LABOUR RELATIONS CODE
(Section 84 Appointment)
ARBITRATION AWARD

HEALTH SERVICES AND SUPPORT FACILITIES
ASSOCIATION OF UNIONS
(HEU, BCGEU, IUOE, CSWU, IBEW, USWA, BCNU, UNCJAP&P, IUPAT)
UNION

HEALTH EMPLOYERS' ASSOCIATION OF BRITISH COLUMBIA
EMPLOYER

(Re: Implementing Collective Agreement Imposed by Bill 37-2004)

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| Arbitration Board: | James E. Dorsey, Q.C. |
| Representing the Union: | Chris J. Allnutt<br>Patrick Dickie |
| Representing the Employer: | Eric J. Harris, Q.C<br>Page E. Kendall |
| Date of Hearing: | July 12, 2004 |
| Date of Decision: | July 15, 2004 |

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## 1. Differences, Jurisdiction and Hearing

This is an expedited arbitration of differences concerning the implementation of the collective agreement imposed by the *Health Sector (Facilities Subsector) Collective Agreement Act*, SBC 2004, Chapter 19, referred to as Bill 37, which was given Royal Assent and came into effect on April 29, 2004. The parties agree I am properly constituted as an arbitration board under this collective agreement and *Labour Relations Code* with jurisdiction to finally decide the differences in dispute.

Section 2(1) of Bill 37 provides that the *Labour Relations Code* applies "in respect of matters to which this Act applies", but Bill 37 applies where there is a conflict. Under section 2(2) "The Labour Relations Board has exclusive jurisdiction to decide a question arising under this Act, including any question of a conflict or inconsistency referred to in subsection (1)." By agreeing that I have jurisdiction as an arbitrator over these differences, the parties are agreeing their differences arise under the collective agreement and not Bill 37.

As an arbitrator under the collective agreement, I have the authority to interpret and apply Bill 37 as an "Act intended to regulate the employment relationship of persons bound by a collective agreement, even though the Act's provisions conflict with the terms of the collective agreement" (*Labour Relations Code*, s. 89(g)).

The arbitration hearing consisted of written and oral submissions accompanied by several documents entered as exhibits. HEABC registered its objection that several of the documents entered by the Association of Unions are irrelevant to the issues in dispute. In the interests of expediting the proceeding, it simply registered the objection and did not pursue a ruling.

These reasons for decision begin with some background to the current differences on increasing the work week from 36 to 37.5 hours; funding the Occupational Health and Safety Agency for Healthcare; continuing supplemental monthly long-term disability benefits; re-opening discussions on long-term disability benefits; adjusting wage rates for technical, professional and trades employees; the application of the savings clause (Article 3.03) to Bill 37; and concessionary local agreement to forestall contracting-out.

The collective bargaining, strike and back-to-work legislation (Bill 37) earlier this year and some subsequent events are reviewed.

Submissions, analysis and decisions on the disputed differences follow this review of some of the background and context for the differences.

## 2. Past Work Week Negotiations and Implementation Disputes (1991-2001)

The Hospital Employees' Union sought a reduced work week since negotiations for its 1974-75 collective agreement and "… throughout the years the Union has consistently tied its proposal for a reduced work week to the concept of accumulated time off (ATO) and scheduling of such ATO days as additions to an employee's regular day off" (*Health Labour Relations Association*, unreported, June 16, 1993 (Ready), p. 7)

During the term of the 1991-1994 collective agreement between the HEU and Health Labour Relations Association (HLRA), the government announced health care system changes that estimated a reduction in 4,800 FTEs from government funded health care facilities. In March 1993, in reaction to this announcement, HLRA and HEU, British Columbia Nurses Union and Health Sciences Association of British Columbia reached a Tentative Framework

Agreement (TFA). Among other things, they agreed to extend their collective agreements for two years to March 31, 1996; to reduce the work week to 36 hours effective July 1, 1993; and made agreements related to employee security, transfer and labour force adjustments, including the creation of a Labour Adjustment Agency.

They agreed: “The work week reduction is in lieu of a general increase for any Union for the contract year beginning April 1, 1993. The wage reopeners or cola provisions that would otherwise have been effective on April 1, 1993 therefore are void.” Amendments to each collective agreement to achieve this goal were to be negotiated. Implementation differences were to be resolved under an expedited process to be negotiated.

A Task Group that was formed to identify and resolve changes to implement the 36 hour work week did not resolve “any of the significant issues concerning the principles of implementation of the reduced work week.” The issues were to Arbitrator Ready on June 13, 1993. He published recommendations on June 16, 1993. HLRA proposed not implementing the 36 hour work week, which it costed at 4.17% or, alternatively, making it effective April 1, 1994 to defer the cost and:

> Further, it is submitted that the implementation of the 36 hour work week for 50,000 employees scattered throughout the province working all different schedules, requires tremendous lead time to implement. Schedules have to be developed, approved, sought and computers reprogrammed. This is a mammoth undertaking. In this alternative position, HLRA believes that the period from ratification date to April 1, 1994, provides that administrative time to implement the 36 hour work week. (p. 18)

Mr. Ready did not recommend setting aside this part of the TFA, but recommended implementation be delayed to September 30, 1993. He recommended the factors to be considered in the implementation, which included the "projected savings of approximately 2% of payroll" (p. 27).

If there were disputes over shift schedules they were to be submitted to expedited final offer selection (FOS) arbitration prior to September 15, 1993 or within three days if the dispute arose after that date. Disputed shifts were to be implemented on a date set by the FOS arbitrator. The necessary changes to the collective agreement were to be made within thirty days of ratification and any

disputes were to be submitted to him for final resolution.

Some differences arose and were submitted to Colin Taylor, Q.C. for mediation and arbitration in September 1993. He decided:

- employee banks of time, such as sick leave or special leave banks, were not to be reduced and 7.2 hours would be the base day for calculating accrued credit banks;
- shift premium payments would not be increased 4.17%;
- rest breaks were not to be extended;
- red-circled wages were not to be reduced; and
- the approval process for schedules for the 36 hour work week;

Arbitrator Taylor reserved jurisdiction to deal with matters related to any changes in definition and language in the collective agreements (*Health Labour Relations Association*, unreported, September 6, 1993 (Taylor))

The final 1991-1996 collective agreement contains several changes arising from implementation of the 36 hour work week. The 1996-1998 collective agreement, with its melded and levelling provisions was the first collective agreement between the HEABC and the Health Services and Support Facilities Association of Unions.

### 3. Occupational Health and Safety Agency for Healthcare in BC (1998-2001)

On April 8, 1998 in collective bargaining for the 1998-2001 collective agreement the parties agreed to establish a government funded, jointly run Occupational Health and Safety Agency for Healthcare (OHSAH).

On May 23, 1998 the provincial government signed a Public Sector Accord with HEABC, the Association of Unions and the Health Services and Support Community Association, which sates, in part: “The Agency will be self financing, that is funded on a cost-neutral basis through savings resulting from better health and safety practices.” Funding was to be generated from various sources. Until programs had time to demonstrate effectiveness, the Province “will provide an accountable advance” to be “repaid over time from savings resulting from the Agency’s activities.”

The advances for the first three years were $5 million (1998-99), $4 million (1999-2000) and $2 million (2000-2001). This funding was on the "condition that no more than $1,000,000 annually be devoted to operating expenditures, and that unexpended funds be carried forward into the following years."

In March 2001, HEABC and the Association of Unions amended their addendum on OHSAH for the 2001-2004 collective agreement by adding the following sentence: "Effective April 1, 2002, funding for the Agency will be two (2) million dollars in each of the fiscal years 2002/2003 and 2003/2004." This meant the total government six-year funding was $15 million as of March 31, 2004.

In September 2003 OHSAH published the *OHSAH Value Report* "to illustrate the value and contribution" the Agency, in partnership with others, had made. It reported that injury rates, time loss and workers' compensation assessments had declined since 1998. The saving from the direct costs of workers' compensation assessments alone from 2002 to 2004 was in excess of $51 million - a threefold return on investment. It concluded the money was "undoubtedly a good investment" (Appendix 2, p. 6). OHSAH had obtained an additional $8,210,127 funding for specific projects from the federal and provincial governments (Appendix 8).

On May 21, 2004 the HEABC and Nurses' Bargaining Association entered a letter of agreement about the current round of collective bargaining. They agreed to a monetary framework for negotiations, "excepting funding" for OHSAH, which is to be the subject of negotiations after July 30, 2004.

I am informed that the provincial government provided $400,000 funding to enable OHSAH to continue after March 31, 2004.

In June 2004 the Office of the Auditor General of British Columbia submitted to the Legislative Assembly its report *In Sickness and In Health: Healthy Workplaces for British Columbia's health Care Workers*, in which it assessed "… how well British Columbia's health authorities are managing to create a healthy work environment for their employees." The Association of Unions notes that the Auditor General's report and recommendations addressed circumstances before

the added factor of an increase in the work week to 37.5 hours.

**4. Supplemental Monthly LTD Benefits (1998-2001)**

On June 5, 1998 the parties agreed to extensive changes to the Long-term Disability Plan, including increased benefits and a focus on rehabilitation. They agreed to include and not disadvantage certain defined and eligible employees who did not have indexed benefits. These employees would receive a supplementary monthly long term disability benefit for the thirty-six months of the collective agreement.

They agreed to re-open discussions about the long-term disability benefit eighteen months after ratification "to determine" whether the supplementary benefit "… will continue beyond the 36-month period and/or be increased for a further period of time" and whether "the employer's portion of premiums for medical, dental, extended health, and accidental death and dismemberment insurance will be increased." The determination was dependant "upon whether there has been an experience savings as a result of the changes to the LTD Plan (i.e., a net savings)." They agreed "Any outstanding issues from this LTD Benefit re-opener shall be referred to Don Munroe for final and binding resolution."

A new memorandum of Agreement on *LTD Claimants Governed by Plans Other Than the Former HEU Master* was added to the 2001-2004 collective agreement. It states: "The current supplemental monthly benefit for eligible non-HEU Master employees shall continue until July 6, 2004, provided that the employee continues to meet the criteria set in Section 1A(1)(b) of the Addendum Long Term Disability Plan." Section 15 of that Addendum includes a re-opener in the same language as in the previous collective agreement.

**5. "Savings Clause" - Article 3.03**

Successive collective agreements have included a savings clause addressing the effect of legislative enactments on the provisions of the collective agreement. Article 3.03 of the 2001-2004 collective agreement states:

**3.03 Future Legislation**

In the event that present or future legislation renders null and void or materially alters any provision of this Collective Agreement, the following shall apply:

(a) The remaining provisions of the Collective Agreement shall remain in full force and effect for the term of the Collective Agreement.

(b) The Employer and the Association shall, as soon as possible negotiate mutually agreeable provisions to be substituted for the provisions so rendered null and void or materially altered.

(c) If a mutual agreement cannot be struck as provided in (b) above, the matter shall be arbitrated pursuant to Article 11 of the Collective Agreement.

This savings clause had been in the preceding collective agreements between HLRA and the HEU since the 1970s (See *Health Labour Relations Association*, unreported, December 14, 1989 (Munroe)).

Governments that propose legislation that affect existing collective agreements must be conscious of the existence of savings clauses. The current government has been.

In 2001 the British Columbia Public School Employer's Association and the British Columbia Teachers' Federation for public school teachers agreed to a savings clause (Article A.8) that addressed what happened when there was "new or amended" legislation, "which arises during the term of the Collective Agreement or subsequent bridging period." In January 2002 a collective agreement was legislatively imposed for the period July 1, 2002 to June 30, 2004.

The imposed collective agreement included the savings clause and section 4 of the *Education Services Collective Agreement Act*, SBC 2002, Chapter 1. Section 4 deemed certain local agreements to apply to all teachers in certain reorganized school districts and other local agreements that formerly applied to some of the teachers in the reorganized districts were "void and cease to have any effect." The parties could vary the terms of the imposed collective agreement, but not what was imposed by section 4.

The BCTF said that the savings clause applied to section 4. BCPSEA said it did not. Arbitrator Munroe agreed with BCPSEA. He found that both the savings

clause and section 4 were terms of a new collective agreement. Therefore, section 4 was not "new" legislation arising "during the term of the collective agreement." He found that both section 4 and the savings clause were “deemed parts of the collective agreement at the exact same moment as each other” and “as a matter of law, Section 4 and Article A.8 originated at the same moment as terms of a binding collective agreement.” They “concurrently acquired legal status” as terms of the collective agreement. (*British Columbia Public School Employers’ Association* [2002] BCCAAA No. 137 (Q.L) (Munroe), ¶ 28)

There was a second statute, the *Public Education Flexibility and Choice Act*, SBC 2002, Chapter 3 enacted and proclaimed as law within a day of the *Education Services Collective Agreement Act*. It amended the *School Act* to exclude class size and composition, and other subjects from the permissible scope of collective agreement. To the extent of any conflict or inconsistency between the amendment and the collective agreement, it declared null and void any provision in the collective agreement that conflicted with or was inconsistent with the amendment. In addition, as Arbitrator Munroe noted, “with obvious reference to Article A.8 of the collective agreement deemed into existence”, the *Education Services Collective Agreement Act* stated that a provision of the collective agreement requiring negotiations to replace provisions that had been voided was itself void to the extent it applied to this new legislation. This was necessary because this legislation came into effect after the deemed collective agreement. Arbitrator Munroe found that such a provision overriding the savings clause was “wholly unnecessary” with respect to section 4 of the *Education Services Collective Agreement Act* (¶ 31).

Despite a “gap” in the legislation relating to the classification of speech language pathologist and correspondence from the Minister of Labour, Arbitrator Munroe declared that the savings clause did not apply to section 4 of the *Education Services Collective Agreement Act* (¶ 32).

At the same time as this education sector legislation, the government proclaimed the *Health and Social Services Delivery Improvement Act* SBC 2002, Chapter 2 enabling employers to reorganize, transfer employees and contract out non-clinical services, notwithstanding provisions of collective agreements, which

were rendered void to the extent they conflicted or were inconsistent with the statute. A union challenge to the constitutionality of the *Health and Social Services Delivery Improvement Act* was dismissed July 5, 2004 by the British Columbia Court of Appeal (*Health Services and Support Facilities Subsector Bargaining Association v. British Columbia* 2004 BCCA 377).

The *Health and Social Services Delivery Improvement Act* expressly addressed saving clauses. Any provision of a collective agreement that required an employer to negotiate with a trade union to replace voided provisions or authorized an arbitrator to amend of modify provisions of the collective agreement "is void to the extent that the provision relates to a matter prohibited under this Part" (s. 10(2)).

In 2003 the government proclaimed the *Health Sector Partnerships Agreement Act* SBC 2003, Chapter 93 to facilitate and encourage HEABC members to engage in private-public partnerships in health care service delivery by voiding provisions of collective agreements. Again, any collective agreement savings clause was "void to the extent that the provision relates to a matter prohibited under this Act" (s. 6(2)).

**6. Local Agreements on 37.5 Hour Work Week and Other Matters (2003-04)**

Following enactment of the *Health and Social Services Delivery Improvement Act* and the employers' newly acquired right to contract out non-clinical services, HEABC and the Association of Unions entered into thirty-six local agreements.

The local agreements varied the 2001-2004 collective agreement in various ways to reduce employer costs, including reducing annual vacation entitlement, eliminating the Super Stat holiday premium rate, reducing wages, foregoing a pay equity adjustment, amending Article 16.01 (c) (Job Postings and Applications) ; adding a new Article 19.01(h) (Scheduling Provisions) and increasing the work week from 36 to 37.5 hours. The 37.5 hour work week was not a provision of all local agreements and all local agreements did not expressly tie a 4% reduction in hourly wages to the increased work week. The 37.5 hour work week was

introduced at several facilities at different times after September 2003.

The local agreements provide that they terminate on the effective date of a "renewed Facilities Subsector Collective Agreement."

**7. Employer Proposals on Work Week and LTD Benefit Re-Opener**

On February 19, 2004 the employer tabled several proposals for a “more affordable collective agreement.” The proposals were tabled on the “understanding that consequential amendments may be required to the language of the Facilities Subsector Collective agreement for implementation purposes.”

Employer Proposal #LTD-A was to delete the LTD Benefit Re-opener. Employer Proposal #20-A, “Implementation of the 37.5 Hour Work Week”, contemplated a final collective agreement subject to ratification by both parties and a delayed implementation of the 37.5 hour work week. It provides that:

- the current 36 hour work week or equivalent for regular full-time employees will continue for a time;
- the work week will increase to 37.5 hours;
- the increase will happen “not later than ninety (90) calendar days after ratification”;
- monthly rates will not increase for regular full-time employees, but hourly rates will be reduced by 4%;
- Local Agreements in effect March 31, 2004 that provide for a 37.5 hour work week will continue - not be affected by the delay waiting for ratification and a subsequent ninety calendar days;
- the work schedule will be determined and implemented by the employer, not “whenever possible, shall be determined by mutual agreement between the Employer and the employees at the local level” as in 1993;
- new work schedules shall be supplied to the union 15 calendar days prior to implementation;
- with the 37.5 hour work week the base day will increase to 7.5 hours for calculating accrued credit banks; and
- Article 20.02(d) is consequentially amended.

There is no evidence how HEABC expected the proposal to be received by the Association of Unions or what it anticipated might be the ultimate agreement, if any, reached through collective bargaining.

The entire text of Employer Proposal #20-A is as follows. New language is underlined. Language to be deleted is struck through.

**HEABC / Facilities Subsector Collective Bargaining 2004**
**Employer Proposal #20-A**
**Article 20.02**

***Implementation of the 37.5 Hour Work Week***

**Proposal:**

Revise Article 20.02 as follows:

Note that consequential amendments will be required to other Articles of the Collective Agreement to reflect the longer work week (e.g., Article 21, Memorandum of Understanding Re: Schedules with Work Days Greater than 7.2 Hours and Up to and Including 8 Hours per Day).

**20.02 Hours of Work**

(a) The hours of work for each regular full-time employee covered by this agreement exclusive of meal times shall be 36 hours per week or an equivalent. Effective the start of the first pay period not later than ninety (90) calendar days after ratification, the work week shall be an average of thirty-seven and one half (37.5) hours per week. The longer work week will not result in an increase in the monthly rate of pay for regular full-time employees (i.e., the monthly wage rate will not change as a result of the implementation of the longer work week); however, the hourly wage rate will be reduced by four percent (4%).

Where an Employer has an existing Local Agreement providing for a thirty-seven and one-half (37.5) hour work week as of March 31, 2004, such an arrangement will continue and Article 21 shall not apply for the difference between a thirty-six (36) hour work week and a thirty-seven and one-half (37.5) hour work week.

(b) The Employer will determine and implement the new work schedules for the longer work week. The new work schedules shall be supplied to the Union fifteen (15) calendar days prior to implementation. The right to grieve the new work schedules is limited to alleged violations of Article 19 and 20. ~~Where the Employer intends to introduce a work schedule of less than 7.5 hours per day, the new work schedule, whenever possible, shall be determined by mutual agreement between the Employer and the employees at the local level.~~

(c) Effective the first pay period prior to September 30, 1993, for hours worked after that pay period, the base day will be seven point two (7.2) hours for the purpose of calculating the accrued credit banks. Effective no later than the start of the first pay period ninety (90) calendar days after ratification, for hours worked after that pay period, the base day will be seven and one-half (7.5) hours for the purpose of calculating the accrued credit banks.

(d) Schedules with work days greater than seven and one-half (7.5) ~~that seven point two (7.2)~~ hours per day and up to and including eight (8) hours per day are further clarified in the Memorandum of Understanding Re: Schedules.

## 8. Strike (April 25th), Bill 37 (April 29th) and Back-to-Work Accord (May 2nd)

Collective bargaining came to an impasse and a strike began April 25, 2004. Efforts to resolve the impasse, including those of the then Deputy Minister of Skills, Development and Labour, were not successful. A tentative framework agreement he had brokered in 2003 between HEABC and the Association of Unions had been rejected by the employees. The government concluded there was no likelihood of settlement and introduced Bill 37.

On Second Reading of Bill 37, the Minister of Skills, Development and Labour said that the "ideal way to end a labour dispute is a negotiated collective agreement", however efforts to that end did not succeed. He identified the objectives of Bill 31:

- "end this labour dispute";
- "restore health facilities to full operations as quickly as possible";
- impose a new collective agreement to expire March 31, 2006 based on "many of the terms negotiated and agreed between h> and the union leadership last spring";
- impose "an increase in the hours of work from 36 to 37.5 hours per week with a corresponding adjustment to hourly rates of pay, 4 percent, which is effective 90 days after passage of this legislation";
- reduce wages by 11% "across the board"; and
- allow the unions within 14 days to ask for an arbitrator to facilitate negotiations based on a 10% reduction of total compensation, instead of the 11% across the board wage reduction. (*Debates of the Legislative Assembly*, Vol. 24, No. 7, Wednesday, April 28, 2004 at pp. 10606 - 7)

Bill 37 defined the 2001-2004 collective agreement in effect immediately before March 31, 2004, "including any letter of understanding or other agreement between the parties" that was part of the collective agreement at that time" as the "former collective agreement." Bill 37 deemed what is to constitute a collective agreement between HEABC and the Association of Unions Section 3 of Bill 37 states:

**Collective agreement continued**

**3** (1) The following are deemed to constitute a collective agreement between HEABC and the association of unions:

(a) the former collective agreement, as amended by the provisions referred to in paragraphs (b) to (e);

(b) effective 90 days after the date on which this Act comes into force, employer proposal #20-A to revise Article 20.02 of the collective agreement *(Implementation of the 37.5 hour work week)* tabled by HEABC with the association of unions on February 19, 2004;

(c) the provisions set out in the Schedule;

(d) the provisions with respect to bumping of employees set out in a regulation under section 9;

(e) the provisions that are necessary to reflect the 11% wage reduction set out in section 4 (1) or the 10% reduction in compensation determined by the arbitrator under section 5 (4).

(2) A provision of the collective agreement constituted under subsection (1) that is inconsistent with the change to the collective agreement referred to in subsection (1) (b) is void to the extent of the inconsistency.

(3) Subsection (1) (d) applies despite the *Health and Social Services Delivery Improvement Act* and the regulation under the Act.

(4) Subject to the limits set out in the *Health and Social Services Delivery Improvement Act*, the collective agreement constituted under subsection (1) may be varied by agreement between the parties.

(5) Despite subsection (4), a provision of the collective agreement constituted under subsection (1) that creates an obligation for the government must not be varied unless the Minister of Finance approves the variation.

The provisions in the Schedule to Bill 37 deemed to be part of the collective agreement by section 3(1)(c) are specific amendments to Articles 16.01(c) (Job Postings and Applications) and 19.01(h) (Scheduling Provisions). The provisions with respect to bumping in regulations under section 9, which I am told have been drafted but not adopted by Cabinet, apply despite the *Health and Social Services Delivery Improvement Act* and its regulations (s. 3(3)). They will likely be specific and detailed.

Bill 37 contemplates an unspecified reduction in employer cost above 11%, or 10% if the Association of Unions chose the arbitration option. The additional reduction is to come with the increase in the work week to 37.5 hours. Sections 4(1) and 5(4), with emphasis added, state:

> 4 (1) Unless an arbitrator is appointed under section 5, **in addition to any reduction that is achieved as a result of the change to the collective agreement that is referred to in section 3(1)(b)**, hourly wage rates payable to the employees must be reduced by 11%.
>
> **********
>
> 5 (4) If an arbitrator is appointed under subsection (3), the arbitrator, within 60 days of his or her appointment, must make a written decision that, **in addition to any reduction that is achieved as a result of the change to the collective agreement that is referred to in section 3(1)(b)**, reduces compensation by 10% of the total compensation payable to the employees.

The government news releases announced this addition labour cost reduction would be 4%. In 1993 it was costed at 2% of payroll before Arbitrator Ready. Bill 37 does not direct that the additional reduction must or will be 4%, as it directs the hourly wage rate reduction will be 11% and the arbitrated compensation reduction must be 10%.

The possible components of the compensation reduction of 10% are identified in a list of collective agreement articles, which does not include Article 20 - Hours of Work. There is no specific mention of LTD benefits, but Article 39 - Long-term Disability Insurance Plan is a benefit included in the list (s. 5(1)(h).

The list includes most of the collective agreement articles addressed in the HEABC "more affordable collective agreement" proposals tabled February 19, 2004. It does not include the complaints investigator, weekly hours of work, OHSAH, pay equity, LTD and casual employee addendums and local agreements, which were included in HEABC's proposal. It does include overtime, shift, weekend and trades qualifications premiums, on-call differential, compassionate leave, educational leave, jury duty, unpaid leave, maternity and parental leave, adoption leave, superannuation and employment insurance coverage, which were not among the HEABC February 19, 2004 proposals.

There is no mention of OHSAH and its funding in Bill 37.

There is no provision addressing the savings clause, Article 3.03 of the "former collective agreement." It is not amended and forms part of the collective agreement constituted under Bill 37 that continues until March 31, 2006.

Bill 37 is repealed on September 30, 2004 or a later date set by regulation (s. 10(1)). The collective agreement constituted under Bill 37 expires March 31, 2006 (ss. 8 and 10(2)).

Bill 37 passed third reading on April 28, 2004 and received Royal Assent on April 29th, at which time it came into effect (s. 11).

There is some opportunity for the Association of Unions and HEABC to agree to vary the terms of the collective agreement within the limits of the *Health and Social Services Delivery Improvement Act* and regulations (s. 3(4)). But any variance that "creates an obligation for the government" must be approved by the Minister of Finance (s. 3(5)).

Bill 37 provides that hourly wage rages must be reduced by 11% effective March 13th, retroactive to April 1, 2004 (s. 4). However, within 14 days or by March 13th, the Association of Unions could chose, instead of the 11% wage reduction, to arbitrate a 10% reduction in compensation before an arbitrator appointed by the minister (s. 5(2) - (4)). The arbitrator must make a decision no later than 60 days after appointment (s. 5(4)). The arbitrator's decision was effective 75 days after April 29th "or a later date determined by the minister" and was retroactive to April 1, 2004 (s. 5(5)). The arbitrator could "phase in implementation of the compensation changes so long as the outcome is consistent with" the 10% reduction in total compensation (s. 5(9)). This was a scheme and timeline that gave some, but relatively little, opportunity to the Association of Unions to influence the final terms of the collective agreement.

The remarkable feature of Bill 37 is the single-minded determination to achieve a 10% or 11% cost saving for all of the 2004-2005 fiscal year beginning April 1, 2004. The 11% reduction in wages or 10% reduction in compensation was retroactive to April 1st - a month before Bill 37 came into effect, six weeks before the 11% wage reduction came into effect or over three months before a 10% compensation reduction came into effect. The foreseeable impact of a retroactive reduction in wages on the employees and the adverse impact on morale and service delivery did not sway the government.

Section 6 of Bill 37 directed a return to work and resumption of services. The HEU defied the direction and was subsequently fined $150,000. Employees defied the back-to-work direction. Other unions joined the confrontation with the government.

On April 30th the government stated it would make the reductions effective May 1st, not retroactive to April 1st.

On May 2nd the Government of British Columbia entered an agreement with the BC Federation of Labour, Association of Unions and HEABC separate from the collective agreement, which:

- confirmed May 1st, not April 1st as the effective date and that no employee would be required to repay money earned prior to May 1st;
- limited reductions in employment as a direct result of contracting out, excluding certain employees including those displaced as a result of agreements under the *Health Sector Partnership Agreements Act*;
- provided $25 million in government funding to health sector employers for severance payments to be allocated, within limitations, in a manner decide by the Association of Unions;
- committed the Association of Unions to direct their members to return to work on May 3rd;
- committed that employers would not sanction employees "as a result of the actions taken in response to Bill 37"; and
- provided for differences under this agreement to be arbitrated under the *Commercial Arbitration Act* before Arbitrator Ready.

Bill 37 has not been amended by the Legislative Assembly to change the April 1, 2004 date to May 1, 2004.

The Association of Unions decided to accept the 11% wage reduction, rather than arbitrate and participate in a 10% reduction in compensation.

## 9. Association of Unions Proposes Negotiating a Variance (May-June 2004)

On May 10, 2004 the Association of Unions proposed that it and HEABC negotiate a variance to the collective agreement as permitted under section 3(4) of Bill 37 in the interests of recognizing "the diversity of the bargaining unit." The subjects proposed by the Association of Unions were funding for OHSAH,

continuation of the supplementary monthly LTD benefit and wage adjustments to retain and recruit professional, technical and trades and maintenance employees.

HEABC informed the Association of Unions on May 14, 2004 that, in its opinion, the local agreements expired April 29th, but the employers do not have to re-introduce the 36 hour work week because Bill 37 enacted the employer's proposal on Article 20.02, which includes the following:

> Where an Employer has an existing Local Agreement providing for a thirty-seven and one-half (37.5) hour work week as of March 31, 2004, such an arrangement will continue and Article 21 shall not apply for the difference between a thirty-six (36) hour work week and a thirty-seven and one-half (37.5) hour work week.

The Association of Unions requested that HEABC meet to discuss the issues it raised in accordance with the savings clause (Article 3.03) of the collective agreement. The Association of Unions was prepared to agree, where there had been local agreements, that the employers did not have to re-introduce the 36 hour work week, but overtime was payable in the interim under Article 21 for time beyond 36 hours.

The Association of Unions and HEABC met on June 2nd. There were no agreements on these issues and this arbitration followed. There was an agreement on the implementation date for pay equity adjustments.

## 10. Disputed Issues

The Association of Unions characterizes the issues in dispute as narrow and focused on addressing real workplace issues.

### *A. OHSAH Funding and "Savings Clause" - Article 3.03*

#### (i) Submissions

The Association of Unions submits that Bill 37 did not alter the savings clause in Article 3.03 and it provides a mechanism to "ameliorate the negative effects that a blunt legislative hammer can wreak - and absent Article 3.03 will wreak - on a complex industry wide collective agreement to the detriment of the parties and the health care system as a whole."

The Association of Unions submits Article 3.03 continues in the collective agreement and Bill 37 is "present or future legislation" that "renders null and void or materially alters" provisions of the collective agreement. Therefore, there is an employer obligation to negotiate "mutually agreeable provisions to be substituted for the provisions so rendered null and void or materially altered." Failing agreement, the differences can be submitted to arbitration.

The Association of Unions submits that the absence of a provision in Bill 37 overriding Article 3.03 is in contrast to the provisions of the *Health and Social Services Delivery Improvement Act* and *Health Sector Partnerships Agreement Act*. Therefore, it was not intended that Bill 37 override the savings clause and the negotiation and arbitration process mandated in Article 3.03. In contrast to those statutes, Bill 37 expressly contemplates negotiation and agreements to vary the collective agreement, within limits and subject to approval by the Minister of Finance for any variance that creates an obligation for the government. This is the control the government retains.

The Association of Unions submits OHSAH has been a "resounding success." Bill 37 continues the Addendum on OHSAH, but has not provided funding, as there was for the past two fiscal years in the 2001 -2004 collective agreement. Continuing the addendum, without providing for funding materially alters the addendum. Therefore, the employer has an obligation to negotiate pursuant to Article 3.03.

HEABC submits Article 3.03 does not apply. It was not in effect when Bill 37 came into effect and there is no "present or future legislation" as contemplated by Article 3.03. HEABC submits:

> Article 3.03 is intended to apply only when legislation, which materially alters the collective agreement, is passed during the term of the collective agreement not at the time of renewal of the agreement. Therefore, the parties are not obligated to meet and follow the process of negotiation outlined in Article 3.03 in relation to the issues raised by the union including funding for OHSAH, retention and recruitment wage adjustments, and the continuation of the long term disability (“LTD”) monthly supplemental benefit.

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> The purpose behind provisions such as Article 3.03 is two fold. First to provide that during the term of a collective agreement, the agreement will continue to be valid even if a portion of it becomes void due to legislative changes. Second, to allow the parties the ability to modify the collective agreement in response to the effect of the legislation and in a manner not inconsistent with the legislation.
>
> This is not a situation where a portion of the collective agreement is unexpectedly modified at a point during the term of the collective agreement, but a situation where following the expiration of the term of the collective agreement a new collective agreement between the parties came into existence through the enactment of Bill 37. While Article 3.03 may have relevance in the future if some other legislative enactment is proclaimed affecting an existing term of the collective agreement, that is not the situation here.

HEABC relies on the interpretive approach and conclusion of Arbitrator Munroe in his 2002 award. In response, the Association of Unions submits the BCTF sought to amend what the legislation expressly said could not be amended, while it seeks to negotiate in a situation where Bill 37 expressly permits a variation of the collective agreement within limitations.

Alternatively, HEABC submits the OHSAH addendum continues. HEABC does not dispute the value of OHSAH, which has received funding to continue while collective bargaining continues with other health care unions.

**(ii) Analysis and Decision**

The operation of the 2001-2004 collective agreement was ended when the strike began. Bill 37 affirms this by referring to it as the "former collective agreement." That agreement "including any letter of understanding or other agreement between the parties that was part of the collective agreement" at March 31, 2004 includes the OHSAH and other addenda.

Section 3(1) of Bill 37 deems what is to constitute the future collective agreement that continues until March 31, 2006 with certain provisions having retroactive effect to April 1, 2004. Bill 37 is explicit that it constitutes a collective agreement from the constituent components in paragraphs (a) to (e) in section 3(1). It refers to the collective agreement as being "constituted" under section 3(1) in subsections 3(2), (4) and (5) or "this Act" (ss. 7, 8, 9(1) and 10(2)).

Despite the heading "Collective agreement continued" to section 3, Bill 37 does not continue the former collective agreement or resurrect it with an extended term as if there was no interruption or termination of that collective agreement. The former collective agreement, as amended, is deemed to be part of the newly constituted collective agreement.

HEABC is correct that Bill 37 is not legislation during the term of the collective agreement. Bill 37 deems what is to be the collective agreement. Both Article 3.03 and the several provisions of Bill 37 came into existence and concurrently acquired legal status at the same moment.

While this analysis resolved the issue for Arbitrator Munroe under a savings clause that addressed "any new or amended statute" arising "during the term of the Collective Agreement", it does not respond fully to the language of Article 3.03, which speaks of the impact of "present" or future legislation.

This is an industry-wide collective agreement in a complex, diverse and highly regulated sector. Parties might renew or conclude a collective agreement unaware of the impact of some presently existing legislation. It is reasonable to have a provision in the collective agreement that says what will happen if they overlook present legislation and its impact materially alters a provision of the agreement.

The nub issue is whether Bill 37 is "present legislation" to which Article 3.03 applies. I have concluded it is not. Bill 37, in all of its provisions, constitutes the collective agreement for a term expiring March 31, 2006. The changes to the "former collective agreement" dictated by Bill 37 are changes that have effect as of April 29th or retroactively or, like the bumping regulations, at some future date. Bill 37 is not distinct legislation separate and apart from the collective agreement.

Bill 37 constitutes the provisions of the collective agreement and does not render null and void or alter any provision of the collective agreement. In a colloquial sense, it might be said the provisions of Bill 37 do render null and void or alter the terms of the 2001-2004 collective agreement. However, Bill 37 does do not render null and void or alter the provisions of "this Collective Agreement", that

is the 2004-2006 collective agreement. There are no "remaining provisions of the Collective Agreement", as contemplated by Article 3.03(a). There are only the provisions constituted under Bill 37.

Therefore, there is no obligation under Article 3.03 to negotiate concerning the OHSAH Addendum and funding for the Agency for the fiscal years 2004-2005 and 2005-2006.

### *B. Supplemental Monthly LTD Benefit and LTD Benefit Re-opener*

#### (i) Submissions

The Association of Unions submits HEABC is required to continue the uncompleted LTD Benefit Re-opener discussions commenced in 2003 and the supplemental monthly LTD benefit is subject to negotiation and arbitration under Article 3.03.

HEABC submits the 2003 re-opener discussions expired with the former collective agreement and it is premature to decide whether or when re-opening discussions recur under the current collective agreement. It submits the obligation to pay the supplemental monthly LTD benefit expired July 6, 2004 and Article 3.03 does not apply.

#### (ii) Analysis and Decision

Article 3.03 does not compel negotiations about the supplemental monthly LTD benefit for the reasons stated above.

The current collective agreement provides for LTD benefits and the LTD Benefit Re-opener provision is part of the current collective agreement.

A memorandum of agreement that was part of the former collective agreement provided for payment of the supplemental monthly LTD benefit until July 6, 2004. That agreement to continue this benefit to July 6, 2004 is part of the current collective agreement constituted by Bill 37. However, there is no obligation for the employers to continue the benefit after July 6, 2004. This is an issue that is a casualty of the collective bargaining dispute resolution process that came with

Bill 37 and the subsequent May 2, 2004 accord. As sometimes happens in the final crunch in consensual settlements, choices are made and some issues are abandoned and other go by the wayside.

In the absence of express agreement, mid-agreement re-opener negotiations do not continue after the expiration of the agreement and the establishment of a new collective agreement. This is because they are no longer "re-opener" negotiations, but collapse into, and form part of, the collective bargaining. There is no agreement or provision in Bill 37 that sustains those negotiations into the term of the current collective agreement.

Under subsections 3(4) and (5) of Bill 37 the Association of Unions and HEABC can agree to negotiate to vary the collective agreement. Perhaps, "experience savings" or other reasons will enable agreements that do not create an obligation for the government and necessitate approval by the Minister of Finance. Perhaps, after Bill 37 is repealed on September 30, 2004 or a later date set by regulation, there can be agreement to a variation with no requirement for approval by the Minister of Finance.

In the meantime, there is no obligation to continue with the LTD Benefit Re-opener negotiations commenced in 2003 and no obligation to engage in re-opener negotiations arises under the current collective agreement for eighteen months. Whether that is September 29th or October 29, 2005 in a 24 or 23 month collective agreement is not a question that requires an answer at this time. Similarly, what limitations, if any, there are on future LTD Benefit Re-opener negotiations and arbitration is not n question that requires an answer in this arbitration.

### *C. Technical, Professional and Trades Wage Rates*

#### (i) Submissions

The Association of Unions submits that in the interests of retaining and recruiting certain bargaining unit technical and professional employees, many of whom are being directed to expand their scope of practice, and trades and maintenance employees, it is necessary to ameliorate the impact of the 11% wage

reduction on these employees. It submits that the process under Article 3.03 is applicable and available to address and resolve the problem.

HEABC shares concerns about retention and recruitment of bargaining unit employees, but not necessarily the occupations identified by the Association of Unions. It submits Article 3.03 does not apply. Article 22.04 provides a trades qualification premium of $500 per year and is part of the current collective agreement.

HEABC submits Bill 37 gave the Association of Unions a mechanism to address this issue had it chosen to arbitrate a 10% compensation reduction rather than accept a 11% wage reduction for all rates. The Association of Unions declined to tailor the blunt instrument of legislative intervention to solve the problem it seeks to address.

**(ii) Analysis and Decision**

Article 3.03 does not compel negotiations about the wage rates of these or any bargaining unit employees for the reasons stated above.

***D. Ratification and Effective Date of Employer Proposal #20-A***

**(i) Submissions**

The Association of Unions submits that the language of section 3(1)(b) of Bill 37 is clear and unambiguous. Employer Proposal #20-A with its language for implementation of the 37.5 hour work week is deemed to be part of the collective agreement "effective 90 days after the date on which the Act comes into force" , which is Thursday, July 29, 2004.

The Association of Unions submits that, until that date, the language of Article 20.02 of the current collective agreement is the language in Article 20.02 of the former collective agreement. On July 29th the language of Articles 20.02(a) to (d) changes to the language tabled by the employer on February 19, 2004.

The language of the employer's proposal to be added to Article 20.02(a) begins: "Effective the start of the first pay period not later than ninety (90) calendar

days after ratification …." Therefore, the Association of Unions submits introduction of the 37.5 hour work week is subject to a ratification vote among the bargaining unit employees, which it will hold without delay.

On May 26, 2004 the Association of Unions wrote to HEABC that the language "contemplates some ratification process" and asked "Please advise us of your ratification process and timetable so that we can finalize our ratification." If the bargaining unit employees approve this change to the work week, then it becomes effective at a time "not later than ninety (90) calendar days" later. On May 25th, the Association of Unions identified this date as no "earlier than the start of the first pay period immediately proceeding [sic] October 25, 2004."

The Association of Unions submits the reference to "the first pay period" is a recognition that various facilities operate on different pay periods and contemplates that all facilities will not go to the 37.5 hour work week on the same date.

The Association of Unions acknowledges that on second reading of Bill 37 the Minister of Skills, Development and Labour spoke of the 37.5 hour work week becoming effective 90 days after passage of Bill 37. He also said Bill 37 "continues the previous collective agreement" when it does not. His generalized statement is consistent with the overview given on introducing a bill on second reading and is not to be relied upon to amend the language of the legislation.

HEABC submits it is irrational and inconsistent with principles of statutory interpretation to say an imposed collective agreement is subject to ratification when Bill 37 does not provide for ratification. Therefore, the only logical interpretation is that the 37.5 hour work week is to become effective 90 days after Bill 37 came into force, which is July 29, 2004. The Minister of Skills Development and Labour stated on second reading of Bill 37 that one goal was to increase the work week "effective 90 days after passage of this legislation" and that is the intention of Bill 37.

HEABC submits the words of Bill 37 are "to be read in their entire context and in their grammatical and original sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament" (Elmer Driedger,

*Construction of Statutes* (2nd ed. 1983) at p. 87 quoted with approval by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd.* [1998] 1 SCR 27; [1998] SCJ No. 2 (QL) at ¶ 21). HEABC submits:

> In applying these principals of the interpretation of section 3(1)(b) of Bill 37 it becomes apparent that the Union's interpretation is unsustainable. Bill 37 has an overall remedial theme. The purpose of Bill 37 was to return stability to the provincial healthcare system through a deemed collective agreement. A ratification process by which employees would vote on the acceptance of the 37.5 hour work week would be contrary to that purpose.
>
> The only interpretation which harmonizes the objectives and intentions of Bill 37 is that the 37.5 hour work week is effective July 29, 2004, 90 days after Bill 37 came into force. Bill 37 does not provide for a ratification process of the deemed collective agreement. This interpretation is consistent with the intention of the Legislature reflected in Debates of the Legislative Assembly during the second reading of Bill 37.
>
> The Labour Relations Board has accepted that Hansard may be considered to find the mischief or condition to which the legislature sought to address in passing the legislation. (*HEABC*, BCLRB No. B382/2001 … para. 9).
>
> In *Rizzo & Rizzo Shoes*, *supra*, …para 35, the Supreme Court of Canada supported what is an arguably more expanded view of the use of Hansard:
>
> > Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 484, Sopinka J. stated:
> >
> > > …until recently the courts have balked at admitting evidence of legislative debates and speeches…The main criticism of such evidence has been that it cannot represent that 'intent' of the legislature, an incorporeal body, but that it is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.
>
> In this particular case, the Debates of the Legislative Assembly clearly indicate the intention of the Legislature that the 37.5 hour work week would come into effect 90 days after Bill 37 came into force.
>
> This intention is demonstrated in the following statement of Minister Graham Bruce during the second reading of Bill 37 on April 28, 2004, Afternoon sitting, …:
>
> > **Hon. G. Bruce**:…This legislation ends the dispute at the time of the royal assent to this bill and requires that the employees return to work as soon as they are scheduled to do so. It also imposes a contract on the parties that continues the previous collective agreement with modifications that are based on many of the terms negotiated and agreed between HEABC and the union leadership last spring.

> This new collective agreement imposes an increase in the hours of work from 36 hours to 37.5 hours per week with a corresponding adjustment to hourly rates of pay, 4 percent, which is effective 90 days after the passage of this legislation…
>
> The above statements confirm that the legislative intent was that the 37.5 hour work week would commence 90 days after Bill 37 was given Royal Assent.
>
> Therefore, it is clear that in reading Bill 37 as a whole, which does not contemplate a ratification process, and in light of the intention of the legislature, that the 37.5 hour work week is to commence 90 days after Bill 37 came into force. Therefore, the 37.5 hour work week will be effective July 29, 2004, which is 90 days after the day Bill 37 came into force.

HEABC has advised its member employers that July 29th is the "drop dead date" for implementing the 37.5 hour work week. In accordance with Article 20.02(b), employers have been advised to supply the 36 hour work week schedules they have been preparing to the Association of Unions "fifteen (15) calendar days prior to implementation", which was yesterday, July 14, 2004.

**(ii) Analysis and Decision**

There is an absurdity in the Association of Unions' submission that emergency back-to-work legislation directing a significant provision intended to achieve additional cost reductions intended that provision to be effective only if both parties agree - do this if you want to! This proposition is more absurd in the context of the employee rejection of the tentative framework agreement in 2003. Bill 37 must be read in manner that avoids this interpretation.

Ratification is a term that signifies acceptance. It is common practice for collective bargaining proposals to make reference to ratification as either a prerequisite or as a reference to the time at which a new collective agreement is reached. In this case, the phrase "after ratification" in Article 20.02(a) of Employer Proposal #20-A is a reference to the time at which the language of Article 20.02 comes into effect.

I find that it was not the intention or meaning of section 3(1)(b) that the inclusion of Employer Proposal #20-A into the new collective agreement is to be subject to ratification by either the employees or the employers.

This does not answer the more problematic question when the 36 hour work week is to become effective.

Bill 37 constituted a new collective agreement as of April 29, 2004. Some of the constituent components of the new collective agreement were effective immediately. Examples are the "former collective agreement" and scheduled provisions (s. 3(1)(a) and (c)). Some of the constituent components were effective retroactively. This was the original intention of the 11% wage rate or 10% compensation reduction. The bumping provisions to be set out in regulations that might override the *Health and Social Services Delivery Improvement Act* and regulations were to become effective at an undetermined future date (s. 3(1)(d)).

Employer Proposal #20-A was given unique treatment. It was to be "effective 90 days after the date on which the Act comes into force" (s. 3(1)(b)). It is not unusual in collective bargaining that the implementation of new provisions is delayed to a date during the term of the collective agreement. There can be many reasons for a delay. One is that planning, consultation, education and operational or contractual changes have to happen to facilitate or enable the future change.

In 1993 and 1994 there were numerous consequential changes that were made to change from a 37.5 hour to a 36 hour work week. There are likely to be several in 2004 to change in the other direction. Bill 37 anticipates the need for consequential changes to facilitate inclusion of Employer Proposal #20-A in the collective agreement and bluntly provides that: "A provision of the collective agreement constituted under subsection (1) that is inconsistent with the change to the collective agreement referred to in subsection (1) (b) is void to the extent of the inconsistency" (s. 3(2)). (I observe that there is likely to be a difference over whether the issues that arise under this section have been circumscribed by paragraphs (b), (c) and (d) of Article 20.02 in Employer Proposal #20-A and the extent to which these paragraphs anticipate the arbitrated differences in 1993.)

It is significant that Bill 37 speaks of Employer Proposal #20-A being a "<u>change</u> to the collective agreement" in section 3(2) and again in sections 4(1) and 5(4).

I have determined that the collective agreement and the provisions of the "former collective agreement", including Article 3.03 were constituted and came into effect at the same moment on April 29, 2004. That includes Article 20.02 - Hours of Work with its unaltered language as in the 2001-2004 collective agreement. Uniquely, among the constituent components deemed to constitute the new collective agreement, Employer Proposal #20-A does not come into effect until a specified later date, namely 90 days after Bill 37 comes into effect.

I have carefully reviewed the statement of the Minister on second reading as directed by the Supreme Court of Canada, "mindful of the limited reliability and weight of Hansard evidence" and scrutinized the entire scheme and language of Bill 37 in its entire context mindful of its objectives. It is my conclusion that the language of Employer Proposal #20-A does not become effective and, consequently, does not make a change to the new collective agreement until July 29, 2004, which is "90 days after the date on which this Act comes into force." After that date, there is a process for implementing the 37.5 hour work week, including notice to the union and a right to grieve that is "limited to alleged violations of Article 19 and 20."

I am supported in my conclusion by the fact that Bill 37 does not direct precise language amending Article 20.02, as it does with Article 6.01(c) and 19.01(h). Rather, Bill 37 plucks one of the employer proposals made months earlier, in another context, and adds it as a change to the newly constituted collective agreement to be effective at a later date. If the intention had been to have Employer Proposal #20-A become part of and operate on the date Bill 37 came into effect, it could have been listed in section 3(1) with the other constituent components of the new collective agreement without any reference to a later date at which it became effective. There would be no need or rationale for referring to this specific component as a "change" to the new collective agreement.

In addition, Bill 37 does not address the specific language of Employer Proposal #20-A. I have determined "after ratification" to be the date the new language of Article 20.02 comes into effect. It is from that date, July 29, 2004, that the 90 calendar days starts.

Is this timeline inconsistent with the cost reduction objective of Bill 37? The government claimed cost reduction percentages based on an 11% wage rate reduction retroactive to April 1, 2004 and then recanted from that date, presumably settling for less than 11%. Bill 37 gave the Association of Unions an option to arbitrate for a 10% compensation reduction, which was not decreased despite the commitment that no employee would be required to repay any monies earned prior to May 1, 2004.

The cost reduction to be achieved by legislating Proposal #20-A is not specified in Bill 37. It is characterized as "any reduction that is achieved as a result of the change to the collective agreement that is referred to in section 3(1)(b)" (ss. 4(1) and 5(4)). The government publicly stated it was 4%. In light of costing percentages commonly accepted in the mid-1990s, and in the absence of any current costing information, it is unclear that this change 90 or 180 days after April 29th will yield 4%. The purpose of this observation is to underscore that there is no specific percentage cost reduction that compels either implementation date submitted by the Association of Unions or HEABC or aids in interpreting Bill 37.

The timeline - 90 calendar days in Bill 37 and 90 calendar days in Employer Proposal #20-A - is not inconsistent with any of the other objectives of Bill 37.

In conclusion, I find that the interpretation of Bill 37 that best accords with the words in their entire context and in their grammatical and original sense and that is harmonious with the objective and scheme of Bill 37 to end a labour dispute, compel a resumption of health care services and impose the terms of a new collective agreement is that the language of Proposal#20-A becomes a part of, and changes, the language of the collective agreement effective July 29, 2004, which is the date that triggers the 90 calendar days in the proposal.

### *E. Consequential Amendments and Affect on Employee Status*

#### (i) Submissions

The Association of Unions submits that Proposal #20-A contemplates consequential amendments because the hours of work are embedded throughout

the collective agreement. It submits these are material alterations to be negotiated under Article 3.03.

The Association of Unions submits that a full-time employee on a 36 hour work week should remain a full-time employee on a 37.5 hour work week and a part-time employee should retain the existing proportion of full-time hours, for example a part-time 0.5 FTE working 18 hours remains a part-time 0.5 FTE and works 18.75 hours. This is consistent with Article 20.05, which states: "The Employer shall eliminate, as far as possible, all part-time employees." It is consistent with strictly construing legislation that curtails rights (Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed., 2002), p. 399; *Attorney-General of Canada v. Lavery* (1991), 76 DLR (4th) 97 (BCCA)).

HEABC submits Article 3.03 does not apply. The employer submits there is no direction in Bill 37 to employers to change hours of service or to maintain existing full or part-time employee status. The employers will implement the 37.5 hour work week, but in some work units the service hours will not change and there will not be an increase in hours of work for some employees. The scheduling of service is distinct from the work week, which under Proposal #20-A will be an average of 37.5 hours per week. The collective agreement does not require full-time employees to be scheduled full-time.

**(ii) Analysis and Decision**

Article 3.03 does not compel negotiations about the consequential amendments following the change brought about by Proposal #20-A for the reasons stated above. Section 3(2) of Bill 37 specifically addresses consequential amendments. The affect the change and this section have on specific provisions of the collective agreement is a subject that can be grieved and arbitrated under the collective agreement.

One of these issues is the affect the change will have on employee status and the nature and extent of the employers' obligation under Article 20.05. These are issues that the Association of Unions can raise in specific situations or more generally after it has been given notice of new work schedules fifteen days prior to

their implementation.

### *F. Local Agreements, 37.5 Hour Work Week and Overtime*

#### (i) Submissions

The Association of Unions submits that the local agreements ceased to exist on April 29, 2004 and Employer Proposal #20-A does not come into effect until July 29, 2004. At that time, the new language in the second paragraph in Article 20.05 (a) of Proposal #20-A will come into effect. It states:

> Where an Employer has an existing Local Agreement providing for a thirty-seven and one-half (37.5) hour work week as of March 31, 2004, such an arrangement will continue and Article 21 shall not apply for the difference between a thirty-six (36) hour work week and a thirty-seven and one-half (37.5) hour work week.

Until that time, employees working the 37.5 hour work week are to be paid at overtime rates in accordance with Article 21.

The Association of Unions does not seek to have any other employees compensated on any basis because they were not assigned or have not had an opportunity to work overtime. It seeks compensation at overtime rates only for employees who worked overtime.

HEABC submits Proposal #20-A came into effect on April 29, 2004 and any 37.5 hour work week under previous local agreements, which it agrees expired April 29, 2004, continue without attracting any overtime payment under Article 21.

#### (ii) Analysis and Decision

Section 3(1)(c) of Bill 37 deemed the scheduled provisions revising Articles 16.01(c) (Job Postings and Applications) and 19.01(h) (Scheduling Provisions) as constituent components of the new collective agreement. The language of these scheduled provisions is included in some, but not all, of the local agreements that preceded Bill 37. These articles were not among the employer proposals tabled on February 19, 2004.

Clearly the drafters of Bill 37 and the Legislative Assembly were aware of

the local agreements. By not including these agreements as another constituent part of the new collective agreement in Bill 37 the local agreements lapsed and the reductions in annual vacation entitlement and other concessions to reduce costs lapsed.

By not including the local agreements as part of the new collective agreement, but selecting to make the locally agreed revisions to Articles 16.01(c) and 19.01(h) applicable to the entire bargaining unit and all employers and facilities, the Legislative Assembly chose a trade-off. Part of the trade-off was that some employer no longer had the benefit of cost reducing measures they had achieved in their local agreements and the employees no longer had the employer's commitments on contracting-out.

The local agreements were overtaken by Bill 37 and the subsequent May 2nd accord. There were winners, losers and casualties under emergency, back-to-work legislation, the imposed collective agreement and subsequent accord. In these circumstances there are likely to be consequences of hastily passed legislation that were not fully explored or realized in the debate. This does not mean they were necessarily unintended. As HEABC observed:

> Therefore, the HEABC members who are parties to the Local Agreements must, effective April 29, 2004, take steps to apply the provisions of the deemed Facilities Subsection Collective agreement, which were suspended or varied by the Local Agreements (including Injury-On-Duty leave with pay, Super Stats, Annual Vacation).

On April 29, 2004 no local agreement exemption from paying overtime rates under a 37.5 hour work week was in place. One consequences of delaying the effective date of Employer Proposal #20-A to July 29, 2004 is that the exemption from paying overtime rates that previously existed under local agreements will not come into effect until July 29, 2004.

This is an incongruous result. Although it was not argued, I closely examined whether the existence of this second paragraph in Article 20.02(a) of Employer Proposal #20-A was helpful in determining the date at which the proposal came into effect. I concluded it was not.

Consequently, the unchanged language of Articles 20.02 and 21 came into effect on April 29, 2004 and employees working a 37.5 hour work week after that date are entitled to receive overtime payment in accordance with Article 21, as they are entitled to receive Super Stat holiday premium pay, injury-on-duty leave with pay, unreduced annual vacation, etc.

On all of the issues in this arbitration, I retain and reserve jurisdiction to clarify my decisions and to deal with any matter related to the implementation of these decisions.

JULY 15, 2004, NORTH VANCOUVER, BRITISH COLUMBIA.

*James E. Dorsey*

James E. Dorsey