the status of the employee will continue to be part-time (i.e. the status will not be converted to full-time), and the provisions of Article 31 will apply based on the total of all active positions occupied, unless otherwise specified in this Article.

ARTICLE 33: SPECIAL PROVISIONS RE: CASUAL EMPLOYEES

3301 The words "casual employee" shall mean a person who replaces an absent employee or is called in to supplement staff coverage in emergency situations. The terms of this Agreement shall not apply to such casual employee, except:

...

(e) Casual employees shall be entitled to compensation for overtime worked in accordance with Article 1901, 1902(a), (b) and (d).

Nature of the evidence

This was a policy grievance raising questions of interpretation regarding overtime pay for part-time employees. Given the admitted longstanding past practice for part-time overtime, the evidence focused mostly on exchanges between the parties during the 2008 round of collective bargaining. Did the Union give effective notice to end its acquiescence and terminate any estoppel which might apply? The Union said it did. The Employer said no. There was also some evidence of scheduling practices and scenarios, intended to illustrate the practical operation of Article 1902(c), but neither side called witnesses with close personal knowledge of Health Sciences Centre scheduling at the time of the grievance filing. I appreciate that to do so may have unduly lengthened an already onerous process. The evidence may thus be characterized as contextual rather than direct in this respect. Context is always important in construing collective agreement language. It is also helpful to hear the views of experienced personnel concerning the meaning and effect of contract provisions. Ultimately, of course, arbitrators are guided by well established principles of interpretation and in particular, harken to the plain meaning of the words chosen by the parties themselves in the agreement.

Both lead negotiators from the 2008 Manitoba Central Table testified in this case. For the Union, Nicole Campbell ("Campbell") is an experienced C.U.P.E. National Representative who has worked with Local 1550 since 1997. She assumed the position of Health Care Coordinator in March 2008 and acted as Chief Negotiator when bargaining began shortly afterward with all the publicly funded health care facilities. C.U.P.E. negotiates through the Provincial Health Care Council ("PHCC") comprised of 15 elected representatives from about 30 union locals across the province, supported by professional staff.

For the Employer, Darcy Strutinksy ("Strutinsky") is the Director of the Labour Relations Secretariat ("LRS") which is housed within the Winnipeg Regional Health Authority but represents and advises health care employers across the province in bargaining and administering collective agreements. From 1987 to 2001, before assuming his current position, he was Director of Employee Relations and later Director of Human Resources at HSC, with responsibility for payroll, benefits, recruitment, compensation, educational services and labour relations.

The Union also called Robyn Powell ("Powell"), a former C.U.P.E. local union president at Golden West Centennial Lodge and a member of PHCC during the 2008 round of bargaining. She served as Recording Secretary for PHCC and prepared detailed notes of table bargaining sessions.

Past practice for part-time overtime at HSC

It was not disputed that Article 1902 has been a feature of the collective agreement in substantially the same form for a long period of time. Darcy Strutinsky testified that he searched back to May 1988 and found no changes. He said that the "design for payment of overtime" as set forth in Articles 1901 and 1902 has remained the same. The definition of

overtime, expressed in Article 1901, was time worked in excess of the regular daily and bi-weekly hours. Language was added in Article 1901 to recognize departmental shift patterns because some schedules run on a six week cycle, rather than bi-weekly. Under the amendment, shifts were averaged out before overtime was calculated. At various times other changes were made to Articles 1901, 1908 and 1910. But the main elements regarding overtime pay have been consistent, as set forth in the first three subsections of Article 1902.

According to Strutinsky, the first three hours of authorized overtime in any one day are payable at time and a half: Article 1902(a). Beyond the first three hours, authorized overtime is payable at double the basic rate: Article 1902(b). Overtime worked on any scheduled day off is payable at double time: Article 1902(c). Strutinsky testified that for as long as he is aware, the double time rate under Article 1902(c) has been applied only to full-time employees and the Union has never raised an issue or an objection. It was never suggested that the clause applied to part-time staff.

On this basis, part-time employees could earn overtime at time and a half if they stayed beyond regular hours. After three excess hours during one day, the double time rate would be triggered. This was the prevailing practice at HSC. Pay stubs provided to employees have included the number of overtime hours and the applicable rate of pay, so the nature of the practice was clearly visible (Ex. 20).

Strutinsky testified that there has long been an adage at HSC that "Full-time have scheduled days off; part-time have scheduled *days of work*." He said that this adage has been expressed to the Union over the years. He admitted that the adage is not stated as such anywhere in the collective agreement but argued that it does reflect the intent of the parties regarding Article 1902(c).

Nicole Campbell gave the following description of part-time overtime practices at HSC based on her experience as a servicing representative for the local over many years. All part-time staff are hired with a guaranteed EFT (equivalent full-time) status and the EFT is confirmed in writing. In practice EFT's range from 0.2 to 0.9. The EFT is a promise by the Employer to provide the specified amount of work and an undertaking by the employee to perform the work. It is permitted for part-time employees to hold more than one position, as long as the total does not exceed 1.0 EFT. Even if the employee's combined EFT's equal 1.0, she retains part-time status under Article 32, which addresses part-time employees occupying more than one position.

Part-timers may also indicate their availability for additional shifts beyond their EFT. When a unit schedule is prepared by management, all full-time and part-time employees are entered, following which foreseen additional shifts are identified. These shifts are divided up among those part-time staff who have indicated availability. In accordance with Article 1805 of the collective agreement, the schedule is then posted not less than four weeks in advance of the starting date. Campbell stated that "changes can only be made by mutual agreement, the employee must be made aware." The article as written provides that the schedule shall not be changed "without the knowledge of the employee". Employees may trade shifts subject to management approval. The schedule is adjusted when changes are made.

Overtime typically arises due to a shortage of staff and Campbell testified that resort to overtime has increased over the past several years.

In cross examination, Campbell confirmed that part-time employees work a variety of shift lengths, ranging from three to 12 hours in duration. When picking up additional shifts, employees are not restricted to their normal working hours. Thus an employee working the regular 7.75 hour shift may elect to pick up any of the available durations.

Scenarios and views on the operation of 1902)c)

According to Campbell, a part-time employee is entitled to double time pay when she has logged 77.5 hours in the bi-weekly period and then works on a scheduled day off. This is the effect of Article 1902(c) and the Union now maintains that the provision applies to part-time employees. A scheduled day off is any day shown on the posted schedule, four weeks in advance, as a non-working day for the part-time employee. This interpretation was a key point of difference between the parties.

In Campbell's view, the double time entitlement extends to situations where the employee has not yet reached the 77.5 hour threshold but is *expected* to reach it based on a call-in for additional hours. The working hours on a non-scheduled day must be paid at double time. She agreed that added shifts often arise on short notice because of unplanned staff absences so that the posted schedule would not indicate an overtime status had been created. In cross examination, it was suggested to Campbell that requiring the Employer to pay overtime in this circumstance would be unfair. In response, she insisted that "the Employer should know." If the employee is on the schedule for less than 77.5 hours and is offered or picks up more hours, the manager ought to realize that the threshold will be triggered. She insisted that managers should be able to access the necessary scheduling documents to keep track of overtime impacts but did concede that a part-time employee picking up shifts in a different department might not be noticed. The arrangements at HSC "have been haphazard at best for years," she said. Pressed to admit that she does not know how scheduling is done at HSC, she answered, "Not clearly."

A series of hypothetical bi-weekly work scenarios for a part-time employee were put to Campbell during cross examination (Ex. 11-15). She confirmed that no overtime is triggered while the bi-weekly hours remain below 77.5, except if the employee picks up a shift and

stays extra hours on that day, beyond the regular 7.75 hours. This creates a *daily overtime* claim at double time for the extra hours. Campbell acknowledged that this component of the Union's current case was not advanced to the Employer until November 24, 2010 but she maintained that the collective agreement provides for double pay in this situation.

In Example 3 (Ex. 14), a 0.6 EFT employee (six shifts per pay period) picks up five extra shifts (each 7.75 hours) at the last minute to cover unplanned absences, for a total of 11 shifts. The bi-weekly total hours reach 82.25 but not until the final day of the period (11th shift), which in the example is a scheduled day of work. Nevertheless, Campbell said that "the double time pay goes to the 10th shift, the same as for a full-time employee." The employee is entitled to a double overtime payment.

By contrast, in Example 4 (Ex. 15), the same 0.6 EFT employee picks up six extra shifts but they are all four hour durations. Bi-weekly hours only reach 70.5 and no overtime is payable. Campbell confirmed that this is the result even though the hypothetical part-time employee worked a series of scheduled days off. Under the agreement, overtime is triggered by excess hours, not excess shifts.

Like Campbell, Strutinsky was led through a number of scheduling scenarios under cross examination (Ex. 21, 22), this time using a six week rotation. He confirmed that a full-time employee (Monday to Friday) who picked up a Sunday shift would be entitled to double pay overtime under Article 1902(c), based on exceeding the threshold of 77.5 bi-weekly hours. For contrast, a 0.9 EFT part-time employee was considered, working a Monday-Friday/Tuesday-Friday cycle. He agreed that the second scenario was realistic as there are 0.9 EFT's working at HSC. He was questioned about the effect of this employee picking up two extra days - Saturday and Sunday shifts. Strutinsky stated that the Saturday shift would be straight time. Biweekly hours would not exceed the overtime threshold of 77.5 hours.

As for the Sunday shift, the first three hours would be paid at time and a half, with the remainder of the shift paid at double time. This is dictated by Article 1902(a) and (b). He observed that while picking up shifts is permitted, Article 3109(a) "limits sign-up to non-overtime situations." Pressed about the application of Article 1902(c), he conceded there is an ambiguity but reiterated that the parties have lived with the present practice for a lengthy period of time. Part-time employees do not receive double time for all overtime hours in this scenario.

The 2008 Central Table negotiations

From a factual perspective, there was little if any dispute about the exchanges that took place between the parties at the 2008 table concerning Article 1902(c). Neither was there any argument about proper negotiating protocols, including the accepted process for giving notice to end a prevailing non-conforming practice under the collective agreement. Both Campbell and Strutinsky emphasized that bargaining in 2008 was respectful and productive. On a personal basis, both expressed appreciation for the professional relationship they have enjoyed over the years. Each is an experienced and effective negotiator. But in hindsight, the Union and the Employer disagree sharply about the effect of the 2008 round of collective bargaining with respect to part-time overtime at HSC. The following is a chronology of the key documents and statements. The challenge in the present case is to reach conclusions from the acknowledged factual record.

The grievance (Ex. 2) was filed in May 2007 but Strutinsky testified he was unaware of it during the 2008 round of bargaining. Although there was a consultation process with all the local management teams in preparation for the Central Table, with discussion of significant issues and exposures, this matter did not reach his attention. He testified that in his role as Chief Negotiator, he would not necessarily be informed of all significant pending grievances

at all sites. It would depend on the specific briefings and circumstances during each round of bargaining. As for Campbell, she stated that she knew about the grievance before the start of bargaining. PHCC meets several times a year and the issues raised in this grievance would have been discussed. The staff representatives also would have reviewed the overtime issues.

PHCC tabled its opening package of "without prejudice" proposals on April 21, 2008 (Ex. 3). Campbell described the document as containing "the wishes and dreams" of the various participating unions. There were three references to Article 19 (at p. 11): a notice concerning double pay under 1902, a proposed deletion from 1906 to remove mandatory overtime and a proposed increase in the meal allowance under 1908. It was normal practice to walk the employer team (led by LRS) through the package, explain the issues and answer preliminary questions. The Article 1902 reference was as follows:

> 1902 The Union is putting the Employer on notice that part-time employees get overtime at double (2) pay on the eleventh shift on (*sic*) bi-weekly period.

LRS tabled its proposals on behalf of the employer group the same day (Ex. 4). There were no proposals relating to Article 19.

On April 21, 2008, there was no response by LRS to the PHCC's Article 1902 notice. In cross examination, Campbell was asked to explain the meaning of the notice being given to the Employer with respect to Article 1902. She replied that the Union had become aware of cases where overtime was not being applied under Article 19. She agreed that the notice as written in April 2008 was limited to excess bi-weekly hours. No notice was given in relation to daily hours as a source of double pay overtime on scheduled days off. That position was only reached by the Union during preparation for the substantive arbitration hearing in late

November 2010. As for bi-weekly hours, while the April 21, 2008 notice made no reference to 77.5 hours, Campbell insisted that this was explained later at the table and that the Union was prepared to have a dialogue on the subject, hoping for an agreement. She conceded that the notice made no mention of a practice, did not demand that a practice cease and did not cite Article 1902(c) in particular.

Campbell agreed that double pay flows from Article 1902(b) as well as 1902(c), so the reference to double pay was not *per se* a notice about Article 1902(c). She admitted that by referencing "pay on the eleventh shift", the Union was using terminology not contained in the collective agreement. She agreed that when serving notice to end a practice, there must be a non-conforming practice under the collective agreement.

Strutinsky testified that this was not understood by LRS as a proposal. The Union side was giving notice that after 10 shifts in a bi-weekly period, there is double pay overtime. In other words, once full-time hours are reached, there is overtime at the double rate. Campbell restated the same notice several times subsequently. But there was no discussion about ending a practice and he was not aware of any past practice that deviated from the terms of the collective agreement. There was no mention of double pay on a scheduled day off and no reference to Article 1902(c). The Union did not provide handouts or explanatory notes of any kind. The LRS reaction was simply to say that they did not agree. The application of Article 1902 had a lengthy and unchallenged history.

Local site issues were handled separately from the main table by sub-groups comprised of local union and management representatives. On April 22, 2008, PHCC tabled a package of local issues (Ex. 5) at the Central Table and reviewed the contents, but detailed discussion and negotiation took place at local tables. Under Article 19, the following was presented on behalf of Local 1550 and two other locals (at p. 9):

1902 (a) Employees shall receive 1 ½ times their basic rate of pay for the first 3 hours of authorized overtime in any one day.

(b) Employees shall receive 2 times their basic rate of pay for authorized overtime beyond the first 3 hours in any one day.

(c) Overtime worked on any scheduled day off shall be paid at the rate of two (2) times the employee's basic salary.

Clarify that 1902(c) applies to part-time employees. (Boldface in original)

This text was a verbatim reproduction of the existing Article 1902 (a), (b) and (c) from the 2004-2008 collective agreement. Campbell testified that the clarification in boldface was intended to say that clause (c) already did apply to part-time employees. The Union was encouraging discussion at the table but also asserting its position on the point.

The entire reference to Article 1902 was later withdrawn from the HSC local issues table. The Union felt that part-time overtime was in the Central Table package and rightfully belonged there, rather than at a local table. Campbell testified that LRS agreed in this respect. Strutinsky said that he noticed the 1902(c) reference in the HSC local issues list but he paid more attention to the central issues. Someone on the LRS team would have dealt with it but maybe not him personally.

In due course the parties merged their Central Table proposals into a rolling document format which tracked the history and status of the various issues under ongoing negotiation. On May 20, 2008, PHCC tabled union proposals in this format (Ex. 6) which stated as follows regarding Article 1902 (at p. 28), repeating the wording of the April 21, 2008 opening package:

PROPOSAL	HISTORY	RESPONSE
ARTICLE 19 - OVERTIME		
Union 1902 **The Union is putting the Employer on notice that part-time employees get overtime at double (2) pay on the eleventh shift on bi-weekly period.**	MONETARY	

The parties agreed to defer monetary issues until later in the negotiation process. The Article 1902 item was labeled "Monetary" because it would cause the Employer to incur an expense. Campbell testified that as of May 20, 2008, there had been no discussion of Article 1902 and no response by LRS, whether written or verbal. The parties met frequently over the summer but, according to Campbell, there was no Employer engagement on the Article 1902 item.

Robyn Powell recalled that Article 1902 was first discussed at the table on June 17, 2008. She took notes (Ex. 18) which attempted as much as possible to reflect verbatim remarks made by the negotiators. She recorded Campbell as introducing the topic as follows:

> Nicole - Serving notice - part-time do have days off and should not be treated less than a full-time. 11th day in 2 weeks - overtime. (Acronyms in original converted to words)

The notes indicate that Strutinsky asked for clarification. Campbell said the Union had been told that overtime pay depended on the bi-weekly period but she pointed out that the collective agreement speaks to daily and weekly hours. There was a brief discussion about picking up shifts. Strutinsky cited the last sentence of Article 3109(a) - additional hours will be offered only if they do not incur overtime costs. (The notes mistakenly refer to 3110(a).) Campbell responded that this only prevented grieving if shifts were denied. Strutinsky ended

the exchange by stating, "We understand."

Finally, on August 13, 2008, PHCC presented a new package document (Ex. 7), which contained the following under Article 19:

PROPOSAL	HISTORY	RESPONSE
ARTICLE 19 - OVERTIME		
Union 1902 **The Union is putting the Employer on notice that part-time employees get overtime at double (2) pay on the eleventh shift on bi-weekly period.**	MONETARY	U - Aug 13-08 Withdrawn. The Union is putting the Employer on notice that part-time employees get overtime at double (2) pay on the eleventh shift on bi-weekly period.

Campbell gave the following background to this step by the Union. At every bargaining meeting, she stated that Article 1902 was outstanding and needed to be addressed. The Union tried to start discussions about the notice it had served on this issue. But the employer side did not respond with any concern or disagreement. The time had come to narrow down the package, withdrawing some issues and focusing on the high priority areas. This issue was rated as a medium priority in an internal Union analysis (Ex. 17). Therefore the issue was marked as "Withdrawn" but both verbally and in writing, the Employer was put on notice about the entitlement to double pay. Campbell recalled that she clearly told LRS that the Employer was on notice. She remembered using the words "to be clear." There was no response.

Powell's notes of the August 13, 2008 session (Ex. 19) were as follows:

> Nicole - 1902 - withdraw - we have explained clearly 11th shift biweekly is overtime. We are putting you on notice.

In her evidence, Powell said she understood the distinction between making a proposal and giving notice. She has experience drafting proposals and sitting at the bargaining table. "When you give notice, you feel the collective agreement already speaks to the issue." Powell understood from the comments addressing the issue of notice for Article 1902 that Campbell strongly believed the agreement already spoke to this entitlement.

Under cross examination, Campbell agreed that when a party withdraws a position during labour negotiations, the reasons are not necessarily stated. Unless specific reasons are given, the opposing party has no way of knowing the motivation for the withdrawal or the priorities being pursued. In fairness, it is accepted in labour negotiations that a party should present the other side with all its issues up front. It is in appropriate to introduce new proposals late in the process, unless the other side agrees to receive them.

As for serving notice that a practice violates the agreement, Campbell said this amounts to a statement that the party intends to exercise its rights. She was asked whether the notice is effective only once there is an opportunity to negotiate a change. She replied that in the present case, the Union would have entered into discussions about overtime. The grievance was filed in 2007 and was still pending. The Employer had a fair opportunity.

The Union stipulated, however, that a claim for double pay on scheduled days off, as part of the grievance remedy, was not advanced to the Employer until February 2, 2010. Was it reasonable that the Employer in 2008 would fail to discern any notice to end a practice? Pressed further, Campbell would not concede the point. The Employer never said it disagreed with the interpretation put forward by the Union. Nor did the Employer say it would not take the Union position as notice. "There was silence by the Employer. I could only assume that they took it as notice."

Questioned in cross examination about the August 13 position and the notice given by the Union, Powell said that it was as follows. When part-time employees pick up shifts in excess of their EFT, at the 11th shift, the Employer must pay double overtime.

For his part, Strutinsky understood the withdrawal as meaning that the parties would agree to disagree. He expected that employers might hear more about the issue in future. He reiterated that there was never any mention of an issue over daily hours of overtime. If that demand or assertion had been made, the LRS response would have been adamant opposition and an attempt would have been made to negotiate the issue during the 2008 round. He understood that the issue being raised was limited to the 11th shift. It was an overtime claim for part-time employees who worked in excess of 77.5 hours. "Nicole was putting us on notice and relying on the Union's right to grieve." But at the time, he was not aware of an active grievance on this issue. Strutinsky did not perceive the notice as being notice to terminate a non-conforming practice.

A settlement was ultimately reached between the parties (Ex. 9, Memorandum of Settlement) and no changes were made to Article 19, except for an adjusted meal allowance rate in Article 1908.

Campbell was questioned about new Article 1515 in the renewal collective agreement, which was agreed between the parties as follows:

> 1515 An employee requested to report to work on a scheduled day of vacation shall receive double time for all hours worked and the vacation day will be rescheduled.
>
> A part-time employee who requests to work and who works additional hours on a non-scheduled vacation day will be paid at the straight time rate. A part-time employee requested by the Employer to work, and who works additional hours on a

> non-scheduled vacation day, shall receive double time for all hours worked.

She said that this was language requested by the Employer after it lost an arbitration decision on vacation blocks. There were practical problems. It was agreed that part-time employees requesting to work would be paid straight time.

Final argument of the Union

On behalf of the Union, Ms McIlroy submitted that a plain reading of Article 1902(c) supports the view that part-time employees do have scheduled days off and are entitled to earn double pay when working overtime on those days. The provision is clear and unambiguous. There is no need for past practice to understand the meaning of Article 1902(c). Once the schedule has been formally prepared, any day not shown as a working day for a part-time employee is a scheduled day off.

The intent of the parties is highlighted by the contrasting treatment of casual and part-time employees under the agreement. Article 3301(e) specifies that casuals shall be paid overtime in accordance with Articles 1901, 1902(a), 1902(b) and 1902(d). Conspicuous by its absence is Article 1902(c) dealing with scheduled days off. Clearly the parties intended that casual employees, who have no regular or guaranteed work schedule, would be excluded from a benefit based on *scheduled* days off. But part-time employees were treated the same as full-time staff, not casuals. If the Employer's interpretation was correct, the parties would have excluded part-time employees from the application of 1902(c), just as they did with casuals, but this was not done. The Employer's claim that part-time employees do not have scheduled days off was a bald assertion advanced without any support in the wording of the collective agreement, said the Union.

Reviewing the relevant articles, the Union noted that Article 19 begins with a cross-reference to Article 31 and the special provisions for part-time employees. Article 3106 addresses overtime. It is straightforward. Part-time employees are entitled to overtime rates when they are authorized to work beyond the daily or bi-weekly hours specified in Article 18. One of the negotiated overtime rates contained in the agreement is the double time rate for work on a scheduled day off, *ie*, Article 1902(c). The parties could have negotiated additional language to define scheduled days off for part-timers or otherwise limit overtime entitlement. Again, this was not done, even after the issue of Article 1902 and part-timers was raised by the Union several times during bargaining in 2008. Having left a generic reference to overtime rates in Article 3106, the parties must be taken to have intended that the double time rate would be paid to part-timers when the occasion arose. In arbitration, the Employer now admitted that it must pay double time to part-time employees under Article 1902(b) but still denied liability under 1902(c).

The Union emphasized that scheduling is a matter within the purview of management, subject to following the rules negotiated in the agreement and respecting employee EFT's. "The Employer is the master of the schedule." It is management personnel who construct and approve the schedule four weeks in advance, so the Employer is aware, or ought to be aware, when calling an employee for extra shifts will trigger double time pay. Just like the case of full-time employees, when a part-timer gives up a scheduled day off at the behest of management in order to work approved overtime, the negotiated pay rates apply. In both cases, the employee loses personal time, a negative impact which double time pay was designed to compensate.

The Union acknowledged the language in Article 3109(a) concerning equitable distribution of picked-up shifts and particularly the last sentence in the clause: "It is further understood that such additional hours shall be offered only to the extent that they do not incur any

overtime costs to the Employer." This allows the Employer to decline an offer of extra shifts if overtime would be triggered, but if management decides to offer the shifts anyway, the clause does not allow a denial of overtime pay. If a part-time employee picks up shifts, works authorized excess hours and qualifies for the overtime rate, why should she not be paid accordingly, asked the Union. Nothing in Article 3109 says that she will not be paid if she performs the work. The choice to offer the work rested with management in these circumstances. This is consistent with the general rules on distribution of overtime and on call stated in Article 1906 and applicable to all employees.

The Union submitted that its interpretation was fair, reasonable and consistent with the terms of the collective agreement as a whole. By contrast, the Employer's position requires that the Article 3301(e) language on casuals be read-in to Article 31. To do so would violate basic precepts of collective agreement interpretation and arbitral jurisdiction. A distinction would be created between full-time and part-time employees under Article 1902 where no such distinction was negotiated by the parties.

The Union cited *Re General Hospital Corp. and N.A.P.E. (Pink)*, [1992] Nfld. L.A.A. No. 10, (1992) 29 L.A.C. (4th) 298 (Oakley), where part-time employees were held entitled to a double time premium for work on their scheduled days off. The Union argued that this case was factually similar and relied on the reasoning as strongly supporting the present grievance. The collective agreement in *General Hospital* required a posted schedule two weeks in advance showing each employee's shifts and days off. Double time was payable when an employee's days off were changed without 48 hours notice. Days off were to be allocated at the rate of at least two consecutive days (Article 17.03)©) and 17.05, para. 15). The employer had unilaterally allocated two days per week for each part-time employee as their days off, thereby excluding the other non-working days.

As in the present case, the union in *General Hospital* argued that a day off meant any day on which the employee was not ordinarily required to perform duties (at para. 13). In response, the employer said it could designate which days were a part-time employee's days off. These were days deemed set aside for rest whereas the other blank days on the schedule were open for voluntary acceptance of an extra assignment, and no premium should be triggered for work on those days. The collective agreement defined "Day off" as "a day on which the employee is not ordinarily required to perform the duties of his/her position ..." (Article 25.02, para. 15).

The arbitrator accepted the union's position, as follows (at para. 18-19):

> The employer relies on art. 17.05 as its authority to designate only two days per week to be "days off" within the meaning of the collective agreement. The effect of such an interpretation is that other days during the week when the employee is not scheduled to work would not be considered "days off". Such a result would be contrary to the plain meaning of the definition of "day off" in art. 25.02(d). Article 17.05 is more properly interpreted to mean that "days off" should not be taken one day at a time, but an employee must be allowed at least two consecutive days off except where the employee and the employer mutually agree. Such an interpretation would be consistent with art. 25.02(d). Therefore, art. 17.05 does not give authority to the employer to prepare the working schedules as it has done in this case, by designating only two days during the week as the "days off", while at the same time the employee is not scheduled to work on other days which are not designated with an "X". *A "day off" is any day that an employee is not scheduled to work.*
>
> Article 17.03©) provides for double time to be paid for each hour required to be worked on a scheduled "day off" when less than 48 hours' notice is given to the employee. In that article "scheduled day off" means any day that an employee is not scheduled to work on the posted schedule. A "day off" is not limited to two days per week designated by the employer. (Emphasis added)

Based on the foregoing submissions, the Union requested a determination that double time

is payable to part-time employees under Article 1902(c) when they work overtime on a scheduled day off. While there was a past practice contrary to this interpretation, the Union submitted that there was no ambiguity justifying resort to the practice as an aid to construction of the collective agreement.

Turning to the question of notice during collective bargaining in 2008 to terminate the practice, the Union defended the sufficiency of its communications at the table. In keeping with Campbell's testimony, however, the Union did concede that its position on daily-hours overtime was not raised at the table and was not advanced to the Employer until the day before the substantive arbitration hearing. In all other respects, the Union maintained that the Employer was put on notice with respect to part-time employee rights to a double time rate under Article 1902(c).

In its opening package (Ex. 3), PHCC raised Article 1902 and gave notice that part-timers get double pay, albeit the notice was framed in relation to the 11th shift, meaning hours in excess of 77.5 hours bi-weekly. At the local HSC table, the notice was explicit (Ex. 5): "Clarify that 1902(c) applies to part-time employees." The Union noted that the grievance citing Article 19 was pending at that time and local management, if not others on the LRS team, should have been aware of the connection. In any event, the Union raised the very issue which is now before the arbitrator for decision. There could have been no doubt about the Union's position during bargaining.

The notice with respect to Article 1902 was inserted into the rolling draft and Campbell spoke to the point repeatedly at the table, eliciting very little response by the employer side. On June 17, 2008, she explained to Strutinsky that part-time employees should not be treated any less than full-time staff. Even when withdrawing the issue on August 13, 2008, the Union was clear in both verbal and written form that it was putting the Employer on notice.

Strutinsky did not deny in his evidence that notice was being given and said he expected in all likelihood to receive a challenge on the issue in future. He understood but did not agree. In these circumstances, the notice was sufficient to terminate the past practice in respect of bi-weekly hours overtime.

The Union cited *Re Canadian Pacific Hotels Corp.(Fairmont Empress) and CAW-Canada, Local 4276*, [2004] B.C.C.A.A.A. No. 35 (Gordon). The collective agreement required 36 hours notice before a change of scheduled shift (at para. 15) but there was a past practice of giving shorter notice when a shift was canceled as opposed to changed. The Union intended to raise the issue and give notice to end the practice at the 1999 table but due to inadvertence the notice was not given. In 2002, the union proceeded as follows (at para. 33, 39), mirroring the approach in the present case:

> ... [The] advice to the Union's Bargaining Committee was that, rather than disputing whether these prior incidents constituted a "past practice" as that term is understood in labour relations parlance, the Bargaining Committee should proceed as if a "practice" had developed and should give "estoppel notice" during negotiations thereby bringing the "practice" to an end. The term "estoppel notice" appears to be a shorthand way of acknowledging an estoppel by virtue of practice and giving notice that henceforth the Union would rely on its strict rights under Article 10.6 such that the Employer could confront the issue in collective bargaining if it wished to do so.
>
> ...
>
> There is no dispute that after receiving the Union's "estoppel notice" the Employer's Bargaining Committee failed to present any proposals for either the amendment of Article 10.6, or for a notice provision relating to shift cancellations. [The union] raised the issue twice more with [management] on August 27, the final day of bargaining. During both a telephone call to discuss last minute changes to the Memorandum of Agreement and a subsequent face-to-face meeting, [the union representative] reminded [management] that she had given

> estoppel notice and the Union would henceforth rely on its rights under Article 10.6 regarding shift cancellations. ... [I]f cancellations without notice continued, the Union would grieve.

The arbitrator held as follows (at para. 95-96):

> ... I find the Union effectively brought the Employer's practice to an end during collective bargaining for the current collective agreement. Given my interpretation of the collective agreement, there was "no need" ... for the Union to make any proposals for the amendment of the language during collective bargaining. The Union raised its issue and asserted its interpretation on the first day of collective bargaining. The Employer thereafter had an opportunity to address the issue at the bargaining table. ...
>
> In all of these circumstances, I find the Employer is unable to rely on practice to create an estoppel against the Union's assertion of its interpretation of Article 10.6. The evidence persuades me that the Employer chose to take its chances that it would convince an arbitration board of its interpretation of Article 10.6.

Similarly in the present case, said the Union, the Employer was put on notice about the Union's position. The Employer declined to negotiate Article 1902 and took its chances. There was no unfairness or lack of opportunity to address the overtime issue.

Final argument of the Employer

On behalf of the Employer, Mr. LaBossiere submitted that there was no notice given by the Union during the 2008 round of collective bargaining which could be held sufficiently clear to terminate the admitted lengthy past practice. Strutinsky testified that the practice had been in effect for decades, as long as he himself could remember. There was no dispute on this point by the Union. Moreover the practice was transparently shown on every pay stub received by employees. Yet no challenge or objection was ever made to the part-time pay

practice throughout this period. Even in the 2007 grievance filing, there was no specific reference to the current issue and the Union stipulated that the double pay rate was never discussed during the grievance and pre-hearing process until February 2010. In these circumstances, the Employer expressed skepticism about the present Union position that clear notice was served back in 2008.

The Employer acknowledged that the Union's communications at the 2008 table were a form of notice rather than a proposal. But the message was far from clear. In the opening package, the Union gave notice that part-time employees get double pay on the 11th shift. The reference was to Article 1902 without any further elaboration. On its face, the notice did not make reference to any practice or purport to end a practice.

The local table notice came closer to the present issue by citing Article 1902(c) specifically and requesting clarification that the clause applies to part-time employees. However, this notice was withdrawn in favour of the Central Table wording, which continued until it too was withdrawn on August 13, 2008. Effectively, the Employer never received any notification about terminating a practice and the only reference point for the brief discussion which did take place was a double pay entitlement on an employee's 11th shift. Shifts may vary widely in duration so the tabled notice was not grounded in the structure of the collective agreement. Understandably the Employer side did not accept such a claim and saw no reason to negotiate it.

The Union left the Employer on notice but failed to particularize its real position until years later, far along in the arbitration process. The Employer contrasted the paucity of information and murky references at the table with the Union's current presentation in arbitration. Now the Union has evolved its understanding of part-time overtime and has launched a claim based both daily hours and bi-weekly hours, connected to an analysis of

scheduled days off for part-timers. Illustrative schedules were filed in evidence. The issue is no longer an 11th shift pay claim. No explanation was given for these significant alterations in position even though Union personnel were available to testify. If it took the Union more than three years to figure out its real overtime claim, an arbitrator should infer that the claim is unsound, or doubtful at best.

According to the Employer, the Union had an obligation to give a clear estoppel notice and allow an opportunity for the Employer to bargain, if it so chose. Not having done so, there should be no remedy available to the Union until the next round of bargaining in 2012. For now the estoppel should continue.

Turning to the interpretive issue under Article 1902(c), the Employer said that the clause is ambiguous and therefore past practice can be considered as an aid to interpretation: *Re Bristol Aerospace Ltd. and CAW-Canada (Garry Stroppa Grievance)*, [2005] M.G.A.D. No. 9 (Wood) (at para. 59, 68-69):

> Often in matters of interpretation, whether a provision is ambiguous is key. For the construing of an agreement is to be derived from the words used unless there is an ambiguity. If ambiguous, then extrinsic evidence, as well as the agreement, may be utilized to aid in interpretation. As noted in Palmer, *Collective Agreement Arbitration in Canada, (3rd ed.)*: "It is the language selected by the parties that governs in a dispute and where the language is clear when given its ordinary meaning, it must be given effect unless admissible extrinsic evidence compels the conclusion that a different meaning was mutually intended by the parties or the facts support an application of the doctrine of estoppel so as to prevent a party from relying on a strict interpretation of language that differs from the manner in which it has been applied." (p. 217).
>
> ...
>
> In dealing with extrinsic evidence in aid of contractual interpretation

Brown and Beatty, *supra*, write:

> Every collective agreement is written against a background of understandings, practices, and unwritten procedures. Frequently one party may seek to obtain a favourable decision on the basis of a practice rather than on the actual wording of the collective agreement. "(para. 3:4430)

The authors go on to refer to the following description of a practice as an aid in interpretation:

> If a provision in an agreement, as applied to a labour relations problem is ambiguous in its requirements, the arbitrator may utilize the conduct of the parties as an aid to clarifying the ambiguity. The theory requires that there be conduct of either one of the parties, which explicitly involves the interpretation of the agreement according to one meaning, and that this conduct (and, inferentially, this interpretation) be acquiesced in by the other party. If these facts obtain, the arbitrator is justified in attributing this particular meaning to the ambiguous provision. The principal reason for this is that the best evidence of the meaning most consistent with the agreement is that mutually accepted by the parties". (*John Bertram & Sons* (1967), 18 L.A.C. 362, (Weiler) at pp. 367-368.)

In the present case, said the Employer, the long unchallenged past practice supports a finding of acquiescence by the Union and an inference that the true meaning of the agreement is the one that the parties have accepted over time.

In any event, it would not be a sensible interpretation of the collective agreement to apply the concept of a “scheduled day off” to part-time employees. At HSC, there are numerous part-time staff with a variety of shifts and rotation patterns. These employees are able to pick up extra shifts in their own and other departments. While the Union claimed that the Employer should know when overtime would be triggered, this factual assertion was not proven on the

evidence. The Union could have called its members to explain how scheduling operates in reality and to establish that there would be no unfairness to the Employer. The agreement allows management to decline an offer of extra shifts if to do so would cause overtime costs. The Union's interpretation could negate this negotiated provision. The Employer argued that in the face of an evidentiary gap, caution should be exercised before declaring new part-time employee rights.

While the Union advocated for equality between full-time and part-time employees, a basic feature of the agreement is that the two groups are differentiated for many purposes. Part-time employees are not required to commit themselves to full regular hours. They have much more time which is open for them to spend as they choose. It does not follow that the same bonus pay rate should apply when they work on a day not previously scheduled. The parties were careful to maintain a separation between full and part-time, as reflected in the details of Article 31. Cost sensitivity is built in. Article 3109 precludes picking up shifts if to do so would incur overtime costs. Article 32 reflects the same intent. Part-time employees may occupy more than one position but not where the Employer would incur additional cost (Article 3201). Article 3203 maintains the part-time status of an employee even where the sum of her EFT's equals 1.0. In a new provision added in 2008 (Article 1515), pay on vacation days is different for part-time as compared with full-time employees. Only some part-timers (those asked to work) get the double pay rate. If the Union is correct about 1902(c), this new provision was unnecessary because every part-time employee working a scheduled day off is entitled to double pay.

Reviewing the scheduling scenarios tendered in evidence (Ex. 11-15), the Employer said that in some circumstances, it would be more lucrative under the Union's interpretation to be a part-time rather than a full-time employee. In situations where a full-time employee would not get double overtime, a part-time employee (Ex. 13, 15) could claim the higher rate

because many picked up shifts would qualify as scheduled days off and trigger Article 1902(c). To the Employer, this was further proof that the concept of scheduled days off is not meaningful outside the ambit of full-time employment.

The adage cited by Strutinsky is not written into the collective agreement as such but it does reflect the practical essence of the situation: full-time employees have scheduled *days off* while part-time employees have scheduled *days of work*. The Employer insisted that a reasonable interpretation must recognize these differences. The Union's position leads to increased costs and would not have been the mutual intention of the parties. Generally under Article 301, management retains the right to maintain efficiency and quality patient care.

The Employer did concede this much - strictly on a reading of the words in Article 1902(c), divorced from the practice and the context, one might conclude that the Union's interpretation is possible. But every other reasonable consideration points the other way. If the provision is ambiguous, this is a case for the application of past practice in construing the collective agreement.

The Employer also cited *Re Wire Rope Industries Ltd. and United Steelworkers, Local 3910* (1982), 4 L.A.C. (3d) 323 (Chertkow) for the proposition that, to succeed in its claim, the Union must prove that the Employer clearly bargained to pay the benefit sought in the grievance. The Union's interpretation must be proven to be more rational and logical than the Employer's version. The *Wire Rope* principle has been endorsed by arbitrators in Manitoba: *Re Westfair Foods Ltd. and Retail, Wholesale and Department Store Union, Local 469 (Steve Palamar Grievance),* [1993] M.G.A.D. No. 90, (1993) 38 L.A.C. (4th) 339 (Freedman); *Re Brandon General Hospital and Brandon Nurses' Local 4 of the Manitoba Nurses' Union (Thompson Grievance)*, [1996] M.G.A.D. No. 48, (1993) 56 L.A.C. (4th) 174 (Chapman) at para. 45; *Re Winnipeg Regional Health Authority, Health Sciences Centre Site*

and Health Sciences Centre Nurses, Local 10 (Mowat Grievance), [2003] M.G.A.D. No. 83 (Chapman) at para. 32, 34, 36.

Turning to the estoppel issue, the Employer emphasized the basic unfairness flowing from the Union's failure to give clear notice at the table, compounded by its delays in apprising the Employer of its position in arbitration. In *Re Manitoba Family Services and Housing and C.U.P.E., Local 2153 (Murdock Grievance)*, [2005] M.G.A.D. No. 55, (2005) 142 L.A.C. (4th) 173 (Peltz), after reviewing the ingredients of equitable estoppel in a case about guaranteed hours, I held (at para. 41):

> ... I am cognizant of the caution that should be exercised by an arbitrator in considering an estoppel argument. After all, it must be remembered that the doctrine of equitable estoppel allows a party to avoid the legal effect of a contract. In the present case, I have already considered the plain meaning of Article 15.03(a), on its own and also in context. I have determined that the collective agreement as written guarantees the grievor her assigned work hours as well as any holiday pay and hours. If the Employer's estoppel argument succeeds, however, the result will be to bar the Union from enforcing the terms of the collective agreement, at least for a period of time. This remarkable outcome is permitted by courts and arbitrators only because a higher purpose is being served: maintaining fairness and equity between the parties. In labour relations, where the parties by definition have a close ongoing relationship, arbitrators have been very concerned that fundamental fairness should prevail.

As in *Manitoba Family Services*, said the Employer, the pay practice in the present case was on display every time a part-time employee hit the overtime threshold while working a non-scheduled day. Hours and pay rates are clearly shown on every employee's pay statement. This was held to be significant in weighing the equities (at para. 45-46):

> ... I can only conclude that the Union and the grievor were readily able to become aware of the practice, if they chose to inquire by looking at a selection of pay stubs. Regardless of the frequency of

> occurrence, it is beyond doubt that the Union could have made itself knowledgeable about the Employer's practice by exercising reasonable diligence.
>
> In considering the facts and the equities, I find it significant that the practice in question did have a direct and material impact on any employee to whom it was applied. That is, any employee in the Program who looked at her pay statement would readily observe how the guarantee was applied. If an employee was shorted on her pay because holiday hours were used as an offset to the guarantee, this would be an immediate pocket book issue. This was not a technical issue or a factor built into the computer payroll program beneath the surface. There was no effort in this case to hide the practice. It was plain for all to see. It would recur from time to time.

Similarly in *Re Board of Commissioners of Police for the City of Owen Sound and Owen Sound Police Association*, [1984] O.L.A.A. No. 49, (1984) 14 L.A.C. (3d) 46 (M.G. Picher), a sick leave credit case, the inequity caused by lengthy delay in raising a grievance was emphasized (at para. 27-28):

> It is reasonable for any employer in a collective bargaining relationship to expect that the application of any part of the collective agreement which does not meet with the approval of the opposite party will either give rise to a grievance or become a point of contention in the periodic renegotiation of the collective agreement. In this case the association has made no objection to the way in which the board of commissioners applied art. 14 over a great number of years. No grievance was filed since the article was first inserted into the collective agreement, nor was any word of objection raised in the many successive rounds of renegotiation of the parties' agreement.
>
> In my view, in these circumstances, it would be most inequitable to allow the association to assert successfully an interpretation of the sick-leave credits provision that is inconsistent with its many years of apparent acceptance of a contrary interpretation applied by the board of commissioners. To give full effect to the grievance would subject the board of commissioners to the substantial cost of retroactively crediting all of the officers in its service in a manner consistent with the correct interpretation of art. 14. It is not subject to dispute that the

> planning and budgeting of the board of commissioners has proceeded on an entirely different expectation. The employer has been encouraged by the apparent acquiescence of the association in its unwavering method of calculating sick-leave credits down through the years. Bearing in mind that it is the association, and not the individual members that is party to the collective agreement, that reliance and consequent prejudice requires that the association be estopped from succeeding in the instant grievance.

On the facts of the present case, argued the Employer, the 2007 grievance was so broad and the 2008 table notice was so vague that the estoppel must continue in effect until bargaining can resume. In *Canadian Pacific Hotels, supra*, cited by the Union, the estoppel notice was clear and repetitive, and for that reason, the estoppel was successfully ended on those facts. In *Re Auto Family Credit Union (Niagara) and United Automobile Workers, Local 374*, [1981] O.L.A.A. No. 89, (1981) 29 L.A.C. (2d) 37 (McLaren), a letter written by the employer to the union was found not to constitute effective notice ending an estoppel because it failed to state which legal rights would henceforth be relied upon and it lacked any explanation for the employer's interpretation (at para. 13):

> The test must be how would a reasonable person interpret the situation when the letter was received? ... The letter contains a conclusion based upon an unrevealed interpretation of art. 25.01(h) that the employer is entitled in the future not to pay the part-time employees' statutory holiday pay. In the absence of an explanation of the interpretation applied by the employer to the article of the collective agreement it cannot be said that a reasonable person, given the knowledge he would have from the letter, would have notice of the cessation of the estoppel. The letter at best only has a secondary intention of giving such notice and when there is no reference to the actual strict interpretation upon which the employer relies then the notice is not a proper one. *To be a proper notice, it must make its recipient aware of which strict legal rights are to be relied upon in the future.* Otherwise, the recipient would not know to which part of the collective agreement and under what interpretation he had received notice of the cessation of an estoppel. The letter of April 23, 1980, fails in this respect and would not constitute proper notice to a

reasonable person. (Emphasis added)

The Employer argued that by this standard, the Union's table notice in the present case was woefully inadequate. The Employer could not know that a practice was ending or precisely what position the Union would henceforth be taking with respect to part-time overtime. As held in *Re Cominco Ltd. and United Steelworkers of America, Local 480 (Jorgenson Grievance)*, [1996] B.C.C.A.A.A. No. 409, (1996) 57 L.A.C. (4th) 36 (Larson), "Because an estoppel is based on conscience, any change must be an informed one" (at para. 29). Notice to end an estoppel must communicate "with adequate clarity" that the party giving notice intends to revert to its strict legal rights and must give "sufficient particularity": *Re Natrel (Ontario) Inc. and Teamsters, Local 647 (Ramsperger Grievance)*, [1999] O.L.A.A. No. 654, (1999) 83 L.A.C. (4th) 55 (E. Newman) at para. 61-62.

The Employer argued that the table notice given by the Union simply made no sense. There was a disconnect between the terms of the notice and Article 1902(c). This contention is proven by the fact that the Union is now advancing a different position in arbitration than it raised at the table. Today the claim goes beyond the 11th shift and applies to overtime on any non-scheduled day. The evidence was clear that had Strutinsky heard a notice cast in those terms - with clarity and particularity - the Employer side would have engaged on the issue.

As an alternative argument to estoppel, the Employer also submitted that general principles of fairness preclude awarding any retroactive remedy, should the Union be successful on any of the merits. The Employer pointed to the second interim award issued on April 16, 2010 in this matter, *supra,* dealing with the scope of the grievance, where it was held (at para. 50): "There is a strong argument for denying any relief under Article 1902(c) for the period prior to February 2, 2010." The equities tipped even further against the Union when, after these

comments in the second interim award, the Union revised its position yet again, on the eve of the main hearing. According to the Employer, the Union's case has been a moving target throughout the proceedings and as a result, the Union has disqualified itself from any retroactive relief.

Union reply argument

The Union denied that its position leads to a more "lucrative" result for part-time employees as compared with full-time staff. It is the nature of health care delivery that there are numerous configurations of shifts and hours of work. For example, there are full-time employees working 10 or 12 hour shifts, and by definition these individuals will also have a greater number of scheduled days off. They do not have any preferential status by virtue of their shift pattern, it is just a logical result of the way their work has been organized. Unexpected consequences can be addressed by the parties when they next engage in collective bargaining.

The Union accepted the point that there are differences between full-time and part-time employee rights under the agreement, but reiterated that these differences are negotiated. As it stands, the collective agreement gives double pay under Article 1902 (c) to all employees who work overtime on a scheduled day off. There have been some changes to Article 19 over the years and during the last round, Article 1515 was added, which dealt with other aspects of part-time employee time off and rates of pay.

Article 19 may need attention, and in the Union's view, it made reasonable efforts last time at the table to flag its concerns and initiate negotiations. Campbell spoke specifically about

the notion that part-time employees have days off and should not face inferior treatment compared to full-timers. Strutinsky stated that he understood. But the Employer chose to ignore the opening and deliberately took its chances, expecting that a challenge would be coming via grievance arbitration. Now the challenge has arrived and in argument the Employer conceded, notwithstanding Strutinsky's adage, that the wording of Article 19 may indeed support the Union's claim of scheduled days off for part-timers. The Union requested a declaratory order and full relief accordingly.

Analysis and conclusions

Is Article 1902(c) ambiguous?

It is a well established principle that collective agreement language is not ambiguous merely because it will bear more than one meaning or because the parties disagree about the correct interpretation. If the provision can be construed by reference to the words used, in the context of the agreement as a whole and the factual framework of the dispute, then no resort to extrinsic evidence is necessary. In the present case, the Employer argued that Article 1902(c) is ambiguous and urged that the long past practice at HSC be considered in reaching a conclusion that part-time employees cannot claim double pay for overtime on a "scheduled day off." The Union said that the provision is clear and should be given its plain meaning, without taking into account the practice. There were no submissions with respect to patent versus latent ambiguity, but in any event, by agreement all extrinsic evidence was received subject to a final determination.

The Employer's basic point was that it makes no sense to speak of a "scheduled day off" for

part-time employees. A reduced EFT means that the employee is committed to less than full-time regular hours and has greater flexibility in managing her personal life. This is a voluntary choice. Open days may be used for a variety of purposes, one of which is to pick up additional shifts which may be offered by the Employer. The Employer distinguished these open days from a full-time employee's scheduled days off. A full-time employee is at the maximum permitted regular hours and any additional work by definition is an imposition on personal time. It is this burden and inconvenience which justifies the extra pay under Article 1902(c). Beyond these considerations, the Employer envisioned a series of illogical consequences flowing from the Union's position whereby vital cost containment would be jeopardized. In some scenarios, it could be more "lucrative" to hold part-time status than full-time. Thus, said the Employer, the Article is ambiguous because it *can* be read as the Union wishes, but to do so makes no sense. Past practice resolves the conundrum.

In my view, the Employer presented arguable points going to the meaning of the provision but they do not support a finding of ambiguity. I hold that Article 1902(c), taken in context, has an ascertainable correct meaning. To be sure, there are two competing interpretations. As outlined above, the Employer says that a part-time employee does not have a "scheduled day off", whereas the Union maintains that the term sensibly does apply to part-timers. The disagreement can be resolved by reference to the words of the provision and the collective agreement as a whole, understood in factual context. Determining the issue may produce a result which one party finds unpalatable, but again, the authorities are clear that this does not mean the language is ambiguous. The proper place to work out acceptable provisions for part-time overtime is in collective bargaining.

For these reasons, and as further elaborated below, I decline to consider past practice as an aid to interpretation.

Is a part-time employee entitled to double pay for overtime under Article 1902(c)?

For convenience, the relevant provisions of Article 19 are as follows:

ARTICLE 19: OVERTIME

Also refer to Article 31 – Special Provisions re. Part-time Employees.

1901 Overtime shall be the time worked in excess of the daily and bi-weekly hours of work as specified in Article 18, or in excess of the normal full-time hours in the shift pattern in effect in the department, such time to have been authorized in such manner and by such person as may be authorized by the Employer. ...

1902 (a) Employees shall receive 1 ½ times their basic rate of pay for the first 3 hours of authorized overtime in any one day.

(b) Employees shall receive 2 times their basic rate of pay for authorized overtime beyond the first 3 hours in any one day.

(c) Overtime worked on any scheduled day off shall be paid at the rate of two (2) times the employee's basic salary.

(d) All overtime worked on a General Holiday shall be paid at two and one-half (2 ½) times the employee's basic rate of pay.

(e) Part-time employees will not be provided preference for additional hours during the employee's scheduled vacation period.

...

1906 Overtime and on-call shall be divided as equally as reasonably possible among the employees who are qualified to perform the available work. No employee shall be required to work overtime against her wishes when other qualified employees within the same classification are available and willing to perform the required work.

The structure of Article 19 indicates that it is a general provision on overtime which *prima facie* applies to all employees, subject to other more specific language in the agreement. The note under the heading ("Also refer to Article 31 ...") makes clear that in addition to the terms of Article 19, there are special provisions governing part-time employees. But it is not the case that the regime for part-time overtime is exclusively contained within Article 31. I caution that these observations are not intended to decide any question under Article 19 other than the one currently before me.

The treatment of casual employee overtime under the agreement is a relevant consideration because this is part of the overall collective agreement context. I find the Union's submission in this regard to be persuasive. Article 3301 states that the agreement does not apply to casuals except as enumerated in this article. More specifically, Article 3301(e) provides that casual employees are entitled to overtime in accordance with Article 1901 and Articles 1902(a), (b) and (d), but excepting Article 1902(c). In express terms, the parties have indicated that the concept of a scheduled day off will not be applicable to casuals, for obvious reasons. A casual employee has no schedule. As defined, a casual replaces an absent employee or is called in to supplement staff coverage in emergency situations. While the Employer argued that part-time employees similarly have no scheduled days off, this assertion was not supported by any express collective agreement language. It was the practice and it was reflected in a well known workplace adage, but it was not a contractually

based proposition. The parties could have drafted an exclusion for part-time employee days off, in similar terms to the casual exclusion, but they chose not to do so. The omission is telling.

I also accept the Union's analysis based on the scheduling provisions of Article 1805, which apply generally to all employees, subject to specific language in Article 31. Like full-time employees, part-time employees appear on the posted schedule which must be completed four weeks in advance. Applying the plain and ordinary meaning of the words, I conclude that part-time employees in this respect have both scheduled days of work and scheduled days off. Nothing in Article 31 negates this interpretation. Article 3109(a) addresses additional work by part-time employees and imposes a number of conditions. The request must be in writing. The employee must be able to perform the duties. There is no preference for hours during a scheduled vacation period. The available hours must be equitably divided among the requesters. Additional hours will be offered only to the extent that they do not incur overtime costs (third sentence). It is apparent that the parties addressed their minds to the question of part-time employee scheduling but did not exclude the applicability of scheduled days off.

The Employer correctly pointed to the third sentence in Article 3109(a) as reflecting an intention to contain overtime costs. This has been an ongoing and justifiable concern of management. However, on a plain reading, the third sentence does not say that overtime worked on picked up shifts will not be compensated. The opening sentence of Article 3109(a) expresses an entitlement to additional shifts (albeit a conditional entitlement): part-time employees "shall be offered such work ...". The third sentence clarifies that there is no entitlement if the assignment would incur overtime costs. None of this removes the Employer's discretion, as a matter of its management rights, to offer shifts which do incur

overtime. It seems obvious that such a situation will inevitably arise in a health care facility and the evidence confirmed this fact. If and when management offers additional hours which trigger overtime compensation under the agreement, the applicable rate must be paid to the part-time employee.

During the course of the main arbitration hearing, much was said about scheduling scenarios and various overtime impacts. The Union insisted that management does or ought to know when a shift will trigger overtime costs. The Employer responded that it is not always knowable and said that the Union bore the onus of proving its assertion. The Employer also said that because part-time employees have more unscheduled days, they would be treated unduly preferentially under the Union's interpretation. The Union replied that the same could be said about 10 hour and 12 hour employees, who similarly have more unscheduled days on the calendar because of their concentrated work periods. In my view, it is not necessary to resolve these questions. The parties are mutually bound to act in accordance with the agreement they have negotiated. If the agreement yields unsatisfactory results, the parties have recourse to a bargaining process in which their concerns may be addressed.

Based on the foregoing analysis, I conclude that Article 1902(c) is applicable to part-time employees. Their scheduled days off are the days shown on the posted schedule as non-working days. Similar provisions were considered in *General Hospital, supra,* and the arbitrator held that a double time premium was payable to part-time employees. Unlike the present case, there was a definition of "day off" written into the agreement in *General Hospital*, which distinguishes the decision to some extent. However, the definition chosen by the parties was generic in nature: "a day on which the employee is not ordinarily required to perform the duties of his/her position ...". Absent a written definition in the present case, it would be reasonable to interpret the meaning of the phrase in Article 1902(c) in a roughly

similar fashion. The arbitrator in *General Hospital* concluded (at para. 19):

> A 'day off' is any day that an employee is not scheduled to work.

The Employer cited the terms of Article 1515, adopted during the 2008 round of bargaining. The Employer reasoned that this new article would have been unnecessary if the Union's version of Article 1902(c) was correct. Every part-time employee would receive double time pay on scheduled days off. I do not find this argument helpful to the interpretive exercise. Article 1515 refers to non-scheduled vacation days and implements a rate of pay distinction for part-time employees, based on whether or not the Employer has requested the work. It appears that the parties had other concerns in mind when negotiating Article 1515.

The Union is entitled to declaratory relief with respect to the meaning of Article 1902(c), as sought.

Did the Union give the Employer effective notice to terminate the past practice?

To terminate a past practice and avoid estoppel, a party must provide clear, fair and informative notice that it is acting to end the practice. Numerous authorities were cited but there was no dispute on the principle. Did the Union's notice during bargaining in 2008 meet this standard?

The content of the notice must be assessed against the contractual issue involved in the past practice which the Union was seeking to end. In this case, the right now asserted in

arbitration is an entitlement of part-time employees to receive double pay for overtime worked on scheduled days off, pursuant to Article 1902(c). It was the HSC practice for decades not to pay such overtime compensation. Nothing in the evidence before me revealed a clear, fair and informative message to the Employer that the Union was reverting to its strict legal rights and ending the practice of non-payment.

The PHCC tabled a package at the local issues table (Ex. 5) which hinted at the issue. Under Article 1902, the document stated: "Clarify that 1902(c) applies to part-time employees." On its face, the document makes no mention of any notice or any practice. In any event, during the course of negotiations, this position was withdrawn by the Union in favour of the formulation put on the Central Table. As a result, the Union cannot now rely on the local table notice.

At Central Table, Article 1902(c) was not cited in specific terms and the Union's notice was framed as an issue of double pay on the 11th shift under Article 1902:

> The Union is putting the Employer on notice that part-time employees get overtime at double (2) pay on the eleventh shift on bi-weekly period.

There was brief discussion at the table between Chief Negotiators, including an assertion that part-time employees do have days off, but the overtime claim was always related to the 11th shift. I agree with the Employer submission that there was a disconnect between the notice provided at the 2008 table and the Article 1902(c) entitlement. While the Union may be right that its position would have become clearer had the Employer engaged in more detailed discussions, the onus remained on the Union to serve an adequate notice if it hoped to end

the estoppel. As it was, the Union never mentioned the practice and did not articulate that it was delivering a termination notice.

The Union argued that there was already a live overtime issue before the parties because of the 2007 grievance but I agree with the Employer that this grievance was so broadly framed that it does not assist the Union on the estoppel notice issue. The Union has stipulated that it did not notify the Employer of a claim for double pay under Article 1902(c) until February 2, 2010, as a component of the grievance. The claim based on daily overtime was not advanced until November 24, 2010, on the eve of the substantive arbitration hearing. I can readily appreciate the Employer's frustration over the "moving target" it was facing in this respect.

In the end, estoppel is a vehicle to ensure equity and fairness. Notice to end an estoppel based on past practice must itself be equitable and fair. In the present case, the Union failed to deliver a clear, fair and informative notice.

As a result, the estoppel will continue until the expiry of the current collective agreement (March 31, 2012), at which time the Employer will have a fair opportunity to bargain on the double pay issue under Article 1902(c).

Award and order

1. It is declared that part-time employees are entitled to be paid at double the basic salary rate for overtime worked on any scheduled day off, in accordance with the terms of Article 1902(c) of the collective agreement.

2. The Union is estopped from enforcing its rights under paragraph 1 of this order until after March 31, 2012.

3. Jurisdiction is retained to settle any aspect of the remedial order herein, on the request of either party.

ISSUED at Winnipeg, Manitoba on June 24, 2011.

A. Peltz"

ARNE PELTZ, Arbitrator