IN THE MATTER OF A GRIEVANCE ARBITRATION

BETWEEN:

Unifor Local 4050
(the "Union")

-and-

Pincher Creek Co-operative
(the "Employer" or "Pincher Creek Co-op")

AWARD ISSUED: JANUARY 26, 2021

Arbitrator: A. Robson Garden, Q.C.

PRELIMINARY MATTERS AND OVERVIEW

1. This Arbitrator was appointed by the parties to hear and determine a grievance relating to a negotiated wage increase. At the time of negotiations, the Union, apparently, believed it had negotiated a wage increase on behalf of all the employees in the bargaining unit. On the other hand, the Employer believed that it had agreed to a wage increase for all employees except for those employees who had already received the wage bump as described below (the "Minimum Wage Employees"). Each party believed that the other was *ad idem*. As events unfolded, however, it became clear that both parties were mistaken. When the wage table for the collective agreement which had just been ratified (the "New Collective Agreement") was in preparation it became obvious that the parties not reached agreement on wage adjustments.

2. Clearly, this is an interpretation grievance. My task is to determine the meaning of the memorandum of agreement that the parties signed (the "MOA").

3. At the commencement of the hearing, Counsel agreed that I was properly appointed and had the jurisdiction to hear and determine the issues and matters that would come before me.

4. Pincher Creek Co-operative (the "Employer") as its name suggests, is a co-operative. It operates a business, based in Pincher Creek, Alberta, selling groceries, hardware, building supplies, agricultural supplies and related items as well as gasoline, diesel fuel and petroleum products. It does this from several locations in and around Pincher Creek. At the time of the grievance the Employer employed approximately 100 employees.

5. Unifor Local 4050 (the "Union") is the bargaining agent for approximately 80 of the employees of the Employer. The parties had what can best be described as a "mature collective bargaining relationship". This round of negotiations was far from their first round of collective bargaining.

6. In the spring of 2018, the Employer and the Union were negotiating to renew their Collective Agreement (the "New Collective Agreement"). During the period of their negotiations, the Government of Alberta announced that there would be an increase to the minimum wage, effective October 1, 2018. This was impactful to the parties collective bargaining because, at the time, approximately 40 employees, or one half of the bargaining unit, were receiving wages under the then current collective agreement ("Old Collective Agreement") that were less than the newly proposed minimum wage of $15.00 per hour. That increase in the minimum wage was scheduled to occur and did occur on October 1, 2018. In this award I have called those 40 employees the "Minimum Wage Employees".

7. In the meantime, however, on July 22, the Employer announced that it was unilaterally increasing the wage payable to the Minimum Wage Employees to $15.00 per hour. The Employer sent a memo to all employees which read as follows:

> This email is to advise Unifor that due to competitor market changes in wages, effective July 22, 2018 we will be moving all employees who are currently making less than $15.00/hour to $15.00/hour. We are taking this step prior to the October 1 legislation to ensure we retain our existing employees and to allow us to attract new employees as required. These employees will not receive additional increases until they have worked enough hours to exceed $15.00 on the existing wage scales.

8. Commencing in the spring of 2018 the parties began negotiating an updated collective agreement. The negotiations initially resulted in a tentative collective agreement which was rejected by the members of the bargaining unit.

9. In August 2018, the parties renewed collective bargaining and believed that they had settled what was to be the "New Collective Agreement" on August 18. On August 21, the parties signed a Memorandum of Agreement (the MOA) setting out the terms and conditions of the agreement. On September 12, the Union advised the Employer that the MOA had been ratified. In short, an agreement had been reached and was ratified. It was after that point that what the parties believe to be an agreement began to fall apart.

10. In my experience the parties usually rush to convert a memorandum of agreement into a new collective agreement, however that was not the case on this occasion. Over the next number of months, the parties exchanged versions of a new wage grid which was based upon, or so they believed, the MOA. The fundamental difference between the parties was that the Union believed that the negotiated general wage increase was applicable to all bargaining unit employees including the Minimum Wage Employees. On the other hand, the Employer believed that the negotiated wage increase was only applicable to those members of the bargaining unit who were paid more than the minimum wage and who, therefore, had <u>not received</u> a bump in wages via the Employer's unilateral increase to the Minimum Wage Employees.

11. On April 26, 2019 the Union filed a grievance in the form of a letter from Jay Thompson, Service Representative for Unifor Local 4050, to Kori Fast, General Manager of the Employer. The letter reads as follows:

> This is a step 2 group grievance for all affected members. Please accept this as step 2 of the grievance procedure as the Company has violated articles 4, 4.1, 7, 7.1, Appendix "A", the Memorandum of Agreement (the "MOA") and any and all pertaining articles and any appendix of the CBA that might apply. The Union contends that the company is failing to pay the percentage increase for year two (2) to some rates and steps as listed in the MOA. The Company has also indicated that they will do the same for year three (3) contrary to the CBA and as listed in the MOA.
>
> **The following is listed in the MOA**

13. Appendix A

General Wage Increases

Year 1: **Increase all scales and steps by 1.75%** excluding the Head Agro Clerk Classification retroactive to the expiry of the previous agreement. Employee in the new Head Agro Clerk classification would receive retroactive pay based on this percentage, based on their rate paid as head Petro/Agro Clerk prior to ratification.

Year 2: **Increases all scales and steps by 1.75%** excluding the head Agro Clerk classification and Agro Clerk classification.

Year 3: **Increases all scales and steps by 1.75%.**

The Union requires for resolution of this grievance the following:

- The Co-op pay the percentage increases as listed in the MOA/CBA for scales and steps as listed above for year (2) two and (3) three.
- Compensate all current and future members that should had wage increases at the start of year (2) two and year (3) three.
- Any other remedies the arbitrator deems appropriate.
- That he be made whole with full redress.

12. When the hearing convened, each of the parties led *viva voce* evidence. The chair of each negotiating committee gave evidence. Additional evidence was also given including, in one case, evidence given via Zoom.

13. While I was hearing the evidence, I concluded that there were three possible outcomes to this disagreement. The first possible outcome was that what the Union believed was the correct interpretation of the facts. In that case all employees including the Minimum Wage Employees would receive an increase in wages as a result of collective bargaining.

14. The second possible outcome was that what the Employer believed was the correct interpretation of the facts. In that case the Minimum Wage Employees would not get the wage increase that those who did not get the minimum wage increase received as a result of collective bargaining.

15. The third possible outcome was that both parties were mistaken and there never was a real "meeting of the minds" of the Employer and the Union. Of course, such meeting of the minds is required by the law of contract to forge an agreement. In that event, no New Collective Agreement was reached. At the hearing I informed the parties that possibility might exist.

16. Counsel for the parties filed written arguments which are reproduced below. These written arguments flesh out the position of each of the parties.

17. It is noteworthy that the wage schedule was not attached to the MOA when it was completed. If it had been attached, the disagreement between the parties would have, I believe, immediately become apparent. Again, I must emphasis the lengthy delay between the time the parties signed the MOA and the time they attempted to conclude the text of the New Collective Agreement. Memories can easily fade over such a long period of time.

18. The Union called as its main witness Rod Wood ("Rod") who was a National Representative for the Union and the chief spokesman during collective bargaining. He stated that the Union wanted an across-the-board wage increase. He said that the Union's position relative to the increase in the minimum wage was that was the base from which the wages for Minimum Wage Employees would "go forward". In other words, Minimum Wage Employees would also receive the negotiated increase in wages.

19. Rod stated that there was no discussion of how the minimum wage increase would affect the wages that were to be negotiated. He went on to explain that the tentative deal which was negotiated on June 14 was not ratified.

20. After the tentative agreement, which was rejected, the witness stated that he and the Employer representative talked about how to make a deal. He said he told Rod that there was no more money but that they agreed that the Employer would move some money, which it had already offered, from year two of the agreement to year one of the agreement. He said that the Union committee was split on supporting the deal, however, the committee decided to take the matter back to the membership and it was accepted. He stated that there was no discussion of the impact of the minimum wage. He said that there was no representation from the Employer that the wage increase would be implemented in a certain way which would give the Minimum Wage Employees the benefit of the general wage increase.

21. He said that the expectation was that the wage rate would rise to $15.00 for the Minimum Wage Employees and then the negotiated increase in wages for all employees would be applied. He said that the Union prepared a wage grid but the Employer did not pay in accordance with the wage grid which the Union prepared. He stated that the Union thought that employees who received the increase in minimum wage would also be paid the negotiated wage increase applicable to employees who received more than the minimum wage.

22. In cross-examination, he testified that this was the first time he had to deal with minimum wage issues in connection with the negotiation of a new or revised collective agreement. He said that wage proposals were not provided in writing but rather provided verbally. He agreed that the MOA was prepared by the Employer. He was questioned about wage increase proposals and stated that neither party explained how the increases would be calculated. No wage grid was prepared prior to the second MOA.

23. In an exchange of email with the Employer's spokesman Tom Zabel (Tom) on April 7, 2019 the Rod stated as follows:

> Although it is correct that the mechanics of the $15.00 increase was never discussed at the table, the actual increase was agreed by both parties during negotiations.… The email from Jim Peace (the Employer's Manager) in August informing the Union that all wage earners below $15.00 would be moved to $15.00 prior to the October legislation was interpreted to mean that this change would ultimately be reflected in the new collective agreement. We came to this conclusion because we were in the process of negotiating a new agreement and it was conveyed to us as not just courtesy but part of the Employer's ongoing strategy to get the CBA ratified. How this change would be reflected in the new collective agreement, seems rather self-explanatory, the rate to be paid at ratification would be represented in the new agreement and subsequent increases identified, going forward."

24. In that email exchange, Tom, on behalf of the Employer, replied as follows:

> I looked through my bargaining notes and discussed with my committee, and I can't find any discussions on overriding the wage scheduling to include the $15.00 an hour. There were examples in the MOA that was ratified that included scheduling with dollar amounts lower than $15.00."

25. Rod stated: "That was news to him." The proposition was put to him that on June 14 at 11:00 AM he said that minimum wage employees would go three years without a wage increase. Rod said that he did not recall saying that and has no note to that effect.

26. Rod was questioned about the discussions that took place between the rejection of the first MOA and the signing of the second MOA. Rod said that he believed that there was a discussion and the Employer stated that it had the ability to move the percentage wage increase set out in the first MOA forward. He said that although the Employer could move money around there was no more money to be offered. Rod was questioned as to whether he said: "This is like putting lipstick on a pig". He agreed that he said that. He also said that the Union recognized that the increase in the minimum wage would impact the Employer and that the Employer was concerned about labour costs.

27. Rod stated that he was unsure how the revised collective agreement was completed. He said that it was October 25 when he saw the wage grid and saw that the 1.75% wage increase was being applied to the wage scale in the old collective agreement that he understood there was a problem. The Union did not agree to exclude the Minimum Wage Employees, from the negotiated increase he said.

28. Rod was shown an example at the time of a previous minimum wage increase where the Employer had increased the rate of pay negotiated between the parties based upon the old

rate in the collective agreement rather than the then current minimum wage rate. Rod stated that he was unaware of that. He said that no one had brought that fact to the attention of the Union.

29. The Employer's primary witness was its spokesman at collective bargaining, Tom. Tom explained that he was employed by Federated Co-op to provide member cooperatives with support in collective bargaining and related union matters. He explained that he had six or seven years of bargaining experience with a number of different unions. At the Pincher Creek Co-op bargaining he was the lead negotiator and part of his job was to understand the needs of the Employer. He explained that there were approximately 80 employees in the bargaining unit of whom 40 employees were receiving minimum wage.

30. Tom stated that he took notes on his computer and tracked each wage proposal. He also said that he scripted what he was going to say. He said that the major issue was the increase in the minimum wage. He said that the increased minimum wage resulted in approximately $85,000.00 per year of additional costs to the Employer. The notes taken by the witness both before and after the first MOA was rejected by the Union membership were marked as exhibits.

31. Tom referred to Exhibit 8 which was an email from the Employer to the Union dated July 23, 2018. The email stated that: "These employees will not receive additional increases until they have worked enough hours to exceed $15.00 on the existing wage scales." The "these employees" he was referring to were the Minimum Wage Employees who received the minimum wage boost.

32. Tom said that the Employer "Did not adjust the freeze component" referring to the fact that the Employer did not change its position in regard to the Minimum Wage Employees. It continued to assert that for positions that were affected by the increase to the minimum wage there would be no wage increase until negotiated wages exceeded the minimum wage. Tom stated that the negotiated percentage wage increase never applied to the new minimum wage which was being paid to employees.

33. Tom said that that the wage schedule prepared by the Employer was based upon what had been agreed to by both parties. He pointed out that Rod had agreed to the year one wage rate in the wage schedule which was calculated in accordance with the Employer's understanding of the agreement between the parties.

34. He said that there were some employees whose wage rates would be frozen at $15.00 per hour. That, he said, was the reason why the Employer agreed to a three-year contract rather than the five-year contract it initially requested. He said that the Union understood why the Employer took that step. The shorter duration contract would permit the Union to negotiate sooner for an increase for those employees whose wages had been frozen at $15.00 per hour for the life of the collective agreement. He said it was clear that the Union

had agreed to the Employer's position. He also pointed to the email from the Employer to the Union informing it that the Employer would be increasing wages paid to the employees who were receiving less than the new minimum wage prior to the actual implementation of same by the Province of Alberta. That email advised that those employees would not receive additional increases until they had worked enough hours to exceed $15.00 per hour on the existing wage scales. The Tom stated that he continued to attempt to convince the Union about the Employer's position was but without success.

35. Tom referred to Exhibit 1 (the "Old Collective Agreement") which was the collective agreement which expired on April 9, 2018. Over the life of that collective agreement there was an increase to the minimum wage, however, the negotiated wage increases were based upon the previously negotiated wage rates set out in that document and not the minimum wage. The witness stated that there were no grievances filed about the way in which the Employer interpreted and applied the Old Collective Agreement.

36. In cross-examination Tom stated that Rod, on behalf of the Union, told him that there was a significant swath of the employees affected by the manner in which the wages were calculated. He said that Rod told him that there was a concern that a three-year employee and a new hire could both receive the same pay.

37. Tom acknowledged that Rod was concerned that some employees might not get an increase for several years. He said that the Union wanted a shorter term and a recalibration of the wage scale. He said that he told Rod that the answer to that was "no" and that the Employer could not absorb the additional costs which that would entail. He said that ultimately the Employer reduced its requested term of the agreement from five years to three years but said "no" to the recalibration of the wage scale.

38. Tom also stated that Rod was concerned about rates which were below $15.00 being set out in the New Collective Agreement. That would occur if the Employer's proposal was accepted by the Union.

39. Tom was asked to review Exhibit 21 which was notes of a discussion between the witness and Rod on April 25 with others in attendance from both sides. Both parties laid out their position. At the end of the discussion, Rod stated that the Union would engage legal counsel on the matter.

40. In redirect, counsel for the Employer question Tom about requests by the Union to "recalibrate" the wage table. The witness stated that he believed that the Union had backed off the idea of recalibrating and it did not come up again. As he understood the concept of "recalibrating" the wage table, the Union meant that the it wanted to insert the wage rate of $15.00 into the New Collective Agreement in place of the wage rates in the Old Collective Agreement that were less than $15.00 per hour.

41. The Employer also called Brian McGillvray (Brian) who had served on the Board of Directors of the Employer since 2015 and who had also served on the Employer's bargaining committee during the current round of collective bargaining. The witness testified to his business experience prior to becoming a member of the Employer's Board of Directors.

42. Brian explained that the increase in the minimum wage raised significant concerns for the Board of Directors of the Employer. Given the Employer's profit margin, it would require an extra $2 million in revenue just break even.

43. At the outset of collective bargaining, he explained that the Employer wanted a five-year collective agreement with a 1% to 1.5% increase per year. When the Employer explained that this would not apply to the employees who received the minimum wage increase, Rod said that members would not see a raise for the length of the New Collective Agreement. Given that was the case, we revised our position and came back with a proposal for a three-year contract.

44. Brian stated that by year two of the proposed agreement the employee would receive the rate negotiated for the grid or $15.00 minimum wage, which ever was higher. Our position, he said, was that the negotiated increase applied to the last year of Old Collective Agreement. He said that he believed that the Union understood the Employer's position when we told them that we had empathy for the minimum wage employees, but our hands were tied. Increases on top of the minimum wage were not on. We told them that at the end of the next round of bargaining we would see the impact of the minimum wage increase.

45. He said that after the first memorandum of agreement was turned down by the bargaining unit the parties met on August 21 but the Employer did not change its position regarding the Minimum Wage Employees, however its financial offer to other employees was changed. That Memorandum of Agreement was ratified. He said that it took a long time to receive the draft from of the new agreement from the Union. When they received the draft, the rates for the Minimum Wage Employees had been increased. He said that the Employer had not agree to that during bargaining.

46. In cross-examination the witness was questioned about his preparation as a witness at the hearing. He said that he received a copy of the evidence that had been filed and went through it. He also said that he sat through the first part of the hearing at a time that he knew he was going to testify later in the hearing. (Note that there had been no request for a witness exclusion order.)

47. He said that the Employer wanted a five-year deal which would mean that the Minimum Wage Employees would not get a raise for 48 months. He was asked whether the Union stated that it wanted the raise to apply to all employees and he said "No that is not correct."

He said that Rod had stated that he was not used to dealing with minimum wage issues.

48. The Employer called Rhonda Poch ("Rhonda"). Rhonda was an accountant by profession and served as the Employer's Controller. She was responsible for all aspects of the business including loss prevention and audit. She reported to the General Manager, had three employees reporting to her and had been employed by the Employer for 10 years.

49. Rhonda said that in her experience the Employer had always applied any negotiated increase in wages to the rates set out in the collective agreement and not to the minimum wage. She said that, in this case, in order for a Minimum Wage Employee to receive a rate of pay above $15.00 that person would need to work the necessary hours set out in the wage scale in order to receive wages above $15.00 per hour. She provided examples where employees received pay increases based on the rates set out in the collective agreement but not based upon the minimum wage rate. She said that the standard practice was that negotiated wage increases were applied to the collective agreement rates and not to the minimum wage rates.

50. In cross examination, the witness said that she had not attended any of the collective agreement negotiations.

Note that some of the information in the preliminary portion of the Union's as well as the Employer's argument is repetitious of information set out above. After consideration, I felt it appropriate to include the entirety of both the written arguments of counsel rather than editing them.

UNION ARGUMENT

Introduction

1. This case involves the interpretation of Collective Agreement language. The dispute between the parties relates to the application of the general pay increases payable on the anniversary dates of the Collective agreement to the $15.00 per hour minimum wage in effect in Alberta as of October 1, 2018.

2. Pincher Creek Co-op sells food, energy, gasoline, and home and building supplies for locations in and around the town of Pincher Creek.

3. The Union is the bargaining agent for the workers at Pincher Creek Co-op. The bargaining unit includes retail workers, etc.

4. In early 2018, there were about 100 employees working at the Pincher Creek Co-op in and out of scope of the bargaining unit. About 80 employees were in the bargaining unit.

About 40 bargaining employees were minimum wage earners. At the time collective bargaining began, the minimum wage in Alberta was $13.60 per hour. The Alberta minimum wage was scheduled to increase effective November 1, 2018 to $15.00 per hour.

5. The Union and Pincher Creek Co-op had been parties to several Collective Agreements and commencing in the spring of 2018 the parties were negotiating to renew their Collective Agreement. A part of the context of that negotiation was the announced increase to the minimum wage that was to occur on October 1, 2018.

6. The parties met for collective bargaining commencing April 18, 2018 continuing over several days, April 18, 19 and 20. They returned to the table on June 13 and June 14. Monetary issues, including wages were discussed over three days June 13, 14 and again August 21.

7. The negotiations held in June resulted in a tentative agreement, but that tentative agreement was rejected by the bargaining unit and did not result in a Collective Agreement.

8. On July 22 the Employer announced that it was unilaterally increasing the basic wage payable to all employee to $15.00 per hour. The July 22 memo from Jim Peace stated:

> *This email is to advise Unifor that due to competitor market changes in wages, effective July 22, 2018 we will be moving all employees who are currently making less than $15.00/hour to $15.00/hour. We are taking this step prior to the October 1st legislation to ensure we retain our existing employees and allow us to attract new employees as required. These employees will not receive additional increases until they have worked enough hours to exceed $15.00 on the existing wage scales.*"

9. The parties returned to bargaining August 21. At the time the parties returned to bargaining August 21, 2018 the lowest wage rate being paid to bargaining unit employees at the Pincher Creek Co-op was $15.00 per hour (as a result of the unilateral increase effective July 22, 2018).

10. The parties achieved a new Collective Agreement. The Memorandum of Settlement was agreed on August 2018 (Exhibit 2). The term of the Agreement was effective April 10, 2018 continuing until April 9, 2021.

11. On September 12, 2018 the Union notified the Employer that the tentative agreement reached August 21, 2018 had been ratified by the bargaining unit (See Exhibit 18).

12. The Memorandum of Agreement reached by the parties contained the following articles:

Article 7 of the Collective Agreement - “Wages, salaries and classifications of work are attached as appendix A and shall be observed by the Co-operative on the effective dates indicated on the Appendix and for the duration of this Agreement.

Appendix A

General Wage Increases

Year 1: Increase all scales and steps by 1.75% excluding the Head AgroClerk Classification retroactive to expiry of previous agreement. Employee in the new Head AgroClerk Classification would receive retroactive pay based on this percentage, based on their rate paid as a Head Petro/AgroClerk prior to ratification

Year 2: Increase all scales and steps by 1:75%, excluding the Head AgroClerk Classification and AgroClerk Classification

Year 3: Increase all scales and steps by 1.75%

13. Over the next 8 months, the parties exchanged versions of the wage grid that each expected would be the result of the negotiated memorandum of agreement.

14. The Employer paid the retroactive increases due under the memorandum of agreement. The agreed wage increases in Appendix A for year one were applied to bargaining unit employees. During the period from July 22, 2018 onward, the lowest wage rate paid by the Employer was $15.00 per hour.

15. The statutory minimum wage of $15.00 per hour came into effect October 1, 2018.

16. The first anniversary date of the agreement occurred April 7, 2019. The General Wage Increase provisions in Appendix A to “Increase all scales and steps by 1:75% [Note: Head AgroClerk/Head Petro Clerk also received the “General Wage Increase of 1.75%” in year one] were required to be implemented from this date forward.

17. On April 18, 2019 the Union sent correspondence to the Employer (Exhibit 23) requesting confirmation that the Employer would be paying the general wage increase of 1.75% (effective April 7, 2019) to employees. The Union’s correspondence made clear that the Union was seeking an increase to all wage rates being paid on the anniversary dates, including seeking a 1.75% increase to the lowest wage payable under agreement (the $15.00 per hour minimum wage).

18. The Employer’s response (Exhibits 23 and 24) was to advise that the information from the

Union “doesn’t match what we have seen on our end. I will need to get back to you…” and “it would be beneficial to set up a call”.

19. On April 25 the parties had a discussion about the apparent difference in position but were unable to resolve the issue. The Employer explained that it did not intend to apply an increase of 1.75% to the $15.00 wage rate (the minimum wage) that was being paid to employees.

20. The first pay period following the first anniversary date of the agreement occurred April 22, 2019 (Testimony of Rhonda Poch). The Employer did not apply an increase to the $15.00 wage rate (the minimum wage) that was being paid to employees.

21. The Union filed both a policy grievance and a group grievance on April 26, 2019 seeking to have the general wage increase of 1.75% applied to the $15.00 wage rate (the minimum wage) that was being paid to some employees.

Issues

22. The issues for adjudication in this grievance involve interpretation of the Collective Agreement language.

23. The Union submits that the Collective Agreement language is clear and unambiguous. The Union submits the agreed wage increases on the anniversary apply generally to “increase all scales and steps [subject to specific exceptions (see note below) in the Memorandum]. The Union submits that the general wage increases in Appendix A apply to increase all the wages that are lawfully required to paid by Pincher Creek Co-op, including the minimum wage of $15.00 per hour, effective on the anniversary date (subject to specific exceptions):

> (Note: The Head Petro Clerk; Head AgroClerk classifications and Petro Clerk; AgroClerk classifications were treated differently by the parties.
>
> The Head Petro Clerk; Head AgroClerk classifications and Petro Clerk; AgroClerk classifications were specifically exempted from receiving the general wage increases in year two; instead the parties agreed to:
>
> - “add $0.75 to the top rate, *keeping the same percentage difference between scale steps*” (AgroClerk)
> - “add $0.50 to the top rate, *keeping the same percentage difference between scale steps*” (Head AgroClerk)

Consequently, the General Wage increase of 1.75% would not apply on the second anniversary to AgroClerk and Head AgroClerk who were receiving minimum wage.

The parties agreed that for year three: "apply the negotiated general percentage to the scale". Consequently, the increase of 1.75% would apply on the third anniversary to AgroClerk and Head AgroClerk who were then receiving minimum wage.

24. The Union submits that extrinsic evidence of negotiating history or past practice is not necessary or admissible for the interpretation of this Collective Agreement.

25. The Union submits the grievances were timely and filed in compliance with the Collective Agreement.

The Collective Agreement language is clear and unambiguous

26. Negotiating history and past practice are forms of extrinsic evidence that may be admitted in evidence as aids to interpretation where there is ambiguity. At the outset of the hearing, the Union objected to the admissibility of extrinsic evidence as an aid to interpretation. The Union asserted that the Collective Agreement language is clear and unambiguous. However, pursuant to the direction of the arbitrator, in accordance with typical labour arbitration practice, the parties provisionally adduced evidence concerning bargaining history and past practice.

27. The Union submits that the Collective Agreement language is clear and unambiguous. The relevant collective agreement language is contained in the Memorandum of Settlement dated August 21 and is as follows:

Article 7 of the Collective Agreement - "Wages, salaries and classifications of work are attached as appendix A and shall be observed by the Co-operative on the effective dates indicated on the Appendix and for the duration of this Agreement.

Appendix A

General Wage Increases

Year 1: Increase all scales and steps by 1.75% excluding the Head AgroClerk Classification retroactive to expiry of previous agreement. Employee in the new Head AgroClerk Classification would receive retroactive pay based on this percentage, based on their rate paid as a Head Petro/AgroClerk prior to ratification

Year 2: Increase all scales and steps by 1:75%, excluding the Head AgroClerk

Classification and AgroClerk Classification

Year 3: Increase all scales and steps by 1.75%

Note: The Head Petro Clerk; Head AgroClerk classifications and Petro Clerk; AgroClerk classifications were treated differently by the parties

The Head Petro Clerk; Head AgroClerk classifications and Petro Clerk; AgroClerk classifications were specifically exempted from receiving the general wage increases in year 2; instead the parties agreed to:

- "add $0.75 to the top rate, *keeping the same percentage difference between scale steps*" (AgroClerk)
- "add $0.50 to the top rate, *keeping the same percentage difference between scale steps*" (Head AgroClerk)

The parties agreed that for year 3: "apply the negotiated general percentage to the scale".

28. The basic principles applied by Arbitrators to interpret Collective Agreement are likely not in dispute in this hearing. We refer the Board to the decisions in *Pacific Press v. GCIU Local 25-C* [1995] BCCAAA No. 637; *UNA Local 85 v. Capital Health Authority (Sturgeon Hospital)* [2011] AJ No. 903; *Purolator Courier v Canada Council of Teamsters Local 395* [2005] CLAD No. 492; and *CEP Local 728 v Owens Corning [2004] AGAA no. 69*, (all attached), and the relevant sections of which have been highlighted for the Board's easy reference.

29. In *United Nurses of Alberta, Local 85 v. Capital Health Authority (Sturgeon Community Hospital)* [2011] A.J. No. 903, the Alberta Court of Appeal confirmed at paragraph 75 that the "proper approach to interpreting collective agreements is to ascertain the purpose of the provision being interpreted either from its words or from its context in the collective agreement. Having ascertained the provision's purpose, one interprets the plain and ordinary meaning of the provision to see if it undermines the purpose of the provision previously ascertained."

30. In *Southern Alberta Institute of Technology (Board of Governors) v. SAIT Academic Faculty Assn*. [2011] A.J. No. 953 2013 ABCA 161 Arbitrator Les Wallace summarized the principles of interpretation at paragraphs [18] and [19]:

> [18] ...the issue is to be decided upon general interpretive principles. The general interpretive approach for this board to use in deciding this case is well-known and not in any real dispute. We are to seek the intention of

> the parties as they have expressed it their collective agreement, and it is the "cardinal assumption" of interpreting the agreement that the parties are assumed to have intended what they have said. It is presumed the words are used in their normal or ordinary meaning; but that presumption may be overcome by the context of the agreement. Context may and should be sought from the entire agreement. All words are presumed to carry meaning, so superfluity and redundancy are to be avoided if possible. Identical words are presumed to carry identical meaning, different words, different meaning; but again, context can displace this presumption.
>
> [19] When there are two or more permissible interpretations, arbitrators can prefer one of them because it better achieves harmony with other provisions of the agreement; because one is more administratively feasible than the other; because one would produce an absurd or unreasonable result; or because one promotes labour relations certainty or labour relations fairness. Where a contractual expression is ambiguous, either patently so (the ambiguity is apparent on the face of the writing) or latently so (the ambiguous character is discovered by evidence outside of the writing), resort may be had to extrinsic evidence like negotiating history or past practice to choose the meaning that best expresses the parties' intent. But if the wording is clear and permits only one interpretation, the arbitration board must give effect to it whether or not it appears fair or fits the arbitrators' own views of what is reasonable. None of this is remotely original; it is but a partial summation of the discussion of principles of interpretation in Brown & Beatty, Canadian Labour Arbitration 3rd ed. (Canada Law Book: Looseleaf 2009), s. 4:2100 -- 4:2150, and the discussion in *Alberta Teachers' Association v. Province of Alberta* (Unreported Alta. Arbitration, Feb 2, 2010, Sims).

31. It is very important to understand that the interpretative task involves only examining the words actually used by the parties. Contracting parties must live with the words they have used if those words are clear and no mistake or other vitiating element is involved (see *Inland Cement, Infra – Paragraph 51*).

32. This is also illustrated in a number of cases. In *Cardinal Coach Lines* [2018] A.G.A.A. No. 1, Arbitrator Casey stated:

> 12 Regardless of what the parties' subjective intentions might have been with respect to the compensation structure, my obligation is to determine the objective intentions as evidenced by the language of the Collective Agreement considered in the entire context. <u>As stated by Brown and Beatty</u>:
>
> > It has often been stated that the fundamental object in construing the terms of a collective agreement is to discover the intention of the

parties who agreed to it. As one arbitrator, quoting from *Halsbury's Laws of England*, stated in an early award:

> The object of all interpretation of a written instrument is to discover the intention of the author, the written declaration of whose mind it is always considered to be. Consequently, the construction must be as near to the minds and apparent intention of the parties as is possible, and as the law will permit.

And further:

> But the intention must be gathered from the written instrument. The function of the Court is to ascertain what the parties meant by the words they have used; to declare the meaning of what is written in the instrument, not of what was intended to have been written; to give effect to the intention as expressed, the expressed meaning being, for the purpose of interpretation, equivalent to the intention.

33. In *Strait Crossing Joint Venture and Union of Operating Engineers/Iron Workers* (1997), 64 L.A.C. (4th) 229 (Christie) the Arbitrator said:

> The parties to collective bargaining must find their rights in the collective agreement, not in what is said during negotiations when "much is said and much can be misinterpreted". (See the quote for Arbitrator George Adams in *Sudbury District Roman Catholic Separate School Board* (1985), 15 L.A.C. (3d) 284 below) but this stricture is relaxed not only where the words of the collective agreement are patently ambiguous, but also where there is cogent evidence that apparently clear words were given a special meaning by *both* parties.

34. In *Aecon Lockerbie Industrial Inc. v. International Brotherhood of Electrical Workers, Local Union 424* (Overtime Grievance) [2011] A.G.A.A. No. 22, Arbitrator Sims stated at paragraph 40:

> This chair, in the *ATA* case (*supra*) ruled at p. 9:
>
> The following passage holds that the context in which a contract is entered into is a part of the interpretive process; something to be considered in deciding on whether a contract is ambiguous.
>
> > [54] A consideration of the context in which the written agreement was made is an integral part of the interpretative process and is not something that is resorted to only where the words viewed in isolation

suggest some ambiguity. To find ambiguity, one must come to certain conclusions as to the meaning of the words used. A conclusion as to the meaning of words used in a written contract can only be properly reached if the contract is considered in the context in which it was made: see McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005) at 710-11.

[55] There is some controversy as to how expansively context should be examined for the purposes of contractual interpretation: see Geoff R. Hall, "A Curious Incident in the Law of Contract: The Impact of 22 Words from the House of Lords" (2004) 40 Can. Bus. L.J. 20. Insofar as written agreements are concerned, the context, or as it is sometimes called the "factual matrix", clearly extends to the genesis of the agreement, its purpose, and the commercial context in which the agreement was made: *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.* (1998), 114 O.A.C. 357 at 363 (C.A.).

[56] I would adopt the description of the interpretative process provided by Lord Justice Steyn, "The Intractable Problem of the Interpretation of Legal Texts", supra, at 8:

> In sharp contrast with civil legal systems the common law adopts a largely objective theory to the interpretation of contracts. The purpose of the interpretation of a contract is not to discover how the parties understood the language of the text, which they adopted. The aim is to determine the meaning of the contract against its objective contextual scene. By and large the objective approach to the question of construction serves the needs of commerce. [2]
>
> [Emphasis added]

Dumbrell v. The Regional Group of Companies Inc. 2007, Ont. C.A. 59

35. The terms of a Collective Agreement are the written terms of the agreement between the parties. This is clear from the statutory definition of "collective agreement".

> 1(f) "collective agreement" means an agreement in writing between an employer or an employers' organization and a bargaining agent containing terms or conditions of employment, and may include one or more documents containing one or more agreements.

36. An arbitrator is statutorily prohibited from adding to or modifying the terms of the

Collective Agreement:

> **Effect of award on collective agreement**
>
> 142(1) Subject to subsections (2), (3) and (4), no arbitrator, arbitration board or other body shall by its award alter, amend or change the terms of a collective agreement.
>
> (2) Where an arbitrator, arbitration board or other body determines that an employee has been discharged or otherwise disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject of the arbitration, the arbitrator, arbitration board or other body may substitute for the discharge or discipline some other penalty that, in its opinion, is just and reasonable in the circumstances.
>
> (3) Where an arbitrator, arbitration board or other body determines that there are reasonable grounds for extending the time for taking any step in a grievance process or arbitration procedure set out in a collective agreement, the arbitrator, arbitration board or other body may, notwithstanding the terms of the collective agreement, grant an extension, even after the expiration of the time, if, in its opinion, the other party would not be unduly prejudiced by the extension.
>
> (4) An arbitrator, arbitration board or other body may interpret, apply and give relief in accordance with an enactment relating to employment matters notwithstanding any conflict between the enactment and the collective agreement.
>
> (5) Subsection (3) only applies to arbitrators, arbitration boards or other bodies appointed on or after the day this section comes into force.

37. In *Alberta Teachers Assn v Buffalo Trail Public Schools Regional Division No 29, [2014] AJ No 1337, 2014 ABCA 407, 588 AR 179, 2014 CarswellAlta 2164, [2015] CLLC para 220-019, 247 ACWS (3d) 675*, the Alberta Court of Appeal stated:

> 10 Arbitrators are generally prohibited from using extrinsic evidence to interpret unambiguous provisions in a collective agreement: *United* Brotherhood *of Carpenters and Joiners America, Local 579 v Bradco Construction Ltd*, [1993] 2 SCR 316 at 342. Using extrinsic evidence to interpret a collective agreement when no ambiguity exists essentially amounts to varying the terms of the agreement, which is prohibited by s. 142(1) of the *Labour Relations Code*, RSA 2000, c L-1: *United Food and Commercial Workers' Union, Local 401 v Canada Safeway Ltd,* 2007 ABCA 331 at para 17, 417 AR 392.

38. This case also involves the intersection of an employment-related statute (the minimum wage provisions of the Employment Standards Code), as part of the interpretation issue. Therefore, it is necessary to very briefly review the applicable principles. The leading cases regarding the effect of employment-related statutes on the content of collective agreements are *McLeod v. Egan*, [1975] 1 S.C.R. 517 and *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324* (O.P.S.E.U.). In *Parry Sound*, the Court stated:

> 28 As a practical matter, this means that the substantive rights and obligations of employment-related statutes are implicit in each collective agreement over which an arbitrator has jurisdiction. A collective agreement might extend to an employer a broad right to manage the enterprise as it sees fit, but this right is circumscribed by the employee's statutory rights. The absence of an express provision that prohibits the violation of a particular statutory right is insufficient to conclude that a violation of that right does not constitute a violation of the collective agreement. Rather, human rights and other employment-related statutes establish a floor beneath which an employer and Union cannot contract.
>
> 29 As a result, the substantive rights and obligations of the parties to a collective agreement cannot be determined solely by reference to the mutual intentions of the contracting parties as expressed in that agreement. Under *McLeod*, there are certain terms and conditions that are implicit in the agreement, irrespective of the mutual intentions of the contracting parties. More specifically, a collective agreement cannot be used to reserve the right of an employer to manage operations and direct the work force otherwise than in accordance with its employees' statutory rights, either expressly or by failing to stipulate constraints on what some arbitrators regard as management's inherent right to manage the enterprise as it sees fit. The statutory rights of employees constitute a bundle of rights to which the parties can add but from which they cannot derogate.
>
> 30 …In each collective agreement, certain procedural requirements and substantive rights and obligations are mandatory. In *McLeod*, the Court determined that these include the obligation of an employer to exercise its management rights in accordance with the statutory rights of its employees.

39. The purpose of Appendix A is to establish the wages payable to each employee. The general scheme of Appendix A is that each position has a wage rate corresponding to that position and duration of employment. Different positions are paid different amounts. Subject to the minimum wage, the wages payable to any particular employee in a position are established based upon the time spent by that employee in the position (or recognized equivalent experience).

40. At the commencement of negotiations both parties were aware that the minimum wage in Alberta was set to increase to $15.00 per hour effective October 1, 2018. This was part of the context of collective bargaining from the beginning, continuing even after the Employer voluntarily and unilaterally began paying employees the minimum rate of $15.00 per hour (effective July 22, 2018). The final Memorandum agreement was concluded August 21, 2018 and the Collective Agreement was ratified in September 2018.

41. It is important to note that while the Employer was paying a rate of $15.00 per hour (an early adoption of the minimum wage) commencing on July 22, 2018, that decision to pay more than the required scale amount was voluntary, and, in contrast to the situation that existed once the statutory minimum wage came into effect, the Union would have had no recourse if the Employer did not want to adopt the $15.00 prior to October 1, 2018 or if it announced it was returning to the listed scale rates that were less than $15.00 but above $13.80 until October 1, 2018. *Until October 1, 2018*, when the minimum wage increased (and the Employer could not lawfully pay below $15.00 per hour), scale rates below $15.00 per hour continued to matter; but after October 1, 2018 (once the new minimum wage rate of $15.00 per hour became law) scale rates below $15.00 per hour became irrelevant because an employee could not lawfully be paid. After October 1, 2018, the lowest possible wage rate that could lawfully be paid by Pincher Creek (*or that could be agreed upon by the parties to be in effect*) was $15.00 per hour.

42. As explained in Brown and Beatty (8:1400 – Alteration of Wages), "*Where an agreement contains a wage schedule that stipulates the rates that are to prevail during the life of the* agreement*, arbitrators have generally held that an employer may not, no matter how legitimate or well-meaning its motives, unilaterally alter (which includes both increasing as well as decreasing) pay, or any other part of the compensation package that is contained in the agreement, of any or all of its bargaining-unit personnel.*"

43. This established principle is of assistance in determining the meaning of the "general wage increase" to be applied to "all scales and steps". According to the Memorandum of settlement August 21, 2018, a "general wage increase" is to be applied to "increase all scales and steps" (with certain listed exceptions) on the relevant dates. The purpose of the negotiated general increase provisions in the collective agreement was to define the scope and quantity of wage increase that would be applicable to all wages. It is submitted that the term "all scales and steps" must mean the wage (wage rate) that the employer is lawfully required to pay to an employee for the position on the relevant date and depending on the hours worked in the position by the employee.

44. The *Employment Standards Co*de sets minimum standards below which the parties cannot contract. The increase in minimum wage required the modification of the lowest wage rate lawfully payable under the Collective Agreement. This also necessarily became the lowest "step" for each position on the grid. There cannot be a lower "step" because the minimum wage sets the "floor beneath which an employer and Union cannot contract" (see *Parry Sound, supra*). It applies even to "new hires". For the period after October 1,

2018 the lowest wage scale (the lowest wage rate) lawfully payable under the Collective Agreement was the statutory minimum wage of $15.00 per hour. This amount was payable for "new hires" and any employees who had not yet worked sufficient hours to be paid at a "step rate" exceeding $15.00 per hour. That lowest wage rate and step in effect for each position was subject to the "general wage increase" applicable to "increase all scales and steps" on the Anniversary dates. There is no wording in the Memorandum of Agreement to indicate otherwise. For those employees earning and entitled to only the statutory minimum wage as at the first anniversary, the wage scale of $15.00 per hour would increase by the agreed percentage to (1.75%) to $15.26 per hour. That would become the new "lowest" wage scale and "step" for that position in the Collective Agreement. That lowest wage scale and step would be subject to a further increase on the 2nd anniversary of the agreement, so that it would increase by a further 1.75% to $15.53 per hour.

45. The Union is not asserting that the time period for an increase is abbreviated where the next scale "step" above minimum wage requires a person to be employed for a specific period of time (even a long period of time); that would continue to apply. Similarly, the Union is not asserting that rates above the minimum wage be increased (beyond the agreed percentages applicable to all "all scales and steps") to maintain the "difference" (relative or absolute) between the lowest rate payable and the "next step" or other steps for that position (Note: the exception of course, is year two of the Head Petro Clerk; Head AgroClerk classifications and Petro Clerk; AgroClerk classifications). Specific language would have been required to achieve the result of abbreviating the time frames or maintaining the difference between the rate paid at the lowest step and the next or subsequent steps (Note: such language was used for year two of Petro Clerk, AgroClerk classifications).

46. The words used by the parties, in particular the words, "general" ("general wage increase" and "all" ("increase all scales and steps") suggest the broadest possible application. There are specific exceptions, but they do not make any reference to the statutory minimum wage. It is self-evident that the statutory minimum wage *is one part of the "wages…[that]shall be observed by the Co-operative" (i.e. "Wages, salaries and classifications of work are attached as appendix A and shall be observed by the Co-operative on the effective dates indicated on the Appendix and for the duration of this Agreement. (Article 7 of the Collective Agreement)* and is subject to the *"*general wage increase" applicable to "increase all scales and steps".

47. The interpretation of the Agreement offered by the Union, whereby the wage scale of $15.00 per hour would increase on the first anniversary date by the agreed percentage to (1.75%) to $15.26 per hour and be subject to a further increase on the 2nd anniversary of the agreement, so that it would increase by a further 1.75% to $15.53 per hour results from a clear and direct application of the Collective Agreement language actually used by the parties. The Collective Agreement is not "ambiguous" in its meaning. There is no uncertainty regarding the meaning of the heading "general wage increase" or the scope

of application the wording "increase all scales and steps". Indeed, based on the wording of the Collective Agreement, and the fact that after October 1, 2018 the lowest possible wage rate that could lawfully be paid by Pincher Creek or that could be agreed upon by the parties to be in effect was $15.00 per hour, there is no other possible meaning.

48. The Employer seeks to avoid the application of the general increase that applies to "all scales and steps" to the minimum wage on the anniversary dates. However, there is no Collective Agreement language to this effect. There is no Collective Agreement language exempting the minimum wage rate from the "general increase" that is applicable to "increase all scales and steps". The Union submits that the Board is statutorily prohibited from adding such an "exemption" to the words of the Collective Agreement. The Board is bound by the words actually used by the parties. The Board cannot "add" words exempting the wage increase from applying to the wage rates in effect on each Anniversary date, one of which was the statutory minimum wage.

49. It is submitted that under proper interpretation of the memorandum of settlement dated August 21, 2018, there is no language that could reasonably support an interpretation where the annual wage increases do not apply to the minimum wage (except for year two Agro/PetroClerk). The clear, unequivocal language in the Collective Agreement establishes that the increase applies to all rates. In the result, the rate in effect (the minimum wage of $15.00 per hour) was subject to the increase on the first anniversary, and this will be increased again on the 2nd anniversary.

Admissibility of Extrinsic Evidence

50. In *Alberta Teachers Assn v Buffalo Trail Public Schools Regional Division No 29, [2014] AJ No 1337, 2014 ABCA 407, 588 AR 179, 2014 CarswellAlta 2164, [2015] CLLC para 220-019, 247 ACWS (3d) 675,* the Alberta Court of Appeal stated:

> 10 Arbitrators are generally prohibited from using extrinsic evidence to interpret unambiguous provisions in a collective agreement: *United Brotherhood of Carpenters and Joiners America, Local 579 v Bradco Construction Ltd*, [1993] 2 SCR 316 at 342. Using extrinsic evidence to interpret a collective agreement when no ambiguity exists essentially amounts to varying the terms of the agreement, which is prohibited by s. 142(1) of the *Labour Relations Code*, RSA 2000, c L-1: *United Food and Commercial Workers' Union, Local 401 v Canada Safeway Ltd.*, 2007 ABCA 331 at para 17, 417 AR 392.
>
> 11 Although extrinsic evidence may be considered to establish context when interpreting a collective agreement, one must ensure that such evidence is not used to vary the terms of the agreement. This accords with the recent Supreme Court of Canada decision of *Sattva Capital Corp v Creston Moly Corp*,

2014 SCC 53 in which the Court held at para 57 that although surrounding circumstances can be considered when interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement. As the Court noted, "[w]hile the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement" (para 57).

12 While noting that the nature of the evidence that can be relied on under the rubric of "surrounding circumstances" will vary from case to case, the Supreme Court in *Sattva* also set an outer limit as to what constitutes surrounding circumstances. It stated at para 58 that the surrounding circumstances "should consist only of objective evidence of the background facts at the time of the execution of the contract ... that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting." In the context of successive collective agreements where language remains essentially unchanged, the relevant circumstances are those prevailing when the clause in question was first negotiated: *Re SKF Canada Ltd and IAM, Local 901* (2005), 83 CLAS 266; *Vallieres v Vozniak*, 2014 ABCA 290 at para 13.

13 In this case, the board relied on the above-noted extrinsic evidence in its interpretation of Article 9 after expressly finding there was no ambiguity in the words of that provision. The relevant words of the collective agreement have been in use since at least 2003 but the evidence establishes that the extrinsic evidence relied on by the board all post-dates that time, such that the extrinsic evidence cannot possibly be considered evidence of "surrounding circumstances". The reviewing justice therefore properly concluded that the board's use of extrinsic evidence in this case was improper and unreasonable.

51. What is an ambiguity? *In INLAND CEMENT INDUSTRIES LTD v UNITED CEMENT, LIME AND GYPSUM WORKERS, LOCAL 359*, [1981] AJ No 723, [1981] 3 WWR 65, 27 AR 135*, 7 ACWS (2d) 299, the Alberta Court of Appeal made the following comments about ambiguity:

15 The resolution of this appeal must be taken in stages, the first of which is to determine whether in the law normally applied by this court the circumstances of the case disclose a latent ambiguity apt to be taken into account in construing the agreement. On this Dea, J., said in part that ". . . when one looks at the contract, and even when one looks at the extrinsic evidence, there is no ambiguity. [*page 145] The real complaint is seen. It is not that the contract is ambiguous, but that the contract does not say what one of the parties to it wanted it to say. A similar problem arose in Re *United Steelworkers of America, Local 1005 and Steel Co. of Canada Ltd. et al* 20 O.R.

(2d) 205, and there Mr. Justice Grange said at p. 206 and 207:

> 'An ambiguity whether patent or latent implies at least two meanings of one word or phrase. A patent ambiguity is an ambiguity on its face; a latent ambiguity does not become one until evidence shows it to be so. The evidence here sought to be adduced is not intended to point out a latent ambiguity or to clear up an ambiguity either patent or latent; it is tendered to show that words unambiguous in meaning were not intended to apply to a particular factual situation. Contracting parties must live with the words they have used if those words are clear and no mistake or other vitiating element is involved.'

I agree…

52. These comments are important here. The words "Increase all scales and steps by ___%" do not imply two or more meanings. As already fully explained, the Union asserts that in this case there is a clear preponderance in favour of one meaning. There is no ambiguity. Extrinsic Evidence is not necessary or admissible for the interpretation of this Collective Agreement since there is no ambiguity. Moreover, even if there were an ambiguity, there was no evidence or insufficient evidence to support a finding that otherwise clear words were attributed the same different (than the actual collective agreement language) "special" meaning by both parties.

53. The parties met for collective bargaining commencing April 18, 2018 and initially continuing over several days April 18, 19, 20. They returned to the table on June 13 and June 14. Monetary issues, including wages were discussed over three days June 13, 14, and August 21.

54. The Collective Agreement negotiations took place at a time when a change to the statutory minimum wage was scheduled to increase on October 1, 2019 to $15.00 per hour. The increase to minimum wage was not a surprise to the parties.

55. At the hearing both Mr. Wood, on behalf of the Union, and Mr. Zabel, on behalf of Pincher Creek Co-op, testified concerning the negotiations during collective bargaining. Mr. Zabel explained that the increase to minimum wage was expected to have a significant impact on the Employer's business. In the discussions on June 13, 2018, the Employer explained that it was trying to achieve an agreement where, "in the event the minimum wage exceeded the wage scale step for the employee, the employee would receive the minimum wage until that time when their rate as per the wage scale step exceeds the minimum wage". In contrast, Mr. Wood initially responded by explaining the Union's concerns and disapproval because while some employees would receive an increase as a result of the increase to $15.00 per hour, for some employees "much of the

existing wage grid" was below the anticipated minimum wage and would be "swallowed by the $15.00" with the result that under the Employer's approach, some employees would not be eligible for increases for a long time. He explained his concerns about how this might affect retention and attraction of employees. The Union expressed its concern and objective that all employees continue to be eligible for an increase during the term of the agreement.

56. Over the course of bargaining, the Employer made several written proposals that made reference to changes to Appendix A. The Employer and the Union had some discussions about these proposals. Each of the proposals made by the Employer contained language proposing a general increase to "all scales and steps" at listed percentages retroactive to the expiry of the prior agreement and on the anniversary dates. A review of these proposals and discussions of the parties surrounding these proposals follows.

57. The Employer initially proposed a 5-year term (Exhibit 5), with the following proposed Collective Agreement language:

> Appendix A
>
> General Wage Increases
>
> Year 1: Increase all scales and steps by 1.0% excluding the Head AgroClerk Classification retroactive to expiry of previous agreement. Employee in the new Head AgroClerk Classification would receive retroactive pay based on this percentage, based on their rate paid as a Head Petro/AgroClerk prior to ratification
>
> Year 2: Increase all scales and steps by 1:0%, excluding the Head AgroClerk Classification and AgroClerk Classification
>
> Year 3: Increase all scales and steps by 1.0%
>
> Year 4: Increase all scales and steps by 1.0%
>
> Year 5: Increase all scales and steps by 1.0%

58. The Union rejected the offer and made a verbal counter-offer. On June 13, 2018, Mr. Wood, on behalf of the Union, proposed a 2-year deal, with annual increases 3% and 3%. The Union noted that starting wage was $15.00 per hour. The Union broadly proposed a "recalibration" of the grid timing for steps paid at a rate higher than $15.00, so that, under the recalibration, employees would achieve grid increases earlier than would otherwise be the case, but under the Union's proposal the grid amounts paid above

$15.00 per hour would not change. Furthermore, under the Union's counter-proposal, on the anniversary of the collective agreement, all rates, including the $15.00 would be subject to a 3% wage increase. The Union's counter-proposal is encapsulated in the notes of Mr. Zabel of Pincher Creek Co-op as Exhibit 15:

> *We're going to propose a 2 year deal, at 3% and 3%. And then what we're proposing… when min wage goes up, it eliminates a large portion of the grid pattern. When that occurs, anything that's beyond the $15.00 gets recalibrated. The starting wage is $15.00, walked across stock clerk, at the 36 month rate, $14.89 that becomes $15.00. We don't think it's reasonable who starts on Nov 2 should have to wait 48 months. We think at 6 months, that person would see a normal increase to $15.37, at 12 months, $16.61 using the current grid. Not proposing increasing the grid beyond that. Anything that's beyond the $15.00 they should remain for the term of this agreement. The $15.00 amount, pump attendant, if I was hired on November 1, wage goes up to $15.00. On anniversary of the collective agreement, that $15.00 sees a 3% wage increase.*

59. In discussions on June 14, the Employer rejected the Union's June 13, 2018 recalibration proposal and made a counter-proposal reduced the term to three years, with amended annual increases to be 1.25%, 1.5% and 1.5%. According to Mr. Zabel (Pincher Creek Co-op), the Employer said that its "position on the application of minimum wage remained unchanged." It is important to note that there was no further elaboration at this stage, but the reference appears to be a reiteration of the Employer's earlier conception that, where the minimum wage exceeds the wage scale step for the employee, the employee would receive the minimum wage until that time when their rate as per the wage scale step exceeds the minimum wage (Note: In his testimony Mr. Zabel explained this was the case, but his notes made on the date of the negotiation do not provide that level of detail).

60. On June 14, 2018, the Union rejected the Employer's counter-proposal. Mr. Wood expressed the Union's concern that all employees should be eligible for a pay increase. The Union made a counter-offer of a three-year offer, with a 2.75, 2.75, 2.75%. annual increases "across the Board".

61. The Employer rejected the Union's offer. The parties then exchanged proposals focussing on the percentage annual increase, with a tentative agreement reached on June 14, 2018 with increases at 1.5%, 2.0%, and 1.75% annual increases.

62. The June 14 tentative Collective Agreement had the following wording:

> 3-year term

13. Appendix A

General Wage Increases

Year 1: Increase all scales and steps by 1.5% excluding the Head AgroClerk Classification retroactive to expiry of previous agreement. Employee in the new Head AgroClerk Classification would receive retroactive pay based on this percentage, based on their rate paid as a Head Petro/AgroClerk prior to ratification

Year 2: Increase all scales and steps by 2.0%, excluding the Head AgroClerk Classification and AgroClerk Classification

Year 3: Increase all scales and steps by 1.75%

63. The Memorandum of Agreement was later rejected by the bargaining unit (see Exhibit 17).

64. On July 22 the Employer announced that it was unilaterally increasing the basic wage payable to all employee to $15.00 per hour. The July 22, 2019 correspondence from Jim Peace to the Union stated:

> *This email is to advise Unifor that due to competitor market changes in wages, effective July 22, 2018 we will be moving all employees who are currently making less than $15.00 per hour to $15.00 per hour. We are taking this step prior to the October 1st legislation to ensure we retain our existing employees and allow us to attract new employees as required. These employees will not receive additional increases until they have worked enough hours to exceed $15.00 on the existing wage scales.*"

65. Mr. Wood testified that the Union was not interested in opposing or challenging this early increase to wages for bargaining unit members.

66. The parties met for bargaining again on August 21. There were no wage language changes to the general wage increase provisions. The only general monetary change was to move 1/4% increase from year two to year one (See Exhibit 2). The tentative agreement reached that day (and later ratified) contained the following language:

Appendix A

General Wage Increases

Year 1: Increase all scales and steps by 1.75% excluding the Head AgroClerk Classification retroactive to expiry of previous agreement. Employee in the new Head AgroClerk Classification would receive retroactive pay based on this percentage, based on their rate paid as a Head Petro/AgroClerk prior to ratification

Year 2: Increase all scales and steps by 1:75%, excluding the Head AgroClerk Classification and AgroClerk Classification

Year 3: Increase all scales and steps by 1.75%

67. The Union notified the Employer of ratification on September 12, 2018 (see Exhibit 18).

68. It is submitted that there is no "ambiguity" in this case. Instead, the Employer is expressly asking the Board to imply one or more terms which are not found in the memorandum of settlement and, indeed, are inconsistent with its express words. This is prohibited by the *Code*.

69. Mr. Zabel testified that in the initial discussions on June 13, 2018, the Employer explained that it was trying to achieve an agreement where, "in the event the minimum wage exceeded the wage scale step for the employee, the employee would receive the minimum wage until that time when their rate as per the wage scale step exceeds the minimum wage". Mr. Zabel testified that he reiterated this statement several times during negotiations (although his notes do not clearly record the words used on other occasions). This statement does not resolve any "ambiguity" in the language. This statement (and the various "illustrations" given during the hearing, which were not actually presented in such detail between the parties at the bargaining table) relates to the issue of <u>progression along the grid for a person receiving minimum wage</u> (i.e. a person might need to work several years before moving to the next grid step). <u>It does not address at all the issue of whether a person receiving minimum wage would be subject to the "general wage increase" that would apply on the anniversary to "all steps and scales"</u>.

70. Moreover, the evidence does not support the conclusion that the Union agreed with this statement, and indeed the evidence suggests the Union repeatedly rejected the notion that the employees who were paid minimum wage would not receive an increase and in addition to early discussion of "recalibration" the Union later specifically referenced that employees receiving minimum wage would receive an increase "*On anniversary of the collective agreement, that $15.00 sees a 3% wage increase." (Testimony of Rod Wood and Tom Zabel; See also Zabel notes Exhibit 15) or proposed an "across the board increase").*

71. During Collective bargaining, the Employer did not address or suggest that the minimum wage rate would be *exempted* from "all steps and scales an increase on the anniversary dates". Moreover, there were no statements that indicated the Union "agreed" to such

a thing (again, the Union specifically referenced that employees receiving minimum wage would receive an increase "*On anniversary of the collective agreement, that $15.00 sees a 3% wage increase." (Testimony of Rod Wood and Tom Zabel; See also Zabel notes Exhibit 15) or proposed an "across the board increase").* The point is that there was no expressed consensus that the minimum wage rate would be exempted from the "increase all steps and scales" on increase on the anniversary dates and, particularly, no consensus about what the specific terms of such an exemption would actually be.

72. While the parties were in Collective bargaining, the wage grid from the previous collective agreement applied since the collective agreement was statutorily bridged. Commencing on July 22, 2019, the Employer unilaterally increased the lowest wage to $15.00 per hour (an early adoption of the minimum wage). As previously discussed, that decision to pay more than the required scale amount was voluntary, and, in contrast to the situation that existed once the statutory minimum wage came into effect, until October 1, 2019 the Union would have had no recourse if the Employer announced it was returning to the listed scale rates that were less than $15.00 but above $13.80.

73. The July 22 announcement increasing the basic wage payable to all employee to $15.00 per hour was made in a memo from Pincher Creek Co-op Manager Jim Peace. The memo stated:

> *This email is to advise Unifor that due to competitor market changes in wages, effective July 22, 2018 we will be moving all employees who are currently making less than $15.00 per hour to $15.00 per hour. We are taking this step prior to the October 1st legislation to ensure we retain our existing employees and allow us to attract new employees as required. These employees will not receive additional increases until they have worked enough hours to exceed $15.00 on the existing wage scales.*

74. Mr. Zabel testified that he assisted in the drafting of the Jim Peace memo, and he (Mr. Zabel) added the last sentence "*These employees will not receive additional increases until they have worked enough hours to exceed $15.00 on the existing wage scales."*

75. The following points are noteworthy:

    a. The Employer was unilaterally and voluntarily paying higher than the Collective Agreement scale rates until October 1, 2018. Effective October 1, 2018 the Employer was lawfully required to pay the minimum wage.

    b. As long as the Employer was paying employees at rates above the minimums on the wage grid, the Union would not have good reason to grieve. Rod Wood addressed this in his testimony, he said he was not going to "stand in the way of an employee receiving a wage increase."

c. Since the pay increase was entirely voluntary that the Union had no possible legal basis to challenge the Employer's self-imposed and potential restricting condition that "*These employees will not receive additional increases until they have worked enough hours to exceed $15.00 on the existing wage scales.*" Of course, the Employer could only apply the "condition" for so long as the "premium" was voluntarily being paid by the Employer and as long as the circumstances were not changed by any new collective agreement language.

76. The "condition" (*These employees will not receive additional increases until they have worked enough hours to exceed $15.00 on the existing wage scales*") set out in the Jim Peace memo (or any other similar restricting or exempting condition does not appear in the memorandum of settlement executed between the parties on August 21, 2018 (i.e. Collective Agreement) or indeed in any of the written proposals exchanged earlier during negotiations. All the written proposals were drafted by the Employer. There was no written collective agreement proposal or language that states, "*These employees will not receive additional increases until the have worked enough hours to exceed $15.00 on the existing wage scales"* or any language exempting the minimum wage rate from the application of the "general increase" that is applicable to "increase all scales and steps".

77. It would have been a simple matter for the Employer to put those words in the collective agreement (or in any proposal) if that was the mutual consensus, particularly since the Employer had already created the Jim Peace memo, but it was not done or ever proposed to be part of the collective agreement in writing by the Employer. This omission is particularly significant since collective bargaining occurred over multiple dates (June 13-14, August 21) both before and after the "Jim Peace memo". If there was a truly a consensus that the minimum wage rate of $15,00 was "exempt from the general increase" that is otherwise applicable to "increase all scales and steps", it is significant that there is no mention of the consensus in the collective agreement proposals prepared (prepared by the Employer) over that period of time. The Employer's own subjective understanding (or misapprehension) of the agreement does not establish consensus.

78. As already expressed by Arbitrator Casey in Cardinal Coachlines, [2018] A.G.A.A. No. 1 and in other cases:

> …the intention must be gathered from the written instrument. The function of the Court is to ascertain what the parties meant by the words they have used; to declare the meaning of what is written in the instrument, not of what was intended to have been written; to give effect to the intention as expressed, the expressed meaning being, for the purpose of interpretation, equivalent to the intention.

79. Long after the memorandum was executed the Employer sought to add wording to the wage schedule. On April 18, 2019, more than 8 months after the Memorandum of

Settlement was signed and ratified to become a collective agreement, Mr. Zabel, on behalf of the Employer wrote (Exhibit 20):

> *Please see the attached wage schedule, inclusive of language similar to what was sent in the email by Jim Peace.*

The new wording in the wage schedule (also Exhibit 20) is highlighted in yellow in the Appendix sent with the Email:

> *Effective July 22, 2018 the Co-operative voluntarily moved all employees making less than $15.00 per hour to $15.00 per hour in advance of the October 1, 2018 legislative changes to minimum wage. These employees will not receive additional increases until they have worked enough hours to exceed the $15.00 on the existing wage scales. Affected wage scale steps are highlighted in grey.*

80. It was obvious to the Employer at this point that, without additional wording (which of course was not agreed to by the Union during bargaining, and which was never included in any bargaining written proposal exchanged between the parties), there was no basis for an interpretation of the Collective Agreement that defers or delays wage increases for some employees "*until they have worked enough hours to exceed the $15.00 on the existing wage scales"*

81. The Union submits that the Board is statutorily prohibited from adding words to the Collective Agreement. The Board is bound by the words used by the parties and cannot add the words *"These employees will not receive additional increases until they have worked* enough *hours to exceed the $15.00 on the existing wage scales" or anything similar.* The Board cannot "add" words exempting the wage increase from applying to the minimum wage, which was one of the wage rates in effect on the Anniversary date that the Employer was lawfully required to pay.

82. The addition of those words by the arbitrator or an interpretation of the collective agreement that included such a restriction would have the effect of adding words to the Collective agreement, something that an arbitrator is statutorily prohibited from doing. It is submitted that by operation of section 142 of the Alberta Labour Relations Code, the Board is prohibited from adding the language: "*These employees will not receive additional increases until the have worked enough hours to exceed $15.00 on the existing wage scales.*"

83. The statements of both negotiators made after the memorandum of agreement was reached but before the grievance was filed are compelling evidence to support the assertion that the parties did not share an understanding during bargaining that the minimum wage rate would be exempted from the general wage increase applied to "all steps and scales on the anniversary dates. In an April 4, 2019 email from Tom Zabel

to Rod Wood (Exhibit 11) Mr. Zabel, for Pincher Creek wrote:

> *I looked through my bargaining notes and discussed with my committee, and I can't find any discussions on overriding the wage scales to include the $15.00 an hour. …There was no discussion or agreement regarding how it would be included in the CBA or if so how it would appear*."

84. Rod Wood replied April 7, 2018: Although it is correct that the mechanics of the $15.00 increase was never discussed at the table, the actual increase was agreed to by both parties during the negotiations. …

85. The Employer's own statements and explanations also demonstrate that the Employer itself is "internally inconsistent" about what it claims was agreed. What exactly was agreed? When? Consider:

a. As previously noted, Mr. Zabel testified that in bargaining the Employer explained that it was trying to achieve an agreement where, *"in the event the minimum wage exceeded the wage scale step for the employee, the employee would receive the minimum wage until that time when their rate as per the wage scale step exceeds the minimum wage*" (see Mr. Zabel's notes – Exhibit 15). Mr. Zabel testified that he reiterated this statement several times during negotiations (Note: His notes do not clearly record the words actually used on other occasions).

b. Compare that against the wording suggested on April 18, 2019, proposed by Mr. Zabel as reflecting the agreement. He wrote (Exhibit 20):

> *Please see the attached wage schedule, inclusive of language similar to what was sent in the email by Jim Peace.*
>
> *Effective July 22, 2018 the Co-operative voluntarily moved all employees making less than $15.00 per hour to $15.00 per hour in advance of the October 1, 2018 legislative changes to minimum wage. These employees will not receive additional increases until they have worked enough hours to exceed the $15.00 on the existing wage scales. Affected wage scale steps are highlighted in grey.*

Note: This wording (also Exhibit 20) is highlighted in yellow in the Appendix sent with the Email.

86. A comparison demonstrates that the wording between the versions is different, and the effects of the wording are different. In these circumstances – where *the Employer itself has offered two differently worded versions of what it claims was the verbal consensus* reached with the Union, it is submitted that the Arbitration Board cannot reasonably

conclude that there was actually a "consensus" between the Employer and the Union. Words matter. The Employer cannot establish that a consensus was reached when it is in effect asserting the parties reached an agreement with wording that was "something like this" or approximately that", or "similar to the following", particularly when that wording is asserted to detract from or change the meaning of the clear written language in the Collective Agreement.

87. In summary, while is true that extrinsic evidence "can serve as an aid to resolving ambiguity" in certain circumstances, that does not compel the admission of extrinsic evidence in every case. Extrinsic evidence cannot be used when there is no ambiguity in the language, and in the face of a conclusion that such evidence would be inconclusive in any event. In this case, there is no basis for the admission of extrinsic evidence as an aid to interpretation (since there is no ambiguity), and even if there were, the extrinsic evidence of bargaining history does not reveal a consensus between the Union and the Employer to ascribe a particular meaning to any ambiguous language in Appendix A.

Delay

88. The Employer raised the issue of an "untimely grievance" in its opening. Although we will respond to this issue more fully when we receive the submissions of the Employer, the Union will briefly explain its position that the grievance was "timely".

89. The tentative collective agreement was reached August 21, 2018. The Union notified the Employer of ratification on September 12, 2018 (see Exhibit 18).

90. The parties were slow to finalize the implementation of the wording changes into the agreement. Except for the issue of retroactivity in year one, neither party expressed any urgency to finalize incorporation of the previously agreed changes.

91. Following notification of ratification, Mr. Zabel on behalf of Pincher Creek Co-op advised that he "had capacity" to attempt to attempt to incorporate the changes that were in the signed written memorandum into the overall Collective Agreement. He delivered a draft to the Union on October 25 (Exhibit 12).

92. On November 14, 2018 (Ex 13) the Union replied that "*The wage grid for year one of the CBA matches our rates. Please initiate the payment retroactively. While there is no issue with the agreed-upon rates, we reserve the right to dispute further calculations are amounts paid, should the need arise*."

93. The Union followed up January 10, 2019 with its understanding of the remaining changes (Exhibits 14 and 14A). See also Exhibit 19A.

94. The Employer's response (February 5, 2019 Exhibit 19A) neither agreed nor disagreed with the Union's version of the incorporated changes. On February 5, 2019 Mr. Zabel

wrote:

> *Sorry for the delay, Michele on our team finalized our review earlier this week.*
>
> *…I expect you we may want to have some conversations on the wage schedule, I wasn't entirely sure how the schedules in your draft were produced.*
>
> *I will be out of the office from the afternoon of February 8 until March 4.*

95. The first Anniversary of the agreement occurred April 7, 2019. The general wage increase provisions in the Agreement applicable to minimum wage were required to be implemented from this date forward. The first pay period following the implementation of these changes was April 22, 2019 (Testimony of Rhonda Poch).

96. On April 18, 2019 the Union sent correspondence to the Employer (Exhibit 23) requesting confirmation that the Employer would be paying the general wage increase of 1.75% (effective April 7, 2019) to all employees. The Union's correspondence made clear that the Union was seeking an increase to all wage rates being paid on the anniversary dates, including seeking an 1.75% increase to lowest wage payable under agreement (the $15.00 per hour minimum wage).

97. The Employer's response (Exhibits 23 and 24) was to advise that the information from the Union "doesn't match what we have seen on our end. I will need to get back to you…" and "it would be beneficial to set up a call".

98. On April 25 the parties had a discussion about the apparent difference in position. (Testimony; The notes of that conversation are at Exhibit 21). The Union explained its understanding of the agreement that the $15.00 minimum wage would remain a starting wage, but it still would be subject to the general increases in years two and three. The Employer disagreed. The Union filed the Grievances on April 26, 2019, the day after it was clear that there was a disagreement between the parties.

99. The Union submits that the grievance was timely. The Collective Agreement Language provides as follows:

> *<u>ARTICLE 10 – GRIEVANCE PROCEDURE</u>*
>
> 1. *Where a difference arises between the parties relating to the application, interpretation, operation or any alleged violation of this Agreement, such differences shall constitute a grievance and the parties agree than an honest effort will be made to settle the differences in the following manner:*
>
> 2. *The Union agrees to advise the Co-operative of the names of the Chief Steward and any Stewards in writing and also of any changes from time to time.*

3. *Any employee, Chief Steward, Steward designate, Local Representative, the National Representative or the Co-operative General Manager may present a grievance. Any grievance which is not presented within ten (10) calendar days following the event giving rise to such grievance shall be forfeited and waived by the grieving party.*

4. *All grievances shall be submitted in writing and set forth the alleged violation(s) of the Agreement.*

5. *The procedure for the adjustment of disputes and grievances shall be as follows, after all attempts to verbally settle the alleged violation of the collective agreement then the following procedure will begin.*

<u>First Step</u> – The grievance shall be submitted in writing to the Department Manager, who shall deliver a written response within seven (7) days. If the response if not satisfactory, the aggrieved party must proceed to the next step within seven (7) days.

<u>Second Step</u> – The grievance shall be submitted in writing by the chief steward or designate to the General Manager, who shall delivery a written response within seven (7) days. If the response is not satisfactory, the aggrieved party must proceed to the next step within seven (7) days.

<u>Third Step</u> – The grievance shall be submitted to Arbitration by the local representative or designate after all attempts to resolve are exhausted. At this time both parties may mutually agree to an extension of this time limit to facilitate further discussion. The Union and the Co-operative shall attempt to nominate an impartial Arbitrator. Failing to agree upon such an impartial Arbitrator within seven (7) working days, excluding Sundays and holidays, the parties shall request the Minister of Labour to appoint an Arbitrator. The Arbitrator, in reaching his or her decision shall be governed by the provisions of this Agreement and a decision of the Arbitrator shall be final and binding on all parties.

It is distinctly understood that the Arbitrator is not vested with the power to change, modify or alter this Agreement, but may only interpret the provisions of the Agreement. It is agreed that the expenses of the Arbitrator shall be borne equally by the Union and the Cooperative.

6. *The procedure for settling disputes set forth in this Article shall be strictly adhered to and where any party fails to proceed to any step in this procedure within the time limit therefore, he shall be deemed to have conceded the grievance in favour of the other party, but were a dispute involves a question of general application of the Agreement, the Co-operative and the Union agree to bypass Step One.*

7. *The parties agree that in the event of a termination of employment, the grievance procedure may be activated at Step Two.*

8. *Any time spent by Stewards, The Chief Steward or employees in dealing with grievances, attending grievance meetings or disciplinary meetings shall be considered as paid time as per the wage and overtime schedules.*

100. The Collective Agreement explains what constitutes a grievance. It states:

> *Where a difference arises between the parties relating to the application, interpretation, operation or any alleged violation of this Agreement, such differences shall constitute a grievance and the parties agree than an honest effort will be made to settle the differences in the following manner:*
>
> > *Any grievance which is not presented within ten (10) calendar days following the event giving rise to such grievance shall be forfeited and waived by the grieving party.*

101. In this case, "the event giving rise to such grievance" was the non-payment of the alleged negotiated increase to the minimum wage beginning on the first anniversary (April 7, 2019). The first Anniversary of the agreement occurred April 7, 2019. The general wage increase provisions in the Agreement applicable to minimum wage were required to be implemented from this date forward. The first pay period following the implementation of these changes was April 22, 2019 (testimony of Rhonda Poch). This would be the earliest date that Employer would have failed to comply with the Collective Agreement.

102. A formal grievance was filed April 26, 2019, within the 10-day period. The grievance is timely.

103. In the alternative, "the event giving rise to such grievance" occurred on April 18, 2019. On that day the Union sent correspondence to the Employer (Exhibit 23) requesting confirmation that the Employer would be paying the general wage increase of 1.75% (effective April 7, 2019) to all the employees. The Union's correspondence made clear that the Union was seeking an increase to all wage rates being paid on the anniversary dates, including seeking an 1.75% increase to lowest wage payable under agreement (the $15.00 per hour minimum wage). The Employer's response (Exhibits 23 and 24) on the same day was to advise that the information from the Union "doesn't match what we have seen on our end. I will need to get back to you…" and "it would be beneficial to set up a call". In this case, "the event giving rise to such grievance" was the notification from the Employer that the Union's expectation that there would be an increase to "to lowest wage payable under agreement (the $15.00 per hour minimum wage) would not be met. A formal grievance was filed April 26, within the 10-day period (from April 18, 2019). The grievance is timely.

Remedy Sought

104. The grievance should be sustained. Subject to the specific exceptions listed in the Memorandum (relating to AgroClerk/Petro Clerk discussed above), the general wage increase in Appendix A that is an "increase to all steps and scales" applies to increase all the wages that are lawfully required to paid by the Employer, including the minimum wage of $15.00 per hour, effective on the anniversary date. Employees should be paid accordingly. The Union's version of the wage grid (Exhibit 14A) should be declared to be the wage grid in effect.

EMPLOYER ARGUMENT

Facts and Evidenced

Introduction and Parties

1. This is the written argument of Pincher Creek Co-operative Association Ltd. (the "**Employer**" or "**Pincher Creek Co-op**") with respect to the group grievance and the policy grievance (collectively, the "**Grievances**") filed by Unifor, Local 4050 (the "**Union**") on April 26, 2019 on behalf its members regarding the Employer's alleged failure to pay the percentage increase for year two to some rates and steps as listed in the Memorandum of Agreement dated August 21, 2018 and ratified on September 13, 2018 (the "**MOA**").

2. Pincher Creek Co-op operates a full-service retail grocery store, a gas bar and convenience store, a Home Centre, an Agro Centre and bulk fuel delivery in the Town of Pincher Creek, in the Province of Alberta.

3. The Union represents all employees at the Pincher Creek and Cowley site except office personnel. Pursuant to Appendix "B" of the Collective Agreement, the bargaining unit excludes the following positions from the bargaining unit: the General Manager, Controller, Accountant, Produce Manager, Meat Manager, Farm and Home Manager, Agro Manager, Petroleum Manager, Cowley Co-op manager, Grocery Manager, Bakery Manager, Deli Manager, Building Materials Estimator, Human Resources Manager/Communications Manager, Gas Bar Manager, Kitchen Sales Person, Food Store Manager, Building Package Sales Person, Asset Protection/Health and Safety Manager, and Agronomist.

4. The Union and Pincher Creek Co-op are governed by a collective bargaining agreement effective April 9, 2018 to April 9, 2021 (the "**Collective Agreement**"). This Collective Agreement has been drafted but not executed by the parties due to a disagreement over the wage schedules that came about after the parties ratified the MOA.

5. At the most recent round of bargaining the parties agreed to and ratified the MOA. The relevant provision in the MOA for the purposes of the Grievances is Article 13, which describes general wage increases and amends Appendix A – Wage Schedule of the Collective Agreement (the "**Wage Schedule**"). Under the MOA, the parties agreed to increase the wages for all steps and all scales contained within the Wage Schedule by 1.75% in each of the three years in the term. The MOA sets out exclusions that do not receive the general wage increase, but rather a greater increase.

6. The MOA states as follows in regard to general wage increases:

> 13. Appendix A
>
> General Wage Increases
>
> Year 1: Increase all scales and steps by 1.75% excluding the Head AgroClerk Classification retroactive to expiry of previous agreement. Employee in the new Head AgroClerk Classification would receive retroactive pay based on this percentage, based on their rate paid as a Head Petro/AgroClerk prior to ratification
>
> Year 2: Increase all scales and steps by 1.75%, excluding the Head AgroClerk Classification and AgroClerk Classification
>
> Year 3: Increase all scales and steps by 1.75%

7. In addition to the MOA, the relevant portions of the Collective Agreement for the purposes of the Grievances are set out below:

> Article 4 – Management Rights
>
> 1. Subject only to the terms of this Agreement, the Union recognizes the undisputed right of the Co-operative to operate and manage its business in all respects in accordance with its commitments and responsibilities. Without limiting the generality of the foregoing, the direction of the working force including the right to hire, promote, transfer, demote, suspend, discipline and discharge for just cause and the methods, processes and means of marketing, production and handling are vested in the Co-operative provided that the Union shall have the right under Article 10 hereof to take grievance procedure with respect to the extent of any discipline invoked.
>
> Article 7 – Wages
>
> 1. Wages, salaries and classifications of work are attached as Appendix "A" and shall be observed by the Co- operative on the effective dates indicated in the Appendix and for the duration of this Agreement.

8. Pincher Creek Co-op submits the correct interpretation of Article 13 in the MOA is that the negotiated percentage wage increases apply to all previously negotiated steps and scales as set out in the Expired Collective Agreement. Employees who were making less than $15.00 per hour under those prior steps and scales would be paid the minimum wage of $15.00 per hour (which came into force on October 1, 2018 but was implemented by the Company earlier on July 22, 2018), but would only receive additional pay increases thereafter once the scale steps as they were on April 1, 2017 (namely, the final year of the prior collective agreement) plus the negotiated contract increases exceed $15.00 per hour. To put it another way, the first-year increase of 1.75% is applied to all steps and scales as they existed in the third and final year of the expired collective agreement. If that amount is less than $15.00 per hour, employees continue to be paid $15.00 per hour. It is only when the steps and scales in the prior collective agreement, together with the negotiated annual increases in the new collective agreement, exceed $15.00 per hour that an employee receives a pay increase. The practical effect is that some employees' wages could be "frozen" or "red circled" at $15.00 per hour for several years until their previously negotiated steps and scales, together with the newly negotiated percentage increases, caught up to and surpassed the NDP Government legislated minimum wage.

9. The Union takes the position that the wording of the MOA requires the parties' previously negotiated wages, step and scales to be completely ignored and overridden. Under the Union's interpretation, all employees (including those who had recently received substantial pay increases due to Government increases in minimum wage) receive a further increase of 1.75% in year two, and an additional increase of 1.75% in year three, regardless of whether their previously negotiated wage scale step, together with the new contractual increases, met or exceeded $15.00. Interestingly, the Union does not allege that the 1.75% increase in the first year should be applied on top of employees' current wages, which were at least $15.00 per hour at the time when the MOA was entered into and ratified.

Bargaining and the First MOA

10. Pincher Creek Co-op called two of the Employer's bargaining committee members, Tom Zabel and Brian McGillivray, to testify. They had specific recollections of what was discussed at the bargaining table, and presented their evidence of in a clear, cogent and consistent manner. Further, their evidence was fully supported by Mr. Zabel's detailed bargaining notes, taken contemporaneously with the bargaining discussions.

11. The Union called only one of its bargaining committee members to testify, namely its spokesperson Rob Wood, despite having a second bargaining committee member present at the hearing. When questioned, Mr. Wood admitted that he did not recall many of the items discussed during bargaining, including wages, and certainly could not recollect details. For the most part, he had no reliable recollection of bargaining discussions. His bargaining notes (Exhibits 4 and 9) offered little or nothing to assist him or the Union's position. His evidence regarding bargaining discussions and proposals was unreliable,

incomplete and replete with mistakes and contradictions.

12. The Employer respectfully submits the evidence of Tom Zabel, the Employer's chief spokesperson, and Brian McGillivray should be preferred over that of Mr. Wood regarding what actually occurred and was said during bargaining, both at the table and in "side bar" discussions between Mr. Zabel and Mr. Wood.

13. Bargaining commenced on April 18, 2018. Pincher Creek Co-op presented an opening proposal that summarized issues to be addressed during bargaining (the "**Company's Opening Proposal**"). At this time, Pincher Creek Co-op did not present a fulsome monetary package and explained it would address wages in a subsequent monetary proposal.

14. The Union provided its opening proposals that same day and advised it was seeking substantial wage increases. The Union provided no particulars of its wage request on April 18, 2018. Language and some monetary items (other than wages) were discussed.

15. Bargaining resumed on June 13, 2018 and lasted for two days. On these dates, bargaining focused primarily on monetary issues including wages.

16. At the bargaining table on June 13, 2018, Pincher Creek Co-op was clear – while they were not planning layoffs, the $15.00 minimum wage increase is a major impact to their business. Pincher Creek Co-op estimated the impact being $85,000.00 in staffing costs in just the first year after the $15.00 minimum wage comes in. In order to pay for that, it would require a growth in revenue of $2.1 million within the next year based on a 4% margin on goods. That was a big number for an organization that runs budget deficits and does not even turn a profit unless and until they receive patronage payments from Federated Co-operatives Limited ("FCL").

17. Pincher Creek Co-op explained at the bargaining table that an employee entitled to a pay increase due to the minimum wage increase would continue to be paid $15.00 per hour as required by law; but would not receive any additional wage increase until their pay scale plus contract increases caught up to and exceeded $15.00. As set out in his bargaining notes, Tom Zabel stated at the table: "In the event the minimum wage exceeds the wage scale step for an employee, the employee shall receive the minimum wage until that time when their rate as per their wage scale step exceeds the minimum wage."

18. The Union's spokesperson, Rod Wood, instantly understood what Tom Zabel meant because Rod Wood stated that the practical effect of the Employer's position was that some employees' pay would be frozen for the life of the new collective agreement - specifically he said their "next wage increase is 48 months down the road." He stated that Pincher Creek Co-op was going to have problems retaining and attracting employees.

19. Later that same day (June 13, 2018 at 1:40 PM during the Union's response), Rod Wood reiterated that employees "aren't going to see a raise".

20. The Employer came back at 2:24 PM on June 13, 2018 with a monetary proposal that included wages. The Company proposed a 5-year term and general wage increases as follows:

> Year 1: Increase all scales and steps by 1%, excluding the Head AgroClerk
>
> Classification retroactive to expiry of previous agreement. Employee in the new Head AgroClerk Classification would receive retroactive pay based on this percentage, based on their rate paid as a Head Petro/AgroClerk prior to ratification
>
> Year 2: Increase all scales and steps by 1%, excluding the Head AgroClerk Classification and AgroClerk Classification
>
> Year 3: Increase all scales and steps by 1%
>
> Year 4: Increase all scales and steps by 1.25%
>
> Year 5: Increase all scales and steps by 1.75%

21. After this proposal was presented, the two chief spokespersons (Rod Wood for the Union and Tom Zabel for the Employer) met separately for an off the record discussion. Rod Wood advised Tom Zabel that the 5-year term was too long and was not acceptable to the Union. Tom Zabel (on behalf of Pincher Creek Co-op) advised Rod Wood that one way to resolve some of the issues regarding the minimum wage and employees staying frozen at $15.00 for the life of the agreement would be to change the duration of the agreement from at 5-year term to a 3-year term. At the Arbitration Hearing, Rod Wood did not have any specific recollection of this off the record discussion; but acknowledged that it is possible it took place.

22. After this side bar discussion between the two spokespersons, the full bargaining committees returned to the table and during the Union's response Rod Wood again stated on June 13, 2018 that "…with the grid being swallowed, people may or may not see a wage increase." The Union had clearly understood the Employer's position on wages, having acknowledged that three times now.

23. Rod Wood proposed a shorter term and a recalibration of the Wage Schedule to address this issue during the parties' last face-to-face meeting on June 13, 2018.

24. Rod Wood testified that he did not have any specific recollection of saying "recalibration", but agreed it is a word he would have used. He further testified that he was unable to recall what he would have meant by recalibration at that time in the context of that

bargaining table.

25. Bargaining continued the next day on June 14, 2018. Pincher Creek Co-op rejected the Union's recalibration proposal. Pincher Creek Co-op countered with a revised monetary proposal. Consistent with the "side bar" discussion that occurred the day before, the Employer amended its position to propose a 3-year term and included general wage increases as follows:

> Year 1: Increase all scales and steps by 1.25%, excluding the Head AgroClerk
>
> Classification retroactive to expiry of previous agreement. Employee in the new Head AgroClerk Classification would receive retroactive pay based on this percentage, based on their rate paid as a Head Petro/AgroClerk prior to ratification
>
> Year 2: Increase all scales and steps by 1.5%, excluding the Head AgroClerk Classification and AgroClerk Classification
>
> Year 3: Increase all scales and steps by 1.5%

26. In presenting this amended proposal, Tom Zabel stated at the bargaining table: "We understand that a 5-year deal would be too long to properly assess market forces, and would leave some employees in a position where they wouldn't get an increase for potentially 48 months. However, recalibration of the wage grid creates a wage and cost escalation that we cannot absorb. Our amended proposal is for a 3-year deal, however, our position on the application of minimum wage is unchanged".

27. Mr. Zabel went on to explain at the bargaining table that under the Employer's proposal, employees who are below the $15.00 minimum wage threshold get a sizeable increase on October 1, 2018, and those above that threshold will receive annual increases. In so doing, Mr. Zabel made it clear that an "increase to all scales and steps" meant that the negotiated increases would be applied to the wage rates contained within the wage schedule under the previous collective agreement, effective April 9, 2015 to April 9, 2018 (the "Expired Collective Agreement").

28. Mr. Zabel explained at the bargaining table that the Employer's amended monetary proposal represented a compromise. Pincher Creek Co-op got time to absorb the business changes and allow the wage market to stabilize, and employees only had to wait about 3 years to negotiate their next increase (rather than 48 months). Pincher Creek Co-op's position is clearly captured in Tom Zabel's bargaining notes dated April 18, 2018 to June 14, 2018.

29. Again, the Union recognized that under the Employer's revised monetary proposal presented on June 14, 2018, there was a shorter term but still "its potentially 3 years without a wage increase" as stated by Rod Wood during the Union response's on June 14, 2018 at 10:59 AM.

30. The Employer never changed its position on the wage freeze, but did adjust the percentage increases applicable to those employees who were above the $15.00 threshold. It was the Employer's proposal language that was ultimately accepted, showing the Union ultimately agreed with the Employer's position and interpretation.

31. At no point during bargaining did Pincher Creek Co-op agree that the negotiated percentage increases would be added to the $15.00 minimum wage rather than to the wage rates contained within the wage schedule under the Expired Collective Agreement. Further, at no point during bargaining did the Union communicate the position that the Wage Schedule should not include any wage rates below the $15.00 minimum wage and that annual increases had to be applied on top of that.

32. On June 14, 2018, the parties tentatively agreed to a Memorandum of Agreement (the "**First MOA**") containing *Pincher Creek Co-op's proposed language* for a 3-year term, which was consistently presented, explained and understood by both parties to mean that some employees' wages would remain frozen at the new $15.00 minimum wage for the entirety of that 3-year term.

33. On or about June 27, 2018, the Union's bargaining committee presented the First MOA at a membership meeting, but a majority of those casting ballots voted against it. The First MOA was not ratified.

Increase in the Minimum Wage to $15.00

34. In order to remain competitive with other employers in the area, Pincher Creek Co-op implemented the $15.00 per hour minimum wage on July 22, 2018 - prior to it coming into force on October 1, 2018.

35. On July 23, 2018, Jim Pearce, the former General Manager of Pincher Creek Co-op, sent an email to the Union advising that effective as of July 22, 2018, Pincher Creek Co-op had moved all employees who were making less than $15.00 per hour up to $15.00 per hour. In this email correspondence, the Union was reminded that any employees whose salary was bumped to $15.00 per hour would not receive additional wage increases until they had worked sufficient hours to exceed $15.00 on the Wage Schedule. This was consistent with the Employer's position throughout all of bargaining.

Bargaining Resumes and results in a Ratified MOA

36. On August 21, 2018, the parties returned to the bargaining table. They had agreed to resume bargaining following the rejection of the First MOA.

37. Shortly before returning to the table, Tom Zabel and Rod Wood had an off the record discussion, during which Tom Zabel advised that Pincher Creek Co-op was already at the top of its wage mandate. The parties agreed that no major financial changes would

be made to the First MOA when bargaining resumed. Mr. Zabel and Rod Wood also agreed that items previously agreed at bargaining would not be re-opened. Rod Wood told Tom Zabel he did not want to see major changes or improvements to the deal after the bargaining unit had rejected the First MOA. Rod Wood described his objective as "putting lipstick on a pig". This discussion set the stage for what would be discussed when bargaining resumed.

38. Rod Wood testified he had no memory of telling Mr. Zabel his objective was to put "lipstick on a pig", but he did not deny it and acknowledged that is an expression he would have used.

39. Tom Zabel testified the side bar discussion confirmed the parties' previous agreement and understanding that some employees' wages would remain frozen at $15.00 per hour for the life of the new agreement – stood. Anything else would constitute a major financial change to the deal and would require much more than a mere application of lipstick.

40. Bargaining resumed on August 21, 2018 around 9:20 AM, with Pincher Creek Co-op stating at the bargaining table that they were at the "top of their wage mandate" and reiterating that they were "not in a position to compound the impact of the minimum wage increases". Pincher Creek Co-op acknowledged they had brought the $15.00 minimum wage in before it was required due to market pressures, but stated they "could not build in wage escalations beyond what has been proposed already".

41. There was some back and forth on percentages and some other minor points, but Pincher Creek Co-op never changes its position on wages – that they could not compound the impact of the $15.00 minimum wage, and that some employees would not receive an increase over the term of the agreement.

42. Pincher Creek Co-op presented a modified monetary proposal on August 21, 2018 that was ultimately accepted by the Union. This proposal was for a 3-year term and included general wage increases as follows:

> Year 1: Increase all scales and steps by 1.75%, excluding the Head AgroClerk
>
> Classification retroactive to expiry of previous agreement. Employee in the new Head AgroClerk Classification would receive retroactive pay based on this percentage, based on their rate paid as a Head Petro/AgroClerk prior to ratification
>
> Year 2: Increase all scales and steps by 1.75%, excluding the Head AgroClerk Classification and AgroClerk Classification
>
> Year 3: Increase all scales and steps by 1.75

43. A fundamental aspect of this proposal, which had been discussed in detail throughout the course of bargaining and did not change at any point, was the fact that employees who had received an increase to $15.00 per hour would not receive an additional increase on top of $15.00 until that employee's prior wage scale step with increases exceeded $15.00. Some employees' pay would be frozen. In other words, under Pincher Creek Co-op's language, the phrase "increase to all scales and steps" meant that in year one of the new agreement 1.75 % would be applied to the wage rates, steps and scales in the final year of the wage schedule under the Expired Collective Agreement. Pincher Creek Co-op's monetary proposal and the MOA signed on August 21, 2018 contained some sample wage schedules for some positions depicting wage rates lower than the $15.00 minimum wage.

44. This position never changed – it was always part of Pincher Creek Co-op's monetary proposals and it was ultimately Pincher Creek Co-op's monetary proposal language that was incorporated into the MOA tentatively agreed to by the parties on August 21, 2018. That MOA was subsequently ratified by the Union on September 12, 2019, when the majority voted in favour of the MOA.

Year One Retroactive Payments

45. Due to a delay in the drafting of the revised Collective Agreement, Pincher Creek Co-op agreed to draft a proposed Wage Schedule for approval by the Union so that year one retroactive payments could be processed.

46. On October 25, 2018, Pincher Creek Co-op sent a proposed Wage Schedule to the Union. The draft Wage Schedule contained rates lower than the $15.00 per hour. This draft Wage Schedule prepared by Pincher Creek Co-op reflected the agreement that had been reached between the parties at bargaining on August 21, 2018.

47. On November 14, 2018, Rod Wood, on behalf of the Union, advised that the proposed Wage Schedule for year one matched the Union's wage rates and directed Pincher Creek Co-op to issue retroactive payments. In this correspondence, Rod Wood advised that while there was no issue with the agreed upon rates, the Union reserved their right to dispute further calculations, if required.

48. Pincher Creek Co-op issued retroactive payments to eligible employees in accordance with the Wage Schedule provided to the Union on October 25, 2018.

Dispute regarding the Interpretation of the MOA

49. On January 10, 2019, the Union provided Pincher Creek Co-op with a proposed draft of the Collective Agreement. Contained within this draft Collective Agreement was a Wage Schedule that was different than the one provided by Pincher Creek Co-op on October 25, 2018, and that did not reflect what had been agreed to during collective bargaining in regard to employees who were making less than minimum wage prior to July 22, 2018.

50. On February 5, 2019, Pincher Creek Co-op provided the Union with a revised draft of the Wage Schedule reflecting what the parties had agreed to during collective bargaining and said that the parties would likely need to have some discussion in regards to the Wage Schedule.

51. On February 10, 2019, the Union began to take the position that the Wage Schedule could not include any rates lower than $15.00 given that the minimum wage had been increased to $15.00, although this was never stated during bargaining nor was it agreed to at the bargaining table.

52. On March 10, 2019, the Union advised Pincher Creek Co-op that the Union had no interest in including any rates in the Wage Schedule that were lower than the $15.00 minimum wage. Again, the Union never communicated this during collective bargaining nor was this agreed to by Pincher Creek Co-op at bargaining. To the contrary, the Wage Schedule included in the MOA that was ratified included a number of wage steps containing rates lower than the $15.00 minimum wage.

53. On or around March 19, 2019, Rod Wood and Tom Zabel had a telephone call to discuss the Union's new position with respect to the Wage Schedule which did not reflect what the parties had agreed to during collective bargaining.

54. On April 4, 2019, Pincher Creek Co-op advised the Union that it did not agree with its position and that the Union had not bargained for overwriting and recalibration of the Wage Schedule. Pincher Creek Co-op reiterated that the MOA itself contained sample schedules with wages lower than $15.00.

55. On April 7, 2019, the Union sent an email to Pincher Creek Co-op to the effect that the Union was disputing what had been agreed to at the bargaining table.

56. On April 18, 2019, Pincher Creek Co-op provided the Union with a revised proposed Wage Schedule, which reflected the new $15.00 minimum wage and the agreement the parties had reached regarding employees who earned less than minimum wage prior to July 22, 2018 staying frozen at $15.00 per hour until the existing scale step plus annual increases exceeded $15.00.

57. On April 25, 2019, the Union presented Pincher Creek Co-op with the Grievances.

Past Practice Evidence

58. Throughout the term of the Expired Collective Agreement, a number of increases to the minimum wage in Alberta occurred. These increases are set out below:

> October 1, 2015: minimum wage increased from $10.20 to $11.20; October 1, 2016: minimum wage increased from $11.20 to $12.20; October 1, 2017:

minimum wage increased from $12.20 to $13.60

59. At the Arbitration Hearing, Rhonda Poch (Pincher Creek Co-op's Controller) gave evidence with respect to how Pincher Creek Co-op dealt with these minimum wage increases and the negotiated wage rate increases under the Expired Collective Agreement. For example, she testified that on October 1, 2016, one of Pincher Creek Co-op's employees, Aletta McCrory, was being paid $12.20, which was the minimum wage at the time. If the Government had not increased minimum wage to $12.20, Aletta McCrory's wage rate under the Expired Collective Agreement would have been $12.15. On April 2, 2017, there was a contract increase of 2% applied to "all steps and scales" under the Expired Collective Agreement. In Ms. McCrory's case, the negotiated wage increase of 2% was applied to $12.15 - not $12.20, to determine her new wage rate of $12.39. The Union did not grieve.

60. Ms. Poch testified that another Pincher Creek Co-op employee, Cheryl Beck was hired on February 6, 2017 earning a wage of $12.20, which was the minimum wage at the time. The wage rate for her position under the Expired Collective Agreement at that time was only $11.73. On April 2, 2017, there was a contract increase of 2% applied to "all steps and scales" under the Expired Collective Agreement. The negotiated wage increase was added to $11.73 - not $12.20, to determine the 2017 wage rate of $11.96. However, due to the fact that $11.96 is less than the $12.20 minimum wage, Cheryl Beck's wage remained frozen at $12.20. She did not receive a pay increase until she achieved a milestone (hours worked) increase and her contract wage rate exceeded the minimum wage, which occurred on September 30, 2017. Ms. Beck had a role on the Union executive. The Union did not grieve the fact that her wage rate remained frozen at $12.20 from April 2, 2017 until September 30, 2017 when she reached the milestone increase.

61. Similarly, Pincher Creek Co-op employee, Jean Marc Paradis, received a wage increase from $11.73 (which was his contract rate at the time) to $12.20 on October 1, 2016 due to the government having increased minimum wage to $12.20 effective on that date. On April 2, 2017, there was a negotiated contract increase of 2% applied to "all steps and scales" under the Expired Collective Agreement. The 2% negotiated increase was applied to $11.73, not $12.20, to determine Mr. Paradis' new wage rate of $11.96. Due to the fact that the increased contract rate was still less than the $12.20 minimum wage, Jean Marc Paradis' wage remained frozen at $12.20. He did not receive an increase until October 1, 2017 when the minimum wage was increased by the Government once again to $13.60. The Union did not grieve the fact that his pay was frozen from April 2, 2017 to October 1, 2017.

62. Based on the evidence given by Rhonda Poch at the Arbitration Hearing, it is clear that Pincher Creek Co-op's well-established past practice was to pay all government mandated minimum wage increases, but not to increase any employee's wage further until their wage step and scale under the Expired Collective Agreement exceeded the legislated minimum wage in place at the time. Pincher Creek Co-op's interpretation of the MOA is entirely consistent with this past practice, which was well known to the Union

and accepted by them as evidenced by the lack of grievances.

63. Pincher Creek Co-op maintains that the proper interpretation of the MOA is that individuals who were making the $15.00 minimum wage would only receive pay increases when the existing scale steps together with negotiated increases exceed the minimum wage. "All scales and steps" start from and builds upon the scales and steps as stated in Appendix "A" of Expired Collective Agreement.

64. The Union's interpretation of the MOA would result in employees who received a significant wage increase when Pincher Creek Co-op implemented the statutory minimum wage early to then be entitled to a further and additional wage increase shortly thereafter. Any such additional benefit would have had needed to be bargained for during collective bargaining and expressly included in the MOA. This additional benefit was not within the contemplation of the parties at the time the MOA was tentatively agreed and subsequently ratified. As a result, Pincher Creek Co-op submits that the Grievances must be dismissed.

I. Issues

65. The Employer submits that the Grievances raise the following issues:

(a) Who bears the onus of proof in these proceedings?

(i) Preliminary Objection

(ii) Merit of the Grievances

(b) Did the Union forfeit and waive the Grievances by failing to present the Grievances in accordance with the Grievance Procedure set out under the Collective Agreement?

(c) What principles of interpretation should be applied to the MOA?

(i) General Principles of Interpretation

(ii) Interpretation imposing monetary obligations

(iii) Admissibility of Extrinsic Evidence as interpretation aid

(d) Which interpretation of the MOA should be preferred and based on that interpretation, is the alleged failure to pay the wage increase for year two for some rates and steps a violation of the Collective Agreement?

II. Argument

A. Onus of Proof

Preliminary Objection

66. Pincher Creek Co-op raised a preliminary objection in regard to the timeliness of the Grievances (the "**Preliminary Objection**"). Pincher Creek Co-op accepts that the onus regarding the Preliminary Objection rests with it. *Calgary Health Region and AUPE, Local 095 (Copeland)*.

Re, 87 C.L.A.S. 211 (**Tab 1**), at para. 3

67. Pincher Creek Co-op bears the onus of proving that the Union filed the Grievances too late, due to the fact that the Grievances were presented more than 10 calendar days following the event giving rise to the Grievances.

City of Fort Saskatchewan v. CUPE, Local 843, Re, 7 C.L.A.S. 68 (**Tab 2**), at para. 6

68. It is respectfully submitted that Pincher Creek Co-op has discharged the onus required for the Preliminary Objection.

Merit of the Grievances

69. In these circumstances, the Union bears the burden of proving the Grievances and that Pincher Creek Co-op has violated the Collective Agreement by its alleged failure to pay the percentage increase for year two to some rates and steps as listed in the MOA.

70. As a general principle, in interpretation grievance arbitrations, the burden rests with the grievor to establish a breach of the collective agreement.

Brown and Beatty, *Canadian Labour Arbitration*, 5th ed. (Aurora, Ont.: Canada Law Book, 2014) ["**Brown and Beatty**"] (**Tab A**), at 3:2400

71. Arbitral jurisprudence has established that the onus rests with the Union to prove its allegations on a balance of probabilities. There is no onus on Pincher Creek Co-op to prove the contrary. The law in this regard is correctly stated in *International Nickel Co. of Canada Ltd. and USW, Re* (1969), 20 LAC 51 (**Tab 3**), at para. 6:

> When the employee files a grievance for any matter, whether discipline or not, he actually alleges that the company is in breach of the contract existing between them and in all but discipline matters (discharge or penalty) there is no question upon whom the conduct of the action and the burden lies, the grievor or the Union, as the case may be. This type of grievance is then conducted in what might be termed a normal court procedure for breach of contract actions with the Union leading and with the right of reply after the company's defence.

72. In *Consolidated Aviation Fuelling & Services (Pacific) Ltd. v Teamsters, Local 213* (1987),

30 LAC (3d) 130 (**Tab 4**), Arbitrator Greyell dealt with the onus on a party asserting a particular interpretation of a collective agreement, pointing out that the onus is not easily discharged where the language is less than clear, and the intention of the parties is not readily ascertained. He referred to an unreported decision of Arbitrator Hope in *British Columbia Hydro & Power Authority and Int'l Brotherhood of Electrical Workers, Local Union 258***,** January 5, 1987, and in particular to the following passage at 133:

> I repeat that the common law and arbitral authorities support the proposition a party, asserting an interpretation upon which it must rely in order to succeed in the dispute, bears the burden of proving on a balance of probabilities that its interpretation is correct, including the burden of resolving ambiguous language consistent with its interpretation. One can start with the general proposition that disputed interpretations, in the vast majority of disputes, arise in the context of an allegation by a Union that an employer has acted in breach of the collective agreement in some particular or another. In that context, **it is equally clear that a party asserting a breach of an agreement bears the burden of proving both the agreement and the breach**. That aspect of the burden of proof is addressed in *Phipson on Evidence,* 10th ed. (1963), on p. 93, as follows:
>
> > ... in actions of contract, proof of the contract, performance of conditions precedent, breach of damages, is upon the plaintiff; while the defendant has the onus of facts pleaded in confession and avoidance ...
>
> [Emphasis added]

73. A similar conclusion was expressed in Palmer, *Collective Agreement Arbitration in Canada*, 2nd ed. (1983). On p. 124 Professor Palmer said:

> ... the onus is on the grievor, whether employer, Union or employee, to establish the preferability of his interpretation of the relevant collective agreement provision ...

74. Further, in circumstances where a Union is arguing that its interpretation of a collective agreement is the correct interpretation, and the Union is seeking to impose a monetary obligation on the Employer, the onus rests with the Union. In *Re Wire Rope Industries Ltd. and United Steelworkers, Local 3910* (1982), 4 LAC (3d) 323 (**Tab 5**), the Board stated:

> We are of the view that the Union carries the same kind of burden as it would have when it attempts to assert a right to a monetary benefit and to impose an obligation on an employer to pay the same. When a Union asserts that a provision in the collective agreement has taken away a fundamental management right to organize and reorganize its work-force for *bona fide* business reasons, the same kind of precise language must be found as arbitrators have held is necessary when a Union attempts to impose an obligation on an employer to pay a benefit. We are of the view that arbitrators ought not to

> impose a monetary obligation on an employer that he clearly did not bargain to pay.

75. In these circumstances, the Union's interpretation of the MOA imposes a monetary obligation on Pincher Creek Co-op, and therefore the onus of proving that this monetary obligation was bargained for and agreed to by both parties, rests with the Union.

76. Pincher Creek Co-op acknowledges and accepts that there is an alternative line of arbitral authority which stands for the principle that the interpretation of a term of a collective agreement is a question of law; and therefore not an issue that engages onus of proof. This line of decisions is based on the principle that the issue of onus is only raised when there is a conflict respecting facts and that it has "no bearing in situations involving questions of law, which includes the interpretation of a term in a collective agreement.

Brown and Beatty, at 3:2400

77. In the above circumstances, the arbitrator must determine the meaning intended by the parties to the collective agreement in question, using "generally accepted canons of construction".

Brown and Beatty, at 3:2400

78. The above principle regarding the issue of onus in matters involving the interpretation of collective agreements is set out clearly in *Canada Safeway Ltd. and UFCW, Local 401 (Policy Grievance), Re*, [2013] A.W.L.D. 4170 ["***Canada Safeway***"] (**Tab 6**), at para 196:

> This case requires me to both interpret the provisions of the Letter of Understanding and to determine whether it has been breached, and if so, what the appropriate remedy is. The interpretative exercise in my view is not one that engages issues respecting the onus of proof but rather the task of interpreting the words used by the parties to determine their intention. The second issue, determining whether the Collective Agreement has been breached does engage the issue of onus. The onus clearly rests upon the Union to demonstrate on the balance of probabilities by clear convincing and cogent evidence that the Collective Agreement has been breached by Safeway and to show that damages have been suffered by reason of the breach if damages are being claimed.

79. Notwithstanding the above, Pincher Creek Co-op respectfully submits that a review of the applicable jurisprudence, as set out above, establishes a general acceptance among arbitrators that the grievor has the ultimate burden to both establish that its interpretation of the collective agreement is the correct interpretation and that there has been a breach of a collective agreement.

80. Therefore, the onus is on the Union to establish on a balance of probabilities the following: (i) that its interpretation of the MOA is the correct interpretation; (ii) that the Pincher Creek Co-op has breached that interpretation of the MOA, and therefore, the Collective Agreement; and (iii) that the affected members have suffered damages. Pincher Creek Co-op respectfully submits that the Union has not discharged its onus in regard to the Grievances.

B. Preliminary Objection: Timeliness

81. Pincher Creek Co-op objects to the Grievances on the basis that the Union has not brought the Grievances in time.

82. The Collective Agreement sets out a grievance procedure and a number of timelines to be complied with. Pursuant to the Article 10.3 of the Collective Agreement, any employee, Chief Steward, Steward designate, Local Representative, the National Representative or the Co-operative General Manager may present a grievance. Any grievance which is not presented within 10 calendar days following the event giving rise to such grievance shall be forfeited and waived by the grieving party. There is no distinction made in this Article regarding individual, group or policy grievances.

83. Article 10.3 of the Collective Agreement uses the imperative word "shall" and the penalty for a failure to comply with the timeline set out therein is clear: the forfeiture and waiver of a grievance. The mandatory language used in Article 10.3 of the Collective Agreement indicates that the 10-day time limit for presenting a grievance is mandatory and not directory.

Sofina Food Inc. and UFCW, Local 401 (Dismissal), Re, [2019] A.L.R.B.D. No. 81 (**Tab 7**), at paras. 8 and 25

84. As a general principle, arbitral jurisprudence has established that the time limit for the filing of a grievance will "begin to run when the important elements that make up the grievance are known or ought to have been known by the grievor".

Foothills Provincial General Hospital and U.N.A., Local 115, Re, 30 C.L.A.S. 139 ["***Foothills Provincial***"] (**Tab 8**), at para. 24

85. In *Edmonton (City) v. C.S.U., Local 52*, [1999] A.G.A.A. No. 12 (**Tab 9**), at paras. 67 – 68, Arbitrator Ponak set out when time begins to run for the purpose of calculating grievance procedure timelines. In this decision, the grievance similarly related to a dispute regarding the interpretation of a term in the collective agreement. Arbitrator Ponak found that the 10-day limit started running when the grievor became aware that she disagreed with her employer in regard to the interpretation of the collective agreement:

> 67 It is equally clear that the Grievor disagreed with Mr. Fisher, rejecting the message he delivered to her. She disputed his interpretation of the collective agreement with respect to her reversion rights, insisting that she

had a right to revert at any time. Moreover, after the conversation with Mr. Fisher she checked with both the Steelworkers and Mr. Wolford to determine if it was true that she had been terminated. Based on her own view of the meaning of the collective agreement and what she interpreted as reassurances from the Steelworkers and Mr. Wolford the Grievor concluded that she was correct and Mr. Fisher was wrong. No grievance was filed.

68 The timeliness issue does not depend, however, on whether Mr. Fisher was right or wrong when he told the Grievor that her reversion rights had expired. The sole question is whether the issue giving rise to the grievance came to her attention. Of this, the Board has no doubt. Mr. Fisher was her supervisor and the individual with whom she had arranged her leave of absence in the first place. The fact that she told Mr. Fisher she disagreed with him and contacted others about what Mr. Fisher had said, only demonstrates that the Grievor knew that management was taking the position that she could no longer return to City employment. It is the Board's conclusion that the substantive issue in dispute, the status of the Grievor's reversion rights, was joined during the October 21, 1996 telephone conversation. The ten-day period commenced at that point. Since the grievance was not filed until March 1997, the Board must conclude that it is untimely and that the Board has no jurisdiction to rule on the merits of the grievance (i.e. whether the Grievor's reversion rights had in fact expired).

86. Further, Arbitrator Ponak, at paras. 69 – 70, went on to find that a grievance which is not filed within a mandatory time limit is not arbitral:

69 In concluding that the missed time limit results in the Board not having jurisdiction to rule on the merits of the grievance, we are following the 1988 arbitration award of Arbitrator Jones in *Re City of Edmonton*, an award that interpreted the time limit provisions in Art. 16.03. That award dealt with the same provision in the same contract between the same two parties (although some of the contract numbering has changed). The arbitration board concluded, after a thorough review of the material language and relevant authorities that "we do not have jurisdiction because the grievance was not initiated with the supervisor within the mandatory time limit of ten working days from the day the incident giving rise to the grievance came to the attention of the Grievor" (at p. 19). In particular, the analysis in *Re City of Edmonton* found that the ten day time limit in Art. 16.03 was mandatory (at p. 22):

> ... we have concluded that the ten-day time limit for initiating a grievance in Art. 16.03 is mandatory, and not directory, for the following reasons. First, Art. 16.21[now Art. 16.22] specifically provides that the parties may agree to extend the time limits

> contained in Article 16. This provision would be unnecessary and superfluous if the time limits were merely directory. Secondly, Art. 16.10 [now 16.11] specifically permits arbitration only "provided that the grievance has been properly processed in accordance with the time limits specified within this grievance procedure" [that is, all of Article 16]. Apart from strongly implying that the time limits are mandatory, it effectively provides a penalty for failure to comply with the time limits by making improperly processed grievances inarbitrable. Thirdly, Article 16 recognizes three different types of grievances. ... There would be no point for the Parties to have specified different time limits for filing different types of grievances if those time limits were merely directory (emphasis in original).
>
> 70 This Board notes that the material contract language dealing with time limits has remained unchanged since *Re City of Edmonton* and can find no fault with the reasoning contained therein. **Accordingly we adopt its conclusion that the failure to file a grievance within the ten day time limit specified in Art. 16.03 means that the grievance is not arbitrable. Because the current Board has concluded that the grievance was not filed within the ten day time limit, we must also conclude that it is not arbitrable.**
>
> [Emphasis added]

87. In *Wild Rose School Division No. 66 v. A.T.A.*, [2008] A.W.L.D. 1883 ["Wild Rose"] (Tab 10), the grievor had made an informal request for a paid leave of absence to attend a funeral. The grievor was advised that she was likely not entitled to a leave of absence under the collective agreement but that she could have the time off. On October 9, 2006, the grievor wrote a letter appealing the decision not to grant her leave of absence. On October 10, 2006, the grievor received a letter from the Secretary-Treasurer of the School Board denying her request for paid leave. On October 16, 2006, the grievor wrote a further letter asking the School Board to exercise its discretion to grant her a paid leave of absence, and alternatively, asking that she be granted an unpaid leave of absence. The grievor took the position at the arbitration hearing that she was not abandoning her request for paid leave, but rather requesting an alternative.

Wild Rose (*ibid*), at paras. 10 – 18

88. Pursuant to the collective agreement in this decision, the grievor was required to file a grievance within 30 days from the date giving rise to the grievance or from the date the grievor first had knowledge of the incident, whichever is later.

Wild Rose (*ibid*), at para. 7

89. Similarly to Article 10.3 of the Collective Agreement, the collective agreement in this decision clearly stated that any grievance that was not filed in time was forfeited.

Wild Rose (*ibid*), at para. 47

90. In *Wild Rose*, the grievor filed her grievance in January 2007 and alleged that she was not aware that her leave would be considered a personal leave until she received her pay stub for her December salary payment, which included a deduction for personal leave. The grievor alleged that this was the event which crystallized her grievance.

91. The School Board argued that the event giving rise to the grievance was the denial of the paid leave of absence, not the date the grievor was issued the pay stub. The Board held that the grievance had not been filed in time and the grievance was dismissed. The Board found that the grievance had crystalized on October 10, 2016, when it became clear that the grievor and the School Board did not agree on her entitlement to a paid leave of absence based on the parties' respective interpretations of the collective agreement. The Board's decision in *Wild Rose* regarding when the grievance crystallized is summarized at para. 58:

> The letter from Mr. McClintock to the Grievor dated 10 October 2006 is a clear and unequivocal refusal to grant the Grievor's request for a leave of absence under Section 14.2 for the dates in question. **In my view, this letter crystallizes the "difference" between the Grievor and the School Board about the interpretation or application of the collective agreement. That is the "incident" which starts the 30-day limitation period running. The grievance was not filed within 30 days of 10 October 2006.**
>
> [Emphasis added]

92. Based on the foregoing, Pincher Creek Co-op respectfully submits that the event giving rise to the Grievances occurred on October 25, 2018, or alternatively on April 4, 2019. Further and in the alternative, Pincher Creek Co-op submits that the event giving rise to the Grievances occurred at the very latest on April 7, 2019.

93. On October 25, 2018, Tom Zabel, on behalf of Pincher Creek Co-op, provided the Union with a proposed Wage Schedule based upon what had been agreed to under the MOA. It contained several wage rates below $15.00 for year two and year three. Pincher Creek Co-op had no intention of paying employees less than $15.00 per hour, but rather needed to track where wages were at when the annual increases were applied to contract rates in the Expired Collective Agreement to give effect to the MOA. Pincher Creek Co-op respectfully submits that at this time, the Union knew or ought to have known that there was a dispute. Accordingly, the 10-calendar time limit to file a grievance started to run on October 25, 2018.

94. Following October 25, 2018, Pincher Creek Co-op did not waiver in regard to its position on the application of wage increases in year two and year three. The Grievances had crystalized on October 25, 2018. This is the Employer's primary position.

95. If that position is not accepted, then alternatively the Grievances crystallized on April 4, 2019, when Tom Zabel (on behalf of Pincher Creek Co-op) sent correspondence to the Union advising that Pincher Creek Co-op did not agree with the Union's position in regard to the Wage Schedule. At this point in time, the Union knew or ought to have known that the dispute had crystalized, and the 10-calendar daytime limit set out under Article 10.3 had started to run. The Union had until April 14, 2019 to file the Grievances. It did not meet this deadline.

96. In the further alternative, if it is found that the events giving rise to the Grievances had not occurred or crystalized by October 25, 2018 or April 4, 2019, then Pincher Creek Co-op submits that the 10 calendar day time limit began to run on April 7, 2019, when Rod Wood (on behalf of the Union) advised Pincher Creek Co-op that the Union did not agree with Pincher Creek Co-op's proposed Wage Schedule and that the Union reserved its right to access any avenues of resolution deemed necessary to resolve "*the dispute*". At this point in time, the Grievances had clearly crystalized. The Union had until April 17, 2019, at the very latest, to file the Grievances otherwise they are forfeited and waived pursuant to the clear mandatory language of the Collective Agreement. The arbitrator cannot rewrite or substitute other collective agreement language to vary this outcome.

97. On April 26, 2019, the Union sent the Grievances *via* email to Pincher Creek Co-op's General Manager, Kori Fast. Regardless of whether the event giving rise to the Grievances occurred on October 25, 2018, April 4, 2019, or April 7, 2019, the Union failed to present the Grievances within 10 calendar days as required under the Collective Agreement.

98. Pincher Creek Co-op raised its Preliminary Objection in its Replies to the Grievances dated May 3, 2019.

99. Subsequently, the parties agreed to extend the time limit for submitting the Grievances to the arbitrator, pursuant to Article 10.5. However, there is no evidence that Pincher Creek Co-op and the Union agreed to waive the time limits or to extend the time limits in relation to the Union presenting Pincher Creek Co-op with the Grievances. To the contrary, the Employer's Reply makes clear the Employer did not waive the time limit to file the Grievances.

100. Further, Article 10.3 does not contain any language that allows the parties to extend the 10-day deadline. This can be contrasted with the language contained under Article 10.5, Third Step, which allows the parties to mutually agree to an extension of the time limit for presenting a grievance to an arbitrator in order to facilitate further discussion.

101. Pincher Creek Co-op anticipates that the Union will argue that the alleged failure to pay the correct wage rate for year two amounts to a continuing breach and, therefore, the Grievances were filed in a timely manner, given that Pincher Creek Co-op's alleged breach is ongoing.

102. A continuing breach has been defined in arbitral jurisprudence as a grievance that does not relate to a single act possessing substantial finality, such as a discharge or promotion, but rather relates to a continuing course of conduct which is renewed at regular intervals and is capable of being considered a series of separate actions rather than one action that may have continuing consequences.

Port Colborne General Hospital v. O.N.A., 1986 CarswellOnt 3676 ["***Port Colborne***"](**Tab 11**), at para. 5

103. As set out in *Capital Health (Alberta Health Sciences) and AUPE, Local 54 (Brennan), Re*, 2010 CarswellAlta 2848, at para. 23 (**Tab 12**), citing Brown and Beatty, there must be a recurring breach of a duty owed and not merely continuing or recurring damages that are the consequences of a breach in order for a breach to be considered a continuing breach:

> ...Continuing violations consist of repetitive breaches of the collective agreement rather than simply a single or isolated breach. They may arise in such circumstances as an illegal strike, failure to insure a safe workplace, the nonpayment of money or benefit premiums, or in connection with decisions based on an improper seniority date or the assignment of work. **In any event, the test most commonly used in determining whether there is a continuing violation is the one derived from contract law, namely, that there must be a recurring breach of the duty, and not merely recurring damages.**
>
> [Emphasis added]

104. It is Pincher Creek Co-op's position that in these specific circumstances, the alleged failure to pay year two rates based on the Union's interpretation of the Collective Agreement is a single action that has resulted in continuing consequences, and therefore is not a continuing breach.

105. Pincher Creek Co-op recognizes and accepts that there is jurisprudence that stands for the principle that an allegation relating to the failure to pay the correct wage rate amounts to an ongoing breach, and therefore time limits do not begin to run until the last breach occurs. This principle is set forth in *Foothills Provincial* (*supra*) at para. 26:

> While the cases are not consistent in their treatment of the subject-matter of this grievance as either a continuing or non- continuing grievance, they do provide a useful framework for deciding the issue. *It is clear from a reading of the cases that the question that must be asked is whether or not the conduct that is complained of gives rise to a series of separately identifiable breaches, each one capable of supporting its own cause of action*. Allegations concerning the unjust imposition of discipline, the improper awarding of a promotion or the failure to provide any premium or payment required under

> the collective agreement on a single occasion, while they may have ongoing consequences, constitute allegations of discrete non-continuing violations of the collective agreement. *In contrast, an allegation of an ongoing failure to pay the wage rate or any benefit under the collective agreement or an ongoing concerted work stoppage constitute allegations of continuing breaches of the collective agreement. In these cases the party against whom the grievance is filed takes a series of fresh steps each one giving rise to a separate breach*. In this latter type of case the time-limits for the filing of a grievance, apart altogether from any question as to when damages commence to run, must be found to be triggered by the breach closest in time to the filing of the grievance.

106. As stated in *Superheat Canada Inc. and Quality Control Council of Canada, Re*, 2020 CarswellAlta 546, citing the seminal decision on continuing breaches, *Port Colborne (supra)*, in circumstances of a continuing breach, the time limit will be triggered by the breach closest in time to the filing of the grievance.

Superheat Canada Inc. and Quality Control Council of Canada, Re, 2020 CarswellAlta 546 (**Tab 13**), at para. 54

107. While Pincher Creek Co-op maintains that the Union knew or ought to have known that some employees would not get a wage increase in year 2 on October 25, 2018, Pincher Creek Co-op submits that even if the alleged failure to pay wage increases in year two amounts to a continuing breach, the breach closest in time to the filing of the Grievances occurred on April 7, 2019. At that time it was abundantly clear that Pincher Creek Co-op and the Union differed substantially regarding their interpretation of the Collective Agreement and that Pincher Creek Co-op would not be paying employees who had their wages increased to $15.00 on July 22, 2018 any additional increases in year 2 unless their original scale step exceeded $15.00. In the event that the alleged breach was a continuing breach, it is submitted that this is the breach closest in time to the filing of the Grievances, and therefore the time limit for the filing of the Grievances began to run on April 7, 2019 under this analysis.

108. As set out in *Northwest Territories Power Corp. v. Union of Northern Workers*, 82 C.L.A.S. 21 (**Tab 14**), at para. 19, the arbitrator does not have the jurisdiction to hear grievances that are not filed within a mandatory time limit:

> In the current circumstances, I am satisfied that the language under review could quite reasonably bear a mandatory interpretation and I find no fault with the analysis undertaken by Arbitrator Moreau or the cases on which he relied. That being the case, I accept that the language requiring timely filing of the grievance is mandatory and, in the absence of any legislative framework allowing an arbitrator to overlook a missed mandatory time limit, its breach in these circumstances would be fatal to the Union's case as a matter of my lacking jurisdiction to rule on the merits.

109. Pincher Creek Co-op submits that the Union failed to present the Grievances within 10 calendar days of the event giving rise to the Grievances, and therefore forfeited and waived the Grievances.

110. Based on the foregoing, Pincher Creek Co-op respectfully requests that the preliminary objection be upheld and that the Grievances are dismissed without the need for a full hearing on the merits.

C. Principles of Collective Agreement Interpretation

General Principles of Interpretation

111. The Grievances relate to Pincher Creek Co-op's and the Union's different interpretations of Article 13 of the MOA, and specifically the interpretation of "increase all scales and steps by 1.75%" for year 2 and year 3.

112. As set out by the Union in their written argument submitted September 11, 2020, there is no real dispute regarding the general principles of interpretation with respect to collective bargaining agreements. Where the dispute arises is with regard to the application of those general interpretation principles to the facts of this case and the interpretation of Article 13 of the MOA.

113. The interpretation of a collective agreement is no different from interpreting statutes, private contracts and other authoritative directives. As was stated by Brown and Beatty, at 4:2000:

> Because the basic source of an arbitrator's jurisdiction is found in the collective agreement, in most arbitrations the main task is to construe a word, phrase, section or group of sections in the collective agreement. Conceptually, however, the task of interpreting a collective agreement is no different than that faced by other adjudicators in applying statutes, private contracts and other authoritative directives. And generally speaking, arbitrators view and approach their function in much the same way.

114. The fundamental object of construing the terms of a collective agreement is to discover the intention of the parties who agreed to its terms. The intention of the parties should be determined by referring to the words used in the collective agreement.

Canada Safeway (*supra*), at para. 197

115. The modern approach to the interpretation of collective agreements is set out in Brown and Beatty at 4:2100:

> A more recent articulation of the proper approach has been as follows:
>
> > The modern Canadian approach to interpreting agreements (including

collective agreements) and legislation is encompassed by the modern principle of interpretation which, for collective agreements, is:

> In the interpretation of collective agreements, their words must be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object and the intention of the parties.

116. In *Canada Safeway* (*supra*), at para. 198, which is a decision regarding a policy grievance based on the interpretation of a letter of understanding, Arbitration Sims held that when there are two possible interpretations, the arbitrator must use a purposive approach in interpreting the disputed provisions and test the two interpretations against a standard of reasonableness which includes avoiding anomalies.

117. The modern principle of interpretation to be applied to collective agreements was exhaustively canvassed by Arbitrator Elliot in *Communication, Energy and Paperworkers Union, Local 777 v Imperial Oil Strathcona Refinery (Policy Grievance)*, [2004] AGAA No 44 (**Tab 15**), at paras 40 – 46:

> 40 The modern Canadian approach to interpreting agreements (including collective agreements) and legislation, is encompassed by the modern principle of interpretation which, for collective agreements, is:
>
> > In the interpretation of collective agreements, their words must be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object, and the intention of the parties.
>
> 41 Using this principle, interpreters look not only to the intention of the parties, when intention is fathomable, but also to the entire context of the collective agreement. This avoids creating a fictional intention of the parties where none existed, but recognizes their intention if an intention can be shown. The principle also looks into the entire context of the agreement to determine the meaning to be given to words in dispute.
>
> 42 Before applying the modern principle of interpretation to this grievance I will identify the components of the modern principle and what they encompass. The modern principle of interpretation is a method of interpretation rather than a rule, but still encompasses the many well-recognized interpretation conventions. The modern principle directs interpreters:
>
> > 1 to consider the entire context of the collective agreement 2 to read the words of a collective agreement

- in their entire context
- in their grammatical and ordinary meaning

3 to read the words of a collective agreement harmoniously

- with the scheme of the agreement,
- with the object of the agreement, and
- with the intention of the parties.

1 What is the "entire context of a collective agreement"

43 The "entire context" includes

- the collective agreement as a whole document. One provision of a collective agreement cannot be understood before the whole document has been read because what is said in one place will often be qualified, modified or excepted in some fashion, directly or indirectly, in another

- reading one provision of the collective agreement keeping in mind what is contained in other provisions. In the first instance it must be assumed negotiators knew not only the provisions specifically bargained but all the others contained in the collective agreement. An example is the use of words that have defined meanings. Those meanings must be applied whenever the defined word is used in the collective agreement

- keeping in mind the legislative framework within which collective agreements exist and keeping that framework in mind as part of the entire context

2 Reading the words

44 Words in a collective agreement are to be read

(a) within their entire context in order to figure out the scheme and purpose of the agreement and the words in a particular article must be considered within that framework,

(b) in their grammatical and ordinary meaning. Typically this involves taking the appropriate dictionary definition of a word and using it, unless the dictionary meaning is modified by a definition, by

common usage of the parties or by the context in which the word is used, and

(c) harmoniously with

- the scheme of the agreement (which could include the arrangement of provisions and the purpose of the agreement or a particular part of the agreement)
- its object
- the intention of the parties, assuming an intention can be discerned. The intention is to be found in the words used, but evidence of intention from other sources may be appropriate in order to decide on what the words used by the parties actually mean.

3 The meaning of "context"

45 The word "context" itself means

> the circumstances that form the setting ... for [a] statement ..., and in terms of which it can be fully understood.
>
> Concise Oxford Dictionary (10th)

and the Merriam-Webster Dictionary includes in its definition of context:

> the weaving together of words; the parts of a discourse that surround a word or passage and can throw light on its meaning; the interrelated conditions in which something exists or occurs.

46 And so, entire context in terms of a collective agreement and the interpretation of the words used in it includes considering

- how words have been weaved together
- how those words connect with other words
- the discourse (other information) that can throw light on the text to uncover the meaning
- any conditions that exist or may occur that might affect the meaning to be given to the text

118. Pincher Creek Co-op submits that the above principles of modern interpretation should be applied to determine the intentions of the parties at the time the MOA was tentatively agreed and subsequently ratified.

Clear and Specific Language Necessary to Impose a Monetary Benefit

119. While the Union argues that the terms of the MOA are clear and unambiguous, which will be addressed in detail below, the Union has failed to address the fact that its interpretation of the MOA would impose an additional monetary benefit on employees. Consistent with the above general principles of interpretation, courts have held that financial benefits should be construed in a manner that is practical and purposive, rather than detached and literal, with a view to obtaining a reasonable result: *Mettoy Pension Trustees Ltd. v Evans*, [1991] 2 All ER 513 (Ch. D) (**Tab 16**); *Electrical Industry of Ottawa Pension Plan v Cybulski*, 2001 CarswellOnt 4214 (Ont SCJ) (**Tab 17**).

120. The complete picture is important, so courts are guided not only by the language of core documents, but also by ancillary documents and in some respects by the parties' conduct, all of which can form part of the legal matrix within which the rights and duties under a contract must be determined: *Boccia v Bata Industries Ltd.*, [1989] OJ No. 972 (HC) (**Tab 18**); *Dinney v Great-West Life Assurance Co*. (2005), 252 DLR (4th) 660 (Man CA) (**Tab 19**).

121. It is submitted that these principles are equally applicable in the context of interpreting the terms of a collective agreement when a party is asserting their entitlement to a monetary benefit. These principles were followed in *Domtar Pulp and Paper Products Inc. and Communications, Energy and Paperworkers Union of Canada,* [2010] SLAA No 34 (Sask Arb) (**Tab 20**), where Arbitrator Ish held as follows:

> [51] My conclusion on this point is supported by general principles of contractual interpretation. As pointed out in *Dinney v. The Great-West Life Assurance Company* (*supra*, at p.20) pension plan terms should be constructed to give reasonable and practical effect to the scheme. **I would extend the principle of interpretation articulated in the *Dinney* case to include any interpretation of contractual terms, including collective agreements. Terms must be interpreted in a practical and purposive manner.**
>
> [Emphasis added]

122. In the specific context of labour arbitration, it is well established that precise language is necessary in order to impose an obligation on an employer to pay a monetary benefit. Intention to confer a monetary benefit must be clear and specific and will not be imposed by inference or implication.

Algoma Steel Inc. v. United Steelworkers, Local 2251,

[2008] OLAA No 292 ["***Algoma***"] (**Tab 21**), at para. 18

123. In *Algoma* (*ibid*), one of the issues before Arbitrator Dissanayake was whether the employer had failed to pay wages for two full time Union representatives serving on the Joint Contracting Out Committee. The employer in this decision argued that the Union had no right under the terms of the collective agreement to claim full wages for its second Joint Contracting Out Committee representative.

124. At para. 19 of *Algoma* (*ibid*), Arbitrator Dissanayake considered various letters of agreement, which explicitly set out the remuneration of employees who served on committees and found that where the parties intended to compensate Union members for serving on committees, an express provision had been made in that regard. Arbitrator Dissanayake went on to find that in the absence of an express provision regarding wages for members of the Joint Contracting Out Committee in the collective agreement or a subsequent letter of agreement, the Union had no right to claim those wages.

125. This is very similar to the circumstances of the Grievances. The Union is alleging that employees who made less than minimum wage prior to July 22, 2018 are not only entitled to a significant bump in order to bring their salary up to the legislated minimum wage increases, but a further 1.75% increase in year 2, even if their wage scale step does not yet exceed $15.00 on the Wage Schedule. In order to be entitled to this additional wage increase, the Union must have made its intention to confer this monetary benefit clear and specific. This monetary benefit cannot be implied. There is nothing contained within the language of the MOA or the Collective Agreement which clearly and expressly states that employees are entitled to this significant monetary benefit.

126. An arbitration decision that brings together many of the concepts discussed above – that intention to confer a monetary benefit must be specific and clear, that in case of doubt the most sensible and fair interpretation of contracts should be adopted as the one most likely intended, and that financial obligation imposed in a collective agreement should be interpreted so as to obtain a reasonable result – is *Sudbury (Greater City) v C.U.P.E., Local 4705* (2005), 50 CCPB 313 (Ont. Arb) (**Tab 22**). In that case, the Union claimed that the employer had by way of general language in a collective agreement recognizing service with a prior employer also agreed to recognize such service as pensionable service under the Employer's pension plan. Giving effect to that recognition would have cost the Employer between $2.5 and $4 million. The arbitrator rejected this claim, principally on the basis that such a significant commitment could not reasonably be considered to have been "hidden" within the generic language relating to past service recognition. At paragraph 17 he stated:

> Put another way, the parties would not have hidden an item of this magnitude within a generic undertaking to recognize service and seniority with the predecessor; a generic undertaking with a number of other practical applications relating to enforceable provisions under the successor collective

agreement, none requiring a capital outlay, let alone a capital outlay of some $2.5 to $4 million.

127. Pincher Creek Co-op submits that the above-noted principles should be applied in this case. The Grievances claim that the affected employees are entitled to a monetary benefit in the form of a wage increase which is not consistent with the Wage Schedule. The acceptance of Union's interpretation of the MOA, which effectively will confer this monetary benefit on the affected employees, will significantly impact and impair the financial status of Pincher Creek Co-op.

Admissibility of Extrinsic Evidence

128. The Union has submitted that the terms of the MOA are clear and unambiguous, and therefore it is not appropriate to consider extrinsic evidence to aid in the interpretation of Article 13 of the MOA. As set out in detail below, Pincher Creek Co-op respectfully submits that Article 13 of the MOA is not clear and unambiguous, and that extrinsic evidence is required to determine the objective intentions of the parties at the time that the MOA was agreed upon.

129. While not relating specifically to the interpretation of collective agreements, the Supreme Court of Canada recently set out guiding principles in regard to contract interpretation and the admissibility of extrinsic evidence in *Creston Moly Corp. v. Sattva Capital Corp*., 2014 SCC 53 ["***Sattva***"], at para. 57 - 60 (**Tab 23**):

> (1) The circumstances surrounding the formation of the contract cannot overwhelm the words of the agreement. The purpose of this evidence is to enhance the understanding of the objective intentions of the parties.
>
> (2) What will amount to "surrounding circumstances" will vary based on each case.
>
> (3) Courts should only admit objective evidence of background facts which existed at the time of the contract as to not offend the parole evidence rule.
>
> (4) Objective evidence relating to "knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting" can be taken into consideration. This is a question of fact.
>
> (5) The parol evidence rule is not offended by evidence relating to the circumstances surrounding the formation of the contract.

130. Where there is ambiguity in the provisions of a collective agreement, as is apparent with respect to Article 13 of the MOA relating to general wage increases for year two and year three, arbitrators are permitted to examine extrinsic evidence which may shed light

on determining the meaning of terms in the collective agreement. This is recognized and endorsed by Brown and Beatty at 4:2250:

> In grievance arbitration, the clearest and most commonly utilized examples of extrinsic evidence are past practice and negotiating history. As well, of course, related documents may be relevant in interpreting the collective agreement. For example, in determining the meaning of terms in the agreement relating to insurance benefits, arbitrators have considered the actual policy taken out by the employer.

131. In its written argument, the Union submits that the words "Increase all scales and steps by %" does not imply two or more meanings, and therefore there is no ambiguity. Pincher Creek Co-op respectfully disagrees. If these words were not capable of two or more meanings, the parties would not be before you. In these circumstances it is clear that more than one meaning can be assigned to this language: (1) the meaning ascribed by Pincher Creek Co-op that "all steps and scales" means the steps and scales contained within the final year of the wage grid of the Expired Collective Agreement, and (2) the meaning asserted by the Union that "all steps and scales" means all steps and scale on a recalibrated wage grid that never existed and does not contain any wages lower than $15.00.

132. In a very recent decision of the Alberta Court of Appeal, *Alberta Union of Provincial Employees v. Alberta Health Service*, 2020 ABCA 4 ["***AHS***"] (**Tab 24**), the Court reaffirmed that the principles set out by the Supreme Court of Canada in *Sattva* regarding contract interpretation and the admissibility of extrinsic evidence are applicable in labour arbitrations where the interpretation of a collective agreement is at issue.

133. In *AHS*, in making a determination regarding the interpretation of a letter of understanding, the arbitrator considered the text of the letter of understanding itself, evidence of surrounding circumstances, and evidence of communications between the parties during the negotiations of the collective agreement. The Alberta Court of Appeal held that the arbitrator reasonably and correctly considered the text of the letter of understanding and the surrounding circumstances; however, the Alberta Court of Appeal found that arbitrator's consideration of the parties' evidence regarding negotiations, which was almost entirely subjective, was unreasonable.

AHS, at paras. 3 to 4

134. In our case, there is objective evidence in the form of Tom Zabel's contemporaneous bargaining notes.

135. The Alberta Court of Appeal held that arbitrators should limit the admission of extrinsic evidence in the labour context to "objective background facts relevant to the interpretive exercise".

AHS, at para. 25

136. In *AHS*, the Alberta Court of Appeal found that labour arbitrators had already been applying the principles set out in *Sattva* in regard to the consideration of surrounding circumstances prior to the Supreme Court of Canada's decision in *Sattva*. The Alberta Court of Appeal held that it is accepted that labour arbitrators "should consider evidence of the origin and purpose of the collective agreement, the nature of the relationship created by it, and the industry in which the parties are operating, when it considers the general context within which collective agreements are negotiated."

AHS, at para. 37

137. In additional to the above, during a labour arbitration, the following evidence of surrounding circumstances may be considered: prior arbitration awards, prior collective agreements, and the general collective bargaining context.

AHS, at para. 38

138. The Court of Appeal in *AHS* went on to find that if it has been established that there is ambiguity in the contractual language, a party may be permitted to admit evidence of past practice or post contract conduct. In order for evidence of past practice and post contract conduct to be considered, the arbitrator must first determine whether there is in fact ambiguity. In the labour relations context, the standard for what constitutes ambiguity has been progressively relaxed. The Court of Appeal in *AHS* made the following findings with respect to ambiguity and the principles of contractual interpretation:

> The question arises in light of *Sattva*, whether the basic practice requiring a finding of ambiguity before a labour arbitrator can use evidence of surrounding circumstances to interpret a collective agreement has been, or should be, abolished. We see no reason why *Sattva* would not apply to labour arbitration. Therefore, labour arbitrators *must* consider evidence of surrounding circumstances relevant to interpreting a collective agreement. Given the practical convergence of the law and the lowering standard for what constitutes an ambiguity discussed above, we expect that this decision will not result in radical departure from how many hearings are conducted. The real issue will be how this evidence is used in the interpretive exercise.

AHS, at paras. 42 to 44

139. Based on the foregoing, it is submitted that the arbitrator must consider evidence of relevant surrounding circumstances in order to make a determination as to whether Pincher Creek Co-op's or the Union's interpretation of Article 13 of the MOA should be preferred; however, it is not appropriate for the arbitrator to consider the subjective intentions of the parties when interpreting Article 13 of the MOA. The evidence of surrounding circumstances adduced by Pincher Creek Co-op in this case does not ask the arbitrator to consider its subjective intentions, but rather the objective background facts regarding the negotiations between Pincher Creek Co-op and the Union, and therefore

the evidence should be considered by the arbitrator.

140. It is further submitted that due to the ambiguity contained within Article 13 of the MOA, evidence of past practice and post-negotiating conduct should also be considered by the arbitrator.

AHS, at para. 44

141. *Loblaws Supermarkets Ltd. and UFCW, Local 1006A (2018MO001), Re*, 140 C.L.A.S. 90 ["***Loblaws***"] (**Tab 25**), is a decision addressing the admissibility of extrinsic evidence in decisions involving the interpretation of a collective agreement. In this decision the Union had objected to the admissibility of extrinsic evidence. The grievance in this decision very similarly related to an alleged failure by the employer to implement wage increases to wage schedules applicable to bargaining unit members as a result of increases in the statutory minimum wage. Arbitrator Surdykowski does not resolve the grievance on its merits in this decision, but rather only decides the evidentiary issue in regard to extrinsic evidence.

142. In *Loblaws*, the employer was seeking to have the following extrinsic evidence admitted for the purposes of interpreting the letter of understanding in question:

> (i) July 16, 2018 Minutes of Settlement between the "Zehrs Market, Zehrs Real Canadian Superstore, Zehrs Great Food Stores" (which are Zehrmart Inc. entities which, like the company herein are a subsidiary of Loblaw Companies Limited) and Local 175, including the specified with prejudice "Agreed Statement of Facts" contained in it (the "Zehrs-Local 175 Agreement");
>
> (ii) Letter of Understanding #70 ("LOU 70") dated July L 2015 in the Local 175 collective agreement(s) negotiated in 2015;
>
> (iii) The testimony of Shawn Haggerty, President of Local 175. "regarding the tripartite intention of the parties in negotiating what became LOU's #70 and #81" in July 2015; and
>
> (iv) The testimony of Mr. Haggerty discussions between Company representatives and representatives of Local 1006A and Local 175 on or about (it appears) December 22, 2017 about Wage Progression Schedules and the application and implementation of LOU 81 (which it appears did not result in any resolution and led to the grievance herein).

Loblaws (*ibid*), at para. 18

143. In coming to a decision regarding the admission of extrinsic evidence, Arbitrator Surdykowski, at paras. 35 – 36, relied on the Supreme Court of Canada's reasoning in *Sattva* to find that it is well established that extrinsic evidence is an admissible aid of interpretation when there is ambiguity contained within a term of a collective

agreement:

> 35 *Sattva* makes two things clear. First, an arbitrator tasked with interpreting a collective agreement is not merely a linguistic technician. Second, extrinsic context evidence is always admissible to the extent that it may inform the interpretation of a collective agreement. (Paragraphs 46-50 and 55-60 of the decision of Rothstein J. writing for the unanimous Court are particularly instructive.) The Supreme Court of Canada of Canada (*sic*) has made it clear that an arbitrator must interpret collective agreement language within the context of the agreement read as a whole, and the broader context of relevant circumstantial facts that were or ought reasonably to have been known to both parties *when the contract was made* — as established by evidence (*Sattva*, paragraph 47). Although extrinsic context evidence is admissible because it may inform the interpretation of a collective agreement by demonstrating the mutual intention of the parties, context cannot change or "overrule" the meaning of the words used by the parties (*Sattva*, paragraph 60).
>
> 36 It is well established that extrinsic evidence is also admissible as an aid to interpretation in order to establish or resolve an alleged ambiguity.

144. Further, in *Loblaws*, Arbitrator Surdykowski held that the decision in *Sattva* makes it clear that circumstantial facts that were, or ought reasonably to have been, known to both parties when the contract was made form part of the context which may inform the interpretation of a collective agreement.

Loblaws (*ibid*), at para. 44

145. Pincher Creek Co-op submits that it was known or ought to have been known to both parties at the time of bargaining that minimum wage would increase to $15.00 on October 1, 2018, and in fact had been implemented early on July 22, 2018. Furthermore, both parties knew, or ought to have known, that whenever the Government had increased minimum wage in the past, any subsequent contractual wage increase was applied to the steps and scaled as they existed in the Collective Agreement, and not to the new legislated minimum wage. These important facts are context that informs the interpretation of the MOA in this case.

146. In specific regard to evidence of past practice, when there is ambiguity, such ambiguity can be resolved by considering the parties' past practice. As set out in *Brown and Beatty* at section 3:4430 quoting *John Betan & Sons* evidence of past practice should be relied upon in the following circumstances:

> Hence it would seem preferable to place strict limitations in the use of past practice in our second sense of the term. I would suggest that there should

> be (1) no clear preponderance in favour of one meaning, stemming from the words and structure of the agreement as seen in their labour relations context; (2) conduct by one party which unambiguously is based on one meaning attributed to the relevant provisions; (3) acquiescence in the conduct which is either quite clearly expressed or which can be inferred from the continuance of the practice for a long [period without objection (*sic*); (4) evidence that members of the Union or management hierarchy who have some real responsibility for the meaning of the agreement have acquiesced in the practice.

147. Based on the foregoing, it is submitted that the ambiguity contained within Article 13 of the MOA requires the consideration of extrinsic evidence, including but not limited to bargaining history and evidence of past practice, which helps enhance the arbitrator's understanding of the parties' objective intention at the time the agreement regarding general wage increases was entered.

<u>Admissibility of Extrinsic Evidence if there has been no Meeting of the Minds</u>

148. It is well-established law that in order for there to be a valid agreement, there must be a meeting of the minds between the parties to the agreement:

> For the reasons I have enumerated I have come to the conclusion without any hesitation, that, with respect to this essential part of this agreement to which I have referred, there was no consensus *ad idem* which rendered the agreement *ab initio*. There was no consensus. "*Ad idem*" means there was no meeting of the mind. In order to have an agreement you have to have the meeting of the minds. If there is no meeting of the minds, there is no agreement.[...]

Kaya v. Baykal, 1977 CarswellAlta 652, at para. 45 (**Tab 26**)

149. As set out in *Canada Safeway Ltd. v. U.F.C.W., Locals 312A, 373A & 401*, 2001 ABQB 120, at para. 41 **(Tab 27**), in the labour relations context, when there has been no meeting of the minds with respect to the terms of a collective agreement or amendments to an existing collective agreement, extrinsic evidence should not be considered by the arbitrator:

> Further, as a result of his conclusion that there was no meeting of the minds before the signing of the Collective Agreement, which was not patently unreasonable, **the Arbitrator was correct in refusing to consider extrinsic evidence** and limiting himself to an interpretation of the written agreements. […]
>
> [Emphasis added]

150. Further, when there is no meeting of the minds with respect to proposed amendments to a collective agreement, the parties will be bound by what they have reduced to in writing.

LDM Lakes *District Maintenance Ltd. and BCGEU, Local 1012, Re*, 2007 CarswellBC 3894, at para. 72 (**Tab 28**)

151. While Pincher Creek Co-op accepts the above principle of law with respect to the consideration of extrinsic evidence when there has been no meeting of the minds, it is respectfully submitted that there was a meeting of the minds in these circumstances, and the Union seeks to resile from its agreement. As set out by Arbitrator Sims in *Richardson Oilseed Ltd. and UFCW, Local 401 (Nunez), Re*, 2018 CarswellAlta 472, at para. 36 (**Tab 29**), where each side maintains that there was a deal but cannot prove the terms of the deal, there will be no meeting of the minds; however, where two parties agree that there was a deal, but disagree as to how the deal is to be interpreted, there has been a meeting of the minds.

152. Pincher Creek Co-op respectfully submits that in these circumstances, there has been a meeting of the minds as between Pincher Creek Co-op and the Union – the parties agree there is a deal, but interpret it differently.

153. In particular, the parties came to a mutual agreement that there would be an increase in the wage rate for all steps and all scales for each of the years within the three-year term of the Collective Agreement. However, they have different interpretations of how the contract increases would be applied to employees who recently received a wage bump to $15.00 per hour.

154. Based on the foregoing, Pincher Creek Co-op respectfully submits that it is appropriate for the Arbitrator to consider extrinsic evidence when interpreting Article 13 of the MOA.

D. Interpretation of the MOA and alleged Breach of the Collective Agreement

155. When determining the correct interpretation of the MOA based on the intention of the parties, the arbitrator must consider the purpose of the MOA.

Canada Safeway (supra), at para. 208

156. The purpose of the MOA was to amend certain provisions of the Expired Collective Agreement. The specific purpose of Article 13 of the MOA was to increase the wages contained within the Wage Schedule contained in the Expired Collective Agreement. The purpose of the MOA was not to recalibrate the entire Wage Schedule based on the increase in the minimum wage, as alleged by the Union in the Grievances.

157. As set out in *Canada Safeway* (*supra*), when there are two possible interpretations, a purposive approach to interpretation should be taken and the interpretations should be measured against the standard of reasonableness. Pincher Creek Co-op submits that the

Union's interpretation of the MOA is unreasonable, given that it confers a substantial monetary benefit on employees that was never bargained for or agreed upon.

158. Further, the Union's interpretation of the MOA, if accepted, will have a huge financial impact on Pincher Creek Co-op. During bargaining, Pincher Creek Co-op clearly expressed several times that it was not able to absorb the cost escalation that would be imposed if the percentage increases were applied on top of the minimum wage increase. The Union's interpretation fails this important fact that was well known to the parties when the MOA was agreed.

159. The words of the MOA must be read in their entire context, taking into account circumstantial facts known to the parties. At the time of bargaining, both Pincher Creek Co-op and the Union knew, or ought to have known, that the minimum wage would increase to $15.00 per hour on October 1, 2018, had been implemented early, that the Employer could not absorb further increases for employees previously below that threshold, and that some employees would not receive a pay increase for three years.

160. Had the Union wished to entirely recalibrate the Wage Schedule based on percentage increases being applied in years two and three to every $15.00 wage earner, the Union should have bargained for express language to be included in the MOA to clearly express that intention, particularly since the Employee and the Union both acknowledged some Employees' wages would be frozen at $15.00 per hour for the entire term of the Collective Agreement.

161. In *U.F.C.W. Local 1400 v. Real Canadian Superstores (The),* 2012 SKQB 103 ["***Superstore***"] (**Tab 30**), the Union was seeking an order quashing an award of the arbitration board that was in favour of the employer. The matter came before the arbitration board when the Union filed a grievance regarding a dispute between the parties relating to the wage schedule in the collective agreement and the impact an increase in the minimum wage had on that agreement.

162. Similarly, to the Pincher Creek Co-op's Wage Schedule, the wage schedule in this decision allowed for wage increases based on hours worked for each different classification of employee.

163. Article 7.9 of the collective agreement in *Superstore* read as follows:

> In the event the Province of Saskatchewan raises the minimum wage during the life of this agreement, the new start rate will be twenty-five (25) cents above the new minimum wage.
>
> *Superstore* (*ibid*), at para. 4

164. In *Superstore*, when a new minimum wage came into force, any existing employee that had a salary that was less than the new minimum wage, which was $9.25 at that time,

had their wage increased to $9.50 per hour. The Union's position in regard to how the wage schedule was impacted based on the increase in minimum wage is summarized at paras. 11 and 12 of *Superstore* (*ibid*):

> 11. The Union argues that the Board in seeking to consider a pro rata pay scale based on what the Board interpreted the Union's position to be was inaccurate. What the Union says it was arguing is captured in para. 17 of its brief where it states the effect of the Union's interpretation would be that following the minimum wage increase all employees would be "deemed" to have worked the number of hours required to earn $9.50 per hour according to the wage grid. Thus employees in the affected classifications who received a pay increase as a result of article 7.9 (or employees hired after May 1, 2009) would continue to earn incremental wage increases at regular intervals until they reached the top rate payable on the wage grid.

165. The Employer argued that the correct interpretation of Article 7.9 was that the increase in the minimum wage only impacted the start rate and once that start rate was adjusted, the employee may stay at the same wage rate until it had achieved the hours required to move to the next step on the wage schedule.

Superstore (*ibid*), at *para*. 13

166. At para. 8 of the *Superstore* (*ibid*) decision, the Court summarized the finding of the arbitration board:

> 51. The Board is unable to find support in the Collective Agreement for the proposition that the wage scales should be pro-rated when Article 7.9 triggers a new start rate for employees in the three affected job classifications. The Board finds that the intention of the parties was that Article 7.9 was to only apply to the new start rate for those employees who would otherwise earn less than $0.25 per hour above the statutory minimum wage. **The Board cannot accept an interpretation of the Collective Agreement, as argued by the Union, that would have such broad implications that it would alter all the relative wage scales, both directly within a job classification and indirectly by altering the differential wage scales between all job classifications, without a clear expression of that intention.**
>
> 52. The Board is unable to find support in the Collective Agreement for the proposition that employees should be credited with hours corresponding to their wage upon an increase to the starting wage due to Article 7.9.
>
> [Emphasis added]

167. The Court dismissed the Union's judicial review application and upheld the finding of the arbitration board:

> 29 In reviewing the decision of the Board, the reviewing court must look at whether the decision made by the Board was one of a possible number of reasonable decisions that the Board could have concluded. In this case, the Board interpreted the section narrowly and found no support in the collective bargaining agreement for what was being proposed by the Union. The Board perhaps was confused in the words it used in writing its decision, but that does not take away from the fact that the interpretation of Article 7.9 that the Board came to is a reasonable interpretation of that article having regard to what was put before the Board. **Article 7.9, when drafted, could easily have addressed the issues the Union now raises or at least the intention to have an effect beyond a mere change to the start rate. It did not. As the Board's decision is a reasonable conclusion it is not subject to review.**
>
> [Emphasis added]

Superstore (*ibid*), at para. 29

168. The facts in *Superstore* are very analogous to the circumstances giving rise to the Grievances. Pincher Creek Co-op submits that the reasoning of the arbitration board, and the subsequent decision of the Saskatchewan Court of Queen's Bench ought to be applied here.

169. The Union's interpretation of the MOA, and specifically what is meant by "increase all scales by 1.75%", would alter the entire Wage Schedule for employees who were making less than $15.00 on July 22, 2018; however, the Union never bargained for this change and the words used in the MOA do not express clear intent that this is what is meant by "increase all scales and steps by 1.75%".

170. Further, the language contained within the MOA does not refer to any recalibration of the Wage Schedule taking into account the new $15.00 per hour minimum wage. Applying the principles of modern interpretation and taking into consideration the context at the time the agreement was formed, there is no evidence to support a finding that the Union's interpretation of the MOA accurately reflects the intention of the parties.

171. The intention of the parties can be established not only through the words of the collective agreement but also from extrinsic evidence of intention. In these circumstances, Pincher Creek Co-op submits that the bargaining history and evidence of past practice must be considered to ascertain the true intention of the parties at the time the MOA was agreed upon.

<u>Bargaining History</u>

172. There were two sets of bargaining dates that took place in relation to the MOA and

Collective Agreement. The first set took place from April to June of 2018 and the second set took place in August of 2018. The MOA was ultimately ratified following the second set of bargaining dates.

173. During the first set of bargaining dates the increase in the minimum wage and the impact it would have on the Wage Schedule was discussed by the parties. Pincher Creek Co-op made it very clear that recent changes to minimum wage had had a huge financial impact on its business. Pincher Creek Co-op also made it clear during bargaining that employees who previously made less than minimum wage would continue to receive minimum wage until their rate as per their wage scale step exceeded the new minimum wage. The practical effect was some employees' wages would remain unchanged (i.e. be frozen) for years.

174. Further, the parties agreed to a shorter 3-year term, rather than a 5-year term, to address this very fact because they both acknowledged and understood a pay freeze would occur. A 3-year term would provide Pincher Creek Co-op with time to absorb the impact of yet another minimum wage increase, while providing employees whose wage rate was frozen at $15.00 the ability to return to the bargaining table and negotiate wages sooner. On that basis, the Employer and Union reached a tentative agreement on the First MOA. When the parties resumed bargaining in August of 2018, it was agreed there would be no major financial changes to the deal and anything agreed to during the first round of bargaining still stood. To use Rod Woods' words, he merely wanted to put "lipstick on a pig".

175. During bargaining, the parties never agreed that no wage below $15.00 would be reflected in the Wage Schedule for tracking purposes, nor did the parties agree that $15.00 would be used as the starting rate on the Wage Schedule for the purposes of calculating future increases. To the contrary, the MOA contains schedules with wage rates lower than $15.00. Additionally, the proposed Wage Schedule provided by Pincher Creek Co-op on October 25, 2018, which was subsequently accepted by the Union and used to calculate retroactive pay for year one, included various rates below $15.00.

176. In its written argument, the Union alleges that Pincher Creek Co-op is asking the arbitrator to modify the MOA and/or add in terms to the MOA. Pincher Creek Co-op expressly denies this and submits that it is the Union who is seeking to have this done. As set out above, there is no language contained within the MOA, or any objective extrinsic evidence, to support a finding that "increase in all steps or scales" included an entire recalibration of the Wage Schedule so that no wages below $15.00 appear on the Wage Schedule and so that existing separation between steps and scales is lost forever. The Union's interpretation of the MOA would require the arbitrator to add terms to the MOA which do not, and never did, exist.

177. The Union's interpretation of the MOA is contradictory to the clear intentions expressed by the parties during bargaining, and ultimately does not reflect what was agreed to by

the parties at bargaining.

Pincher Creek Co-op Past Practice

178. In the past, when there has been an increase in the statutory minimum wage, Pincher Creek Co-op has paid its employees in a manner that is consistent with its interpretation of the MOA. Pincher Creek Co-op's practice regarding contractual general wage increases in light of an increase in the statutory minimum wage is based on the common labour practice of red circling.

179. The principle of red circling is concisely summarized by Arbitrator MacDowell in *Waypoint Center for Mental Health Care and OPSEUA, Local 329 (Pauze), Re*, [2013] O.L.A.A. No. 459 (**Tab 31**), at paras. 2 - 4:

> 2 "*Red-circling*" is a labour relations tool that is applied when certain workers are being paid more than the wage rate stipulated for their job classification (and therefore more than other similarly situated employees doing similar work). That kind of wage-anomaly usually arises (as it did here) when some employees' wage rates reflect historical factors rather than the current operational reality, or where the employer has introduced a new system for classifying jobs and evaluating work. It also occurs in the shadow of organizational or technological change.
>
> 3 The easiest way to resolve this kind of problem is to reduce the outliers to the rate for their classification. That approach ensures that all employees will be paid for the actual value of their work and it reinforces the principle of equal pay for equal work.
>
> 4 However that does not necessarily happen in the collective bargaining world. Instead, the bargaining parties often agree that these higher-paid employees will be "red-circled" — which is to say, their existing wage rates will be "*frozen*" until the other employees "catch up" through the normal application of annual wage increases. In the meantime, the anomalous higher (personal) rates are preserved until the situation is "corrected" by the passage of time. The outliers are allowed to keep their anomalous rates — at least temporarily.

180. Throughout the term of Pincher Creek Co-op's previous collective agreement, which was in force from April 9, 2015 until April 9, 2018, there were a number of increases to the statutory minimum wage in Alberta.

181. Set out below is a summary of the increases in minimum wage that occurred from 2015 to 2018 in Alberta:

October 1, 2015: the minimum wage increased from $10.20 to $11.20;
October 1, 2016: the minimum wage increased from $11.20 to $12.20;
October 1, 2017: the minimum wage increased from $12.20 to $13.60

182. Each time these minimum wages came into force, Pincher Creek Co-op would increase the wage of any employee who was making less than the new minimum wage to meet the minimum wage; however, any subsequent contractual wage increase was applied to their previous wage rate and the scale steps set out under the Wage Schedule. Employees who received a bump up to the new minimum wage did not receive any further wage increases until the existing scale steps exceeded the minimum wage.

183. For example, employees who were making less than $12.20 on October 1, 2016, received an increase to $12.20 per hour due to the then increase in minimum wage. However, in the following April, when general wages increased by 2%, those employees did not receive a further wage increase unless and until their scale step plus 2% exceeded $12.20. In other words, their wages were frozen or red circled.

184. As set out in Brown and Beatty at 4:2120:

> Another related general guide to interpretation is that in construing a collective agreement, it should be presumed that all of the words used were intended to have some meaning. As well, it is to be presumed that they were not intended to be in conflict. However, if the only permissible construction leads to that result, resolution of the resulting conflict may be made by applying the following presumptions: special or specific provisions will prevail over general provisions; where a definition conflicts with an operative provision, the operative provision prevails; where the same word is used twice it is presumed to have the same meaning; where two different words are used, they are intended to have different meanings; where an incorporated document conflicts with an incorporating document, the conflicting provisions of the incorporated document will not be incorporated by reference; and **a clear expression of intention is required to confer a financial benefit, or other important provision.** One cannot both accept and reject a given legal document. **Likewise, where a variance from a usual practice is intended, it is said that it must be expressed clearly.**
>
> [Emphasis added]

185. In the absence of an express agreement that wages would be calculated differently following an increase of the minimum wage on October 1, 2018, Pincher Creek Co-op states that the intention of the parties was to continue to calculate wages in this same manner under the MOA and Collective Agreement. As set out above, had the Union intended to have the Wage Schedule recalibrated so that $15.00 acted as new starting rate across the grid, to which there would be a subsequent 1.75% increase applied annually, the Union was required to bargain for this monetary benefit. The Union did not.

186. Pincher Creek Co-op respectfully submits that the words of the MOA, read harmoniously with the object of the Collective Agreement, taking into consideration the context and the intent of the parties, which includes a consideration of bargaining history and past practice, Pincher Creek Co-op's interpretation of the MOA should be preferred over the Union's interpretation.

Employees Suffered No Financial Loss

187. Based on the application of Pincher Creek Co-op's interpretation of the MOA, the affected employees received full payment of their regular hourly wages in year two and will continue to do so in year three. As a result, the affected employees have not, and will not, experience any loss of income due to Pincher Creek Co-op continuing to pay their wages in accordance with the Wage Schedule as proposed by Pincher Creek Co-op. Accordingly, Pincher Creek Co-op has not breached the Collective Agreement or any of the terms contained therein.

III. CONCLUSION AND RELIEF REQUESTED

188. Based on the foregoing, Pincher Creek Co-op submits that it has not violated the Collective Agreement by failing to pay the percentage increase for year two to some rates and steps as listed in the MOA as alleged by the Union.

UNION REPLY TO EMPLOYER ARGUMENT

Onus

189. The Board should reject the submissions of the Employer that suggest that there is an onus on the Union, because those submissions are based on case law that has been rejected. There is no onus of proof on the Union. This grievance arbitration squarely relates to the interpretation of a Collective Agreement. In *Louisiana-Pacific Canada Ltd. (Golden) v. United Steelworkers, Local 1-405 (Dahlin Grievance)* [2013] B.C.C.A.A.A. No. 53 the Board explained:

> 44 Having reviewed the parties' submissions and authorities in this regard, I find the following excerpt from *Catalyst Paper* reflects the current arbitral consensus regarding the onus or burden of proof in collective agreement interpretation disputes:
>
> > The notion that a party has a special onus or burden to establish its interpretation of a collective agreement has been overtaken by subsequent authorities in this Province. Most (and perhaps all) of the

leading arbitrators who once espoused that approach have expressly charted a different course. See, for instance, *Pope and Talbot -and- CEP, Local 1092*, [2006] BCCAAA No. 224 (Hope), at paragraph 92. The current state of the law is exemplified by *The Board of Education and School District No. 36 (Surrey)/BCPSEA -and- BCTF/Surrey Teachers' Association* (March 6, 2009), unreported (Korbin):

> With respect to the Employer's reliance on the *Wire Rope* and *Noranda* line of cases, arbitrators have not, in recent history, strictly adhered to the notion that the Union bears any additional onus or burden in cases such as this. It is my view that as this is a matter of interpretation, *my role is to find the mutual intention of the parties within the competing interpretations put forward by the parties. In such an analysis, neither party bears any special onus of proof*. (p. 13)
>
> (Emphasis added)

45 I agree with and adopt this approach to onus in interpretation cases.

190. This approach has been accepted in Alberta (see paragraph 18 below).

<u>Timeliness</u>

1. The Union has already expressed its basis for asserting that the grievance was timely.

2. As already noted by the Employer, there is longstanding authority for the proposition that failure to pay the correct wage rate amounts to an ongoing breach (See para 104 – Employer's Argument).

3. Arbitration decisions have consistently referred to the date of payment (or non-payment) as the important occurrence for wage or payment grievances. For example*, United Food and Commercial Workers Union, Local 2020 v Northern Cruiser Ltd (Coombs Grievance),* [1994] CLAD No 640. In that case, the Arbitrator said:

> 41 The event giving rise to the grievance was the incorrect payment of vacation pay.

4. Similarly, in *Saint Mary's University v Saint Mary's University Faculty Union (Vacation Pay Grievance)*, [2015] NSLAA No 3, 124 CLAS 245, 263 LAC (4th) 110, 2015 CarswellNS 805:

> 8 The employer has asserted that the grievance is time barred because it was filed more than twenty (20) working days after the occurrence of the incident giving rise to the grievance, contrary to 22.3.1 of the Collective Agreement.

> For several reasons this objection cannot be upheld. First, the grievance is about the failure to pay vacation pay. The basis of the grievance is found in the *Code* where it provides that vacation pay is payable within ten days after the termination of employment. Leaving aside for the moment the issue of different professors having different termination days and focusing instead on the essence of the grievance, this is a claim that comes to fruition or is triggered ten working days after the Limited Term Appointees' employment ends. For many appointees, their contracts expired the 30th day of May. Their entitlement to vacation pay would therefore crystalize ten working days later. The grievance was filed May 29th, probably because this was shortly after the employer made it clear that it was denying any liability for vacation pay. Therefore, it must be seen that these facts reveal that the grievance was filed within, or actually before, the 20 working days after the "occurrence of the incident giving rise to the grievance", that being the alleged non-payment of vacation pay. Therefore, the grievance is timely with respect to such claims. Consideration should also be given to the fact that the grievance covers all the bargaining unit members on limited contracts whose contracts terminated during the September 1, 2012 - August 31, 2013 Academic year. For those with four-month appointments whose contracts terminated in December 2012, there is a better argument for the notion that the grievance is "late" for them. However, this is a group grievance. The timing of their claims may be relevant to remedy, but it is not a bar to the hearing of the merits with regard to the real issue in dispute.

5. A more extensive analysis concerning when a grievance will arise occurred in *Guardian Ambulance Ltd. v. Canadian Union of Public Employees, Local 319 (Retroactive Pay Grievance),* a recent decision of Arbitrator Ponak:

> 3 This award is devoted exclusively to an objection by the employer that the grievance was filed out of time. In the employer's submission, the CBA has a ten-day mandatory time limit, after which any grievance is deemed to be abandoned.

6. At page 37, the Employer argued that through its actions, the Union must have concluded that the Employer was not going to pay the wage levels the Union expected. The Arbitrator summarized the argument:

> 37 In the employer's view, the incident that gave rise to the grievance took place in July 2102 when Guardian assumed ownership and commenced paying wages below the wage levels set out in the CBA. According to the employer, since the Union was fully aware of Guardian's actions at the time, following the reasoning in *Alpine Drywall*, the incident which resulted in the grievance occurred in July 2012 and the ten-day grievance clock began at that time. Alternatively, the Employer submitted that the incident giving rise to the

> grievance was the Alberta Labour Relations Board determination that Guardian was the successor employer. This decision established that the CBA applied retroactive to July 2012, immediately calling into question the company's below-CBA payments. The employer pointed to the conclusions in *GenAlta* in support of the position that the ALRB ruling started the 10-day time clock. Either way, the grievance was untimely.

7. The Board's decision was to deny the Employer's preliminary objection. The Board stated:

> 39 The Board prefers the Union's position that the incident that gave rise to the grievance occurred on October 25, 2013 when detailed pay statements for October 2013 were released to employees. With the release of the detailed October statements, the Union could reasonably conclude for the first time that the company did not intend to pay workers the retroactive wages to which the Union believed employees were entitled. Up until that point, the breach was at most anticipatory.

8. In ***Guardian***, the Board made relevant comments about the context of disputes:

> 50 …Under our labour relations system, a collective bargaining relationship is viewed as a continuous one. The parties are expected to work together in good faith during the life of the collective agreement and for the renewal of subsequent agreements. To suggest a legal structure in which the first step on confirming the existence of a collective bargaining relationship is the filing of multiple grievances is antithetical to good faith. It makes no sense for a Union to be obligated, regardless of the circumstances, to immediately file what could amount to hundreds of grievances in some cases. Grievances like the one in the current case crystallize only at the time it is reasonable to infer that the obligation to implement particular aspects of the CBA is being ignored.

9. These points are particularly important in the context of the present dispute. Over a period of time, through discussions and email correspondence, the parties were exchanging their thoughts about what was the "agreement", or at least what were the implications in year two and beyond (recall that the Employer paid the retro pay for year one, so the payment obligation that was really being disputed would arise only at the first pay period after the anniversary date). It was an "ongoing exchange" of views between the parties (continuing as late as April 25, 2019), and the Union could only reasonably conclude that the company did not intend to pay workers the wages to which the Union believed employees were entitled in year two, after the April 25 discussion, or on April 22, 2019, when the Employer actually paid employees for work done pursuant to the relevant scales.

10. The time limit should only run from the date of the actual breach (in this case the date of

non-payment). In *Drug Trading Co v United Steelworkers of America, Local 3313 (Pension Grievance),* [1998] OLAA No 206, 71 LAC (4th) 231, the arbitrator made the following comments about anticipatory breach:

> 26 Counsel relies upon Abitibi-Price Inc. and United Paperworkers International Union, *(1993), 38 L.A.C. (4th) 59* (Rennie) where a thirteen-month delay in grieving a discharge, coupled with a delay of twenty-eight months in referring the grievance to an arbitrator, barred the Union from arbitration. There is an important distinction between the facts in that case and those at hand. An unjust discharge is an actual violation of a collective agreement and causes concrete harm to the employee who is dismissed. In contrast, the issuance of a benefit statement, based upon a mistaken understanding of a collective agreement, is better characterized as an anticipatory breach of the contract. No concrete harm occurs until the employer actually withholds pension benefits that should have been paid under the terms of the agreement. Does delay in grieving an anticipatory breach, before real injury occurs, bar a grievance at a later date? In Canadian Labour Arbitration, Brown and Beatty cite a case on point: Corporation of Township of Richmond and Richmond Fire Fighters Association *(1989), 7 L.A.C. (4th) 430* (Larson). Mr. Larson, a leading British Columbia arbitrator, answered the question posed above in the negative:
>
> > Any other conclusion would mean that, in almost every case, a Union would be obliged to launch a policy grievance immediately that it discovers that the employer is asserting an interpretive position contrary to its own and would not be able to wait until the collective agreement is actually breached. That would, almost certainly, have the effect of generating a huge increase in arbitrations from which no one would benefit but the arbitrators.
> >
> > The failure of a Union to launch a policy grievance to test an interpretation of a collective agreement taken by the employer does not constitute a representation that it will not grieve when the employer subsequently breaches the collective agreement. (page 463)
>
> Mr. Larson was addressing estoppel, but his reasoning applies with equal force to laches. Delay in grieving an anticipatory violation does not ground a defense of laches for the same reasons as such delay does not create an estoppel.

11. There are obvious practical benefits to determining that the time limit should only run from the date of the actual breach (in this case the date of non-payment). Such a position becomes obvious from the Employer's own argument. The Employer writes at paragraph 94:

> If that position is not accepted, then alternatively the Grievances crystallized on April 4, 2019, when Tom Zabel (on behalf of Pincher Creek Co-op) sent correspondence to the Union advising that Pincher Creek Co-op did not agree with the Union's position in regard to the Wage Schedule.

12. There is an obvious internal flaw in this analysis. The Employer asserts that by Mr. Zabel's response (April 4) to the Union's position, the "Union knew or ought to have known that the dispute had crystallized"; however, the opposite must also be true: that from the Union's previous correspondence to Mr. Zabel it must have been clear that there was a dispute, *so the* Employer *ought to have filed a grievance*, and the Employer was untimely. Again, these practical difficulties support the application of the general arbitral consensus, as explained above, that the date of payment (or non-payment) is the important occurrence for wage or payment grievances (the Employer references the *Foothills* Decision to similar effect – para. 104 of its argument).

13. As already noted, the correspondence between Pincher Creek and the Union made clear that there would be ongoing discussion. In Palmer, *Collective Agreement Arbitration in Canada*, (3rd) at 187, the authors explain:

> Generally...time begins to run when the important elements that make up the grievance are known or ought to have been known to the grievor. One case refines this test somewhat by adding that knowledge of the importance of the facts is also essential. Moreover, if the employer indicates in some way that a fuller or more formal explanation of the event will be forthcoming, it appears that time does not run until the later explanation is given...
>
> (Emphasis added)

14. The correspondence between Pincher Creek and the Union after the Collective Agreement was ratified made clear that both parties were seeking a fuller explanation, so time did not begin to run until this process was exhausted, on April 25, 2019. If the Employer did not intend to engage in this discussion, it could have said so; instead, it continued to exchange correspondence with the Union about the terms and through its conduct clearly represented that it was not enforcing any time limits or had waived them while discussions were ongoing.

15. In any event, the Union asserts that this matter is continuing grievance. In *St. Lawrence Lodge v. Canadian Union of Public Employees, Local 2107 (Collective Agreement Grievance).* The Board stated:

> 46 I must also reject the employer's objection to my consideration of the October 25, 2012 grievances on the grounds of timeliness, where it is asserted the Union was aware of the employer's practice of not paying for the shift and

weekend premiums for work on overtime and similar assignments outside of the "regular hours worked" since at least January 13, 2009 when it filed the first of several grievances on the matter.

48 …Different considerations apply when the matter complained of is properly characterized as being of a "continuing nature", which is particularly amenable to claims of improper payment where each failure to make the required payment is a fresh breach of the employment contract. The current Online edition of Brown, Donald J. M. and David M. Beatty, *Canada Labour Arbitration*, (Toronto, Ontario: Canada Law Book), summarizes the arbitral jurisprudence in such circumstances as follows at para. 2:3128:

> Where the violation of the agreement is of a continuing nature, compliance with the time-limits for initiating a grievance may not be as significant unless, of course, the collective agreement specifically provides that in those circumstances the grievance must be launched within a fixed period of time. Continuing violations consist of repetitive breaches of the collective agreement rather than simply a single or isolated breach. They may arise in such circumstances as an illegal strike, failure to ensure a safe workplace, the non-payment of money, or benefit premiums, or in connection with decisions based on an improper seniority date or the assignment of work. And although a refusal to deduct Union dues has not been classified as a continuing violation, other arbitrators have reached the opposite conclusion. In any event, the test most commonly used in determining whether there is a continuing violation is the one derived from contract law, namely, that there must be a recurring breach of duty, and not merely recurring damages.
>
> Where it is established that the breach is a continuing one permitting the time period for launching the grievance to be measured from the latest occurrence, it has been held that the failure to initiate it within the stipulated time from the date of its first occurrence will not render it in arbitrable. However, the relief or damages awarded retroactively in such circumstances may be limited by the time-limit. Thus, for example, where a grievance claimed improper payment of wages and the grievance was allowed, the award limited the damages recoverable to five full working days prior to the filing of the grievance, which was the time-limit for initiating the grievance.
>
> [Footnotes omitted]

49 Thus, in *Re Ontario (Ministry of the Attorney General) and O.P.S.E.U. (Hunt et al.)* (2003), 120 L.A.C. (4th) 119 (Abramsky), following an extensive review of the arbitral jurisprudence, it is noted at p. 127 that the standard for

> determining whether there is a “continuing grievance” on a matter is to show that the grievance concerns the breach of a “continuing duty” and not merely “that the collective agreement has been breached in a single transaction”.
>
> 50 Applied in the factual circumstances of the present case, the foregoing principles support the conclusion that the Union's October 25, 2012 group grievances are timely, even though the parties' dispute over the proper interpretation of Article 18.05 has been ongoing for many years, and notwithstanding the mandatory time limits in article 12.08 requiring that policy and group grievances be presented “in writing and within twenty-one (21) calendar days ***of the incident*** having occurred giving rise to the grievance” (Emphasis added). The obligation to pay shift and/or weekend premiums to employees who work the majority of hours between 1500 and 0715 hours and/or from 11:00 PM Friday through to 11:15 PM Sunday, whether as part of the employee's regular hours of work or on an overtime basis, is a continuing duty that is triggered each time the employee works those hours. Article 25.01 of the collective agreement obliges the employer to “pay salaries and wages bi-weekly” along with “overtime and other supplementary pay and deductions”. Thus, each alleged failure to pay the appropriate shift and/or weekend premium to employees working an overtime or extra shift assignment is an “incident” constituting a fresh breach of the collective agreement when proper payment is not remitted. As such, the Union's complaint of the employer’s alleged breach of its continuing duty under Article 18.05 enables the filing of the group grievances before me.
>
> 51 I accordingly find the grievances are timely.

16. In summary, if there is a timeliness issue in this case, the weight of the arbitral jurisprudence is that where a collective agreement provides time limits for the filing of grievances, recovery for continuing breaches should be limited to the period of time that begins with the earliest occurrence in respect of which the grievance filed was timely, unless there are circumstances that would make it inequitable for a party to rely on this rule. In this case, since the Grievance was filed April 26, 2019, the damages would be retroactive to when the breach occurred, being the first pay period after the first anniversary date. There is no basis for the Board to refuse any recovery in this case.

<u>Collective Agreement Interpretation</u>

17. The Employer argues at paragraphs 118-126 that clear and specific language is required to confer a monetary benefit and it argues such language was not present in this case. With respect, its submission ought to be rejected. The recent arbitral consensus has rejected the assertion that there is any special or extraordinary burden in monetary cases. Relying upon established analysis from previous cases, Arbitrator Phyllis Smith concisely confirmed this approach (based on the “modern approach” to Collective Agreement

interpretation) in *Teamsters Local Union 987 of Alberta v Saputo Dairy Products Canada GP Calgary Cheese (Payment of Statutory Holiday Pay Grievance),* [2016] AGAA No 33:

> The rules of interpretation governing this task were discussed at some length by Arbitrator Sims in *Coca-Cola Bottling Company and Miscellaneous Employees, Teamsters Local 987,* [2011] A.W.L.D. 4261. Those rules were summarized at paragraph 15 of Arbitrator Sims' decision quoting Arbitrator Elliott in the *Owen-Corning* case:
>
> - *The modern Canadian approach to interpreting agreements (including collective agreements) and legislation is encompassed by this statement:*
>
> - *"In the interpretation of collective agreements, their words must be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object, and the intention of the parties".* Arbitrator Elliott went on to discuss the meaning of the "*entire context of a collective agreement", "reading the words", "meaning of single* 'context".
>
> 14 Arbitrator Sims discussed a number of cases which applied these rules. What is apparent, from the cases that were provided to me by both parties is that the most recent approach to the interpretation of collective agreements places no special burden or onus on any party with respect to the interpretation of any specific provision. The task of interpretation is to determine the intention of the parties by examining the words they used in the context of the agreement as a whole. In that sense even the decisions which appear to place an extraordinary burden on the Union to establish a monetary benefit can be reconciled with the modern approach, as what those cases say is that the employer ought not to be required to pay a benefit which he has not expressly and clearly agreed to pay: *Wire Ropes,* para. 20. In essence those words are reflective of a determination of the intention of the parties from the words they used. If they did not use words that conferred a benefit, no such benefit was conferred. This is not a finding that the Union failed to meet its burden but a finding that the words used did not reflect the intention that was urged by the Union.

18. The circumstances where arbitrators have struggled to determine if the parties have intended to confer a monetary benefit typically involved "peripheral matters" such as entitlement to statutory holiday, time away for Union or committee related business, or bereavement pay. Those situations are entirely different than what exists in this case. In this case, the central issue of the case, and the clear purpose of the collective language (the MOA) was to confer a general wage increase in each year of the Collective Agreement. There can be no doubt that the parties intended to confer a monetary benefit. Moreover, the parties expressed their intention to confer the monetary benefit

in the broadest possible language: The parties used the words "general wage increase" that would apply on the anniversary to "all steps and scales". There are no words of limitation whatsoever – there are no words that reflect an intention to delay or disentitle or deprive anyone from the general wage increase, as has been urged by the Employer.

19. At paragraph 8 of its submission, Pincher Creek Co-op argues that:

> The correct interpretation of Article 13 in the MOA is that the negotiated percentage wage increases apply to all previously negotiated steps and scales as set out in the Expired Collective Agreement. Employees who were making less than $15.00/hour under those prior steps and scales would be paid the minimum wage of $15.00/hour (which came into force on October 1, 2018 but was implemented by the Company earlier on July 22, 2018), but would only receive additional pay increases thereafter once the scale steps as they were on April 1, 2017 (namely, the final year of the prior collective agreement) plus the negotiated contract increases exceed $15.00/hour.

20. However, the exceptions, and limitations set out in the Employer's interpretation do not appear in the language actually used by the parties in the Collective Agreement and the "freeze" does not result from a necessary inference. There are no words that might be interpreted as exempting the general wage increase from applying to the wage rates in effect on each anniversary date, one of those rates being the statutory minimum wage. The Union is not seeking to "imply a monetary benefit" as is being asserted by the Employer; instead, the *Employer* is seeking to imply a restriction or exception or delay to the application of the general increase for *some* employees which is not supported by *any* language. The Employer is seeking to imply this restriction against the broad collective agreement language which ostensibly confers a general wage increase.

21. The Board is statutorily prohibited from adding words to the Collective Agreement. The Board is bound by the words used by the parties and cannot add the words "*but would only receive additional pay increases thereafter once the scale steps as they were on April 1, 2017 (namely, the final year of the prior collective agreement) plus the negotiated contract increases exceed $15.00 per hour*" (i.e. the words used in paragraph 8 by the Employer) or anything similar. The Board cannot "add" words exempting some employees from the wage increase or exempting the increase from applying to the minimum wage, which was one of the wage rates in effect on the Anniversary date that the Employer was lawfully required to pay. Again, it is self-evident that the statutory minimum wage is one part of the "wages…[that]shall be observed by the Co-operative" (Article 7 of the Collective Agreement) because observance of that minimum wage was required by legislation. Those wages were subject to the "general wage increase" applicable to "increase all scales and steps" that were in effect on the second anniversary (and third anniversary) as expressed in Article 13.

22. The Employer argues that "the financial obligation imposed in a collective agreement should be interpreted so as to obtain a reasonable result" and that the outcome could "significantly impact…Pincher Creek Co-op" (paras 125-126). Of course, the converse is equally true – the outcome will also significantly affect the individual employees working at the Co-op who are only earning the minimum wage permitted in the province. However, that misses the point: The Board has a role only as a rights arbitrator, interpreting the language of the Collective Agreement, not an interest arbitrator. The Board's role as a "rights arbitrator" is circumscribed by the Section 142 which does not permit the Board to alter or amend the Collective Agreement. The Board's role is not to determine if the wage increase is "reasonable" or balance the relative fairness of a result.

23. The Employer argues that "the Union's interpretation of the MOA is unreasonable, given that it confers a substantial monetary benefit on employees that was never bargained for or agreed upon" (para 156), and the "Union's interpretation of the MOA, is accepted, will have a huge financial impact on the Employer" (para 157). However, the fact the article confers a monetary benefit does not make it "unreasonable" – that is not the test or principle of collective agreement interpretation. The Employer has not identified any absurdity or internal incoherence or other defect of construction or application that renders the Union's interpretation of the language unreasonable. For that matter, the Employer has not identified any ambiguity in Article 13 or the application of the Article. The Employer has not demonstrated that there is another plausible interpretation of the Agreement whereby the statutory minimum wage *is not part of the "wages…[that]shall be observed by the Co-operative" (Article 7 of the Collective Agreement) or part of the steps and scales, or* that the words "general wage increase" or "increase all steps and scales" are capable of more than one meaning. Instead, the Employer's "interpretation" adds words that are not in the agreement or necessarily implied by the context of the Collective Agreement and that is both an unreasonable interpretation and statutorily prohibited. In contrast, the Union's interpretation (and application) as expressed in its submission is internally coherent and consistent with the factual context where the agreement would apply, taking into account the words of Article 7 ("wages...that shall be observed"); the Employer's statutory obligation to abide minimum wage after October 1, 2018 (which was known to the parties when the agreement was made); the timing of the "general wage increase" (the minimum wage was in effect at the time of the second anniversary and thereafter); and the broad words chosen by the parties, "general wage increase" and "increase all steps and scales".

24. At paragraph 130, the Employer argues that "If these words were not capable of two or more meanings, the parties would not be before you." However, that argument has been rejected in countless awards. On the Employer's logic, the simple act of challenging the interpretation would mean there is ambiguity. As noted by Arbitrator Peltz in *Westfair Foods Ltd v United Food and Commercial Workers, Local No 832 (Health and Welfare Benefits Grievance)*, [2012] MGAD No 29, 2012 CanLII 97794:

> 72 Is the collective agreement language clear? Or is there ambiguity? If the

provisions are unambiguous, which version is the correct one? Arbitrator Hamilton's analytical framework in *Manitoba Telecom, supra*, is a good starting point (para. 69-71):

> A finding that an ambiguity exists must be done in the context of the basic rules which govern our interpretive task. The predominant reference point for this Board must be the language in the Agreement because it is primarily from the written word that the common intention of the parties must be ascertained. Language is to be construed in accordance with its ordinary and plain meaning, unless adopting this approach would lead to an absurdity or repugnancy but, in these latter situations, arbitrators will interpret the words used in a manner so as to avoid such results. It is also well recognized that a counter-balancing principle is that anomalies are considered results which are not sufficient to cause the alteration of the plain meaning of the words and neither is the fact that one interpretation of the collective agreement may result in a (perceived) hardship to one party [see *Massey-Harris*, (1953) 4 LAC 1579 (Gale) at p.1580]. **It is well accepted that "arguability of different constructions", standing alone, does not create an ambiguity thereby allowing the introduction of extrinsic evidence** [*Re Canadian Railway Company, Telecommunications Department and Canadian Telecommunications Union (1975), 8 LAC (2nd) 256* (Brown) at p.259]. **When ascertaining the common intention of the parties, objective tests must be used and "...not what the parties, post contractu, may wish to say was their intent albeit with honesty and sincerity"** [*Re Puretex Knitting Co. Ltd. and C.T.C.U. Local 560 (1975), 8 LAC (2nd) 371* (Dunn) at p.373]. These principles are reinforced by the prescription in Article 13.03 of the Agreement under which this Board cannot "...alter or change any of the provisions of this Agreement or to substitute any new provisions for any existing provisions thereof".

25. The Employer argues that "all steps and scales means the steps and scales contained within the final year of the wage grid of the Expired Collective Agreement". But this argument does not even address the issue of whether minimum wage is a "wage" for the purposes of Article 7; does not address or reconcile its words with the words "General Wage Increase" or address how minimum wage fits into the wages payable by the Employer, or how there is a delayed increase selectively applicable to those employees earning the statutory minimum wage. Moreover, the Employer's assertion that, "*all steps and scales means the steps and scales contained within the final year of the wage grid of the Expired Collective Agreement*" is literally and self evidently flawed. The increase in each year cannot be measured only against the "final year of the wage grid of the Expired

Collective Agreement" because such an interpretation ignores the basic fact that the increases that are applied each year (ratification; 1st Anniversary, 2nd Anniversary) build on the increases and changes made in the previous year. The increases over the term are compounding. The increases effective at ratification in first year (prior to the new statutory minimum wage) were increases made against "the final year of the wage grid of the Expired Collective Agreement". But that is not the case for the increases in the second and third year. For those years, the general wage increase is applied to the rates in effect on anniversary date (i.e. building on the rates then in effect).

Admissibility of Extrinsic Evidence

26. The Union repeats its submission that extrinsic evidence of bargaining history is not admissible in this case.

27. An arbitration board must be conscious that its mandate is to interpret the collective agreement and not the collective bargaining. In this case, the Employer is trying use extrinsic evidence of what it asserts happened in collective bargaining to establish rights (a wage freeze for those individuals earning minimum wage) contrary to what the collective agreement language states. The effect of the Employer's request is to amend the Collective Agreement, something prohibited by statute. What the Employer is proposing that you admit as evidence directly "*overwhelms the words of the agreement*" and offends the parole evidence rule that continues to apply to contracts generally, included Collective Agreement as noted by the Employer in its reference to *Sattva Capital* (paras 128 and 131-137 of the Employer's submission).

28. The Board should reject the assertion that the notes of Tom Zabel are "objective" or even complete. His notes are obviously not a "transcript" and his notes are not "objective". While he testified that he had some pre-prepared statements, his testimony also reflected that he also made notes (which are obviously summary notes) after returning to caucus or at the end of the session. His notes are his own summary of events he considered noteworthy or his perceptions and recollections and interpretations of comments made at during bargaining. He was not third party uninterested by-stander.

29. In any event, there is a NEVER a point in this notes that he records that the Union has provided clear unequivocal agreement to an interpretation or proposal by the Employer (again there is more than one interpretation offered) (see our prior submission).

30. The Employer was trying to explain what it wanted to achieve in bargaining. There is a record of concerns raised by the Union and different proposals made by the Union. Of course, even if where a party repeats or rephrases a statement made the other party, that does not necessarily imply agreement. Over the course of bargaining, the Union expressed concerns about how "much of the existing wage grid" was below the anticipated minimum wage; and concerns that some employees would not be eligible for

increases for a long time; concerns about how this might affect retention and attraction of employees; the Union expressed its concern and objective that all employees continue to be eligible for an increase during the term of the agreement. As expressed in our prior submission, even Mr. Zabel's notes record that on June 13, the Union was seeking increases for employees earning minimum wage. The notes of Mr. Zabel's record of Mr. Wood's comments at Exhibit 15:

> *We're going to propose a 2 year deal, at 3% and 3%. And then what we're proposing… when min wage goes up, it eliminates a large portion of the grid pattern. When that occurs, anything that's beyond the $15.00 gets recalibrated. The starting wage is $15.00, walked across stock clerk, at the 36 month rate, $14.89 that becomes $15.00. We don't think it's reasonable who starts on Nov 2 should have to wait 48 months. We think at 6 months, that person would see a normal increase to $15.37, at 12 months, $16.61 using the current grid. Not proposing increasing the grid beyond that. Anything that's beyond the $15.00 they should remain for the term of this agreement. The $15.00 amount, pump attendant, if I was hired on November 1, wage goes up to $15.00. On anniversary of the collective agreement, that $15.00 sees a 3% wage increase.*

31. On June 14, 2018, the Union made a counter-offer of a three-year offer, with a 2.75, 2.75, 2.75%. annual increases "across the Board".

32. The bargaining took place over several days spread over several months in 2018. There is no clear evidence of a consensus between the parties to forego or ignore the actual language used by the parties in the agreement or a consensus between the parties about how the actual language used by the parties in the agreement will be interpreted or applied. In this regard, there is never a point recorded in the notes of Tom Zabel where he claims to record a clear unequivocal agreement by the Union to the interpretation proposed by the Employer or a consensus between the parties about how the actual language used by the parties in the agreement will be interpreted or applied. The only evidence of consensus is the written language actually used in the Memorandum of Understanding. Whatever the intention and objective of the Employer, the extrinsic evidence in this case is insufficient to allow this arbitration board to attribute a shared intent to the Union beyond what was actually expressed in writing.

33. The Board should be very cautious about undermining the express written agreement between the parties. The interpretation of negotiations any kind is fraught with difficulty. The silence of one party does not necessarily imply agreement; similarly, where a party repeats or rephrases a statement or part of a statement made the other party that does not necessarily imply an agreement to be bound. Parties are fully entitled to bargain and evaluate their respective positions based on the written contractual language proposed between the parties. There is no obligation on one party to collective bargaining to alert

or advise the other party to collective bargaining (or any contractual negotiation for that matter) that the language proposed by the other party does not or might not achieve all or any of the objectives sought by the other party. However, there is an obligation on both parties to try to express their consensus in writing because the written language reflects a *mutuality* of intent measurable by objective standards.

34. As already explained, most arbitrators accept that there is no special onus on a party asserting a contractual breach to establish that its interpretation of the collective agreement is correct. However, this general consensus has not removed the general arbitral sentiment that "a very important promise is likely to be clearly and unequivocally expressed" (See *Pacific Press*, [1995] B.C.C.A.A.A. No. 627 (Para 28 of the Union's first submission).

35. In *Nigel Services for Adults with Disabilities Society-and-Construction and Specialized Workers' Union, Local 1611 (Severance Allowance Grievance)*, [2013] B.C.C.A.A.A. No. 24 (McPhillips), the Board at paragraph 35 adopted the following statement "...the more grave the consequence to the parties concerned, the more inherently unlikely it is that their bargain ... would be expressed in anything other than approximately precise language": see *Highmont Operating Corporation* (unreported), October 31, 1985 (Kelleher).

36. The Jim Peace Memo distributed July 2018 states: "*These employees will not receive additional increases until the have worked enough hours to exceed $15.00 on the existing wage scales."* The language now apparently sought by the Employer appears in the Jim Peace Memo in July 2018, *while collective bargaining was ongoing*, but never in <u>any</u> of the Collective Agreement proposals made by the Employer. The language of the Jim Peace memo was distributed two months prior to the last day of bargaining in August 2018. The Employer drafted the restrictive words in the Jim Peace memo. There can be no doubt that the Employer (and indeed both the Union and Employer) must have known that similar language was necessary if the same limitation was to apply after the implementation of the statutory minimum wage increase. But such language was never proposed during collective bargaining by the Employer or the Union (even though the parties had a least one telephone discussion and met for collective bargaining after the Jim Peace memo was distributed).

37. The *inclusion* of the restricting language in the Jim Peace memo on July 2018 but its *absence* from memorandum reached between the parties - and every written collective bargaining proposal made by the Employer - is ***<u>a very significant feature of the factual bargaining history</u>*** in the present case. Its absence is not easily discounted. It is the kind of "very important promise … that is likely to be [needs to be] clearly and unequivocally expressed." It would have been a simple matter to include it in the Collective Agreement if the parties had actually reached a consensus to include it – or in a proposal, if the Employer thought it could achieve that restriction in collective bargaining, but that

language was not included or proposed by either party in collective bargaining.

38. An important guiding interpretive principle is that where an agreement uses different words, one presumes that the parties intended different meanings. By analyzing, we might presume that by including the restricting language in the Jim Peace memo on July 2018, but excluding it in Collective bargaining, the parties, or at least one, of them intended different meanings and consequences.

39. The Employer has noted that "the Wage Schedule provided by Pincher Creek Co-op on October 25, 2018 which was subsequently accepted by the Union and used to calculate retroactive pay for year one, included various rates below $15.00" (para 174). The inclusion of rates below $15.00 for year one is entirely consistent with the Union's position and reflected the state of affairs as they applied in year one. Year 1 began April 2018 and the statutory minimum wage was not in effect until October 1, 2018. So, until October 1, 2018, the Employer could pay rates less than $15.00 hour, so application of the general increases to all rates below $15.00 was still relevant. As previously explained, the Union could not require (enforce) the Employer's unilateral decision to pay the minimum wage early.

Past Practice Evidence

40. The following principals are relevant to the discussion of past practice. In *Dominion Consolidated Truck Lines Limited and Teamsters Union Local 141*, (1981) 28 L.A.C. (2nd) 45 (Adams), the following comments appear on p. 49:

> [W]here parties in collective bargaining refer to a "practice" they are referring to the accepted "way of doing things"; their uniform and constant response to recurring set of circumstances... But regardless of how it is initiated, like all binding past practices, the course of conduct must occur with sufficient regularity, and continue long enough to be accepted by both parties as the normal way of operating presently and in the future...

41. There is no evidence of a "consistent long-standing past practice" that was treated by both parties as that the "normal way of operating presently and in the future". A statutory change in minimum wage does not occur frequently – it is an exceptional occurrence. The issue of past practice was never discussed by the parties at this bargaining table. Mr. Zabel was not even an employee of Pincher Creek when the prior changes occurred. Whatever happened in the past, it was clear the parties in these negotiations were not treating it as "the normal way of operating presently and in the future". The discussions between the parties at bargaining indicates that neither party had any expectations that the previous course of conduct for treatment of the wage increases to the minimum wage was expected to be determinative – or even a guide – about what was going to happen in the future.

AWARD

51. After concluding the first memorandum of agreement which was rejected by the Union membership the parties went back to the bargaining table. On this second attempt, the Employer and the Union negotiated what they apparently believed was the basis for a revised collective agreement (the "new CBA"). They executed the MOA which I must interpret.

52. This round of negotiations was not the first time the parties had bargained to achieve a new collective agreement. The parties had a mature bargaining relationship; in short, they knew each other. Each party was represented at the negotiating table by a bargaining committee led by an experienced person. For the Union, that representative was Rod Wood ("Rod"), a Unifor Representative. For the Employer that person was Tom Zabel ("Tom"). Tom was an employee of Federated Co-operatives based in Saskatoon. Tom's job was, among other labour relations tasks, to bargain collective agreements on behalf of Federated Co-operative's member cooperatives including the Employer.

53. The negotiations, which continued, on and off, over a lengthy period, took place after the Government of Alberta announced that it would increase the minimum wage to $15.00 per hour. At the time there was a significant portion of the Employer's unionized workforce that earned less than the new minimum wage (the "Minimum Wage Employees").

54. Prior to the Government of Alberta's implementation date for the minimum wage increase, the Employer moved to increase its lowest rate of pay to $15.00 per hour. It did that to keep trained employees from "jumping ship" to work for other employers in the Pincher Creek area who had already raised their rates of pay on the basis of the announced minimum wage increase by the Government of Alberta.

55. The Employer paid the increase unilaterally beginning on July 22. There was no bargaining with the Union and no amendment to the then extant collective agreement (the "Old CBA") was made. The steps and scales for each of the classifications set out in the Old CBA remained notwithstanding that all the Minimum Wage Employees were then receiving $15.00 per hour as a result of the Employer's unilateral wage increase.

56. The Employer also stated in its announcement that: "These employees will not receive additional increases until they have worked enough hour to exceed $15.00 on the existing wages scales." Those scales were set out in the Old CBA

57. For some of the Minimum Wage Employees, the increase in wages brought about by the announced minimum wage increase was a significant increase. The Old CBA for the year 2017 (the last year of the Old CBA) listed 28 classification scales and steps. The start rate for 22 of those 28 wage scales was less than $15.00 per hour. For some employees the start

rate on the scale was as low as $11.96 per hour. Of course, under the old CBA wages increased by steps based upon the length of time the employee worked for the Employer in the particular classification scale.

58. After July 22, 2018 no employee was receiving a rate of pay of less that $15.00 per hour. The negotiations were protracted. An initial memorandum of agreement was negotiated but was rejected by the Union membership. The parties returned to the bargaining table and ultimately, apparently believed that they had negotiated a new memorandum of agreement (the "New MOA"). However, the New MOA did not include a wage table. As events unfolded, when the parties attempted to set out the new wage table which was to be part of the New CBA, they had a significant disagreement. The disagreement was whether the Minimum Wage Employees would also receive the negotiated percentage increases that the other employees who earned more than the minimum wage were entitled to receive. The dispute did not affect those employees who were earning more than the minimum wage.

59. The operative phrase from the MOA which is to be interpreted reads as follows:

> *Increase all scales and steps by 1.75% excluding…*
>
> The exclusions are irrelevant as they do not include the Minimum Wage Employees. The issue is whether that increase applies only to the rates set out in the Old Collective Agreement or whether it also applies to the $15.00 rate for the Minimum Wage Employees.

60. There is also the preliminary issue of the Union's compliance or lack thereof with the provisions of the New CBA regarding the time limit for filing grievances. The relevant provisions of Article 10 are as follows:

> 1. Where a difference arises between the parties relating to the application, interpretation operation or any alleged violation of this agreement, such differences shall constitute a grievance and the parties agree that an honest effort will be made to settle the differences in the following manner:
>
>   a. The Union agrees to advise the Cooperative of the names of the Chief Steward and any stewards in writing and also of any changes from time to time.
>
> 2. Any employee, Chief Steward, Steward designate, local representative, National representative or the Cooperative Gen. Manager may present a grievance.
>
> 3. Any grievance which is not presented within 10 calendar days of the event giving rise to such grievance shall be forfeited and waived by the grieving party….
>
> 4. ...

5. It is distinctly understood that the arbitrator is not vested with the power to change, modify or alter this agreement, but may only interpret the provisions of the agreement. It is agreed that the expenses of the arbitrator shall be borne equally by the Union and the Co-operative.

61. It is clear from the foregoing that the provisions are mandatory and not directory. Reviewing the testimony and the exhibits makes it clear that there was a great deal of back and forth between the parties regarding whether the negotiated percentage wage increase applied to all employees or only to those employees who did not receive the minimum wage bump.

62. Normally, the issue of "when the grievance arose" would be very simple but that is not the case here. Finalizing a new collective agreement dragged on over an extended period. The process began on September 21, 2018 when the Union notified the Employer that the new collective agreement had been ratified.

63. The last exhibit relevant to the issue of timeliness is Exhibit 21 dated April 21, 2019 (seven months later) which is a note of a discussion between Rod and Tom together with additional persons on each side. At that point, it was clear that there was a significant disagreement between the parties about the entitlement of the minimum wage employees to the negotiated wage increase. The notes indicate that Rod stated that the Union would engage legal counsel for advice.

64. There can be no doubt that on April 25, 2019 it was clear that there was a dispute between the parties over this important matter. That clarity was buttressed by the fact that the Union stated that it would be engaging counsel. The Employer, however, argues that there were other, earlier, notable dates when the Union ought to have known that there was a dispute and filed a grievance in order to comply with the filing time provisions of the New CBA. That assertion may be questionable based upon the manner in which bargaining took place. Based upon the evidence, bargaining in this case looked and sounded very much like the old adage of "two ships passing in the night", albeit, in slow motion. Neither party seemed to realize that they were not on the same "nautical heading".

Interpretation of the Memorandum of Agreement

65. I now turn to the Award on the merits. At issue is the meaning of the words in the MOA: "Increase all scales and steps by 1.75%…" That language applies to all 3 years of the new collective agreement as the parties negotiated a three-year agreement with the same annual increase.

66. Counsel for both parties provided extensive written arguments which have been reproduced above in full. It is not my intention to regurgitate those arguments, however, I believe that

a summary is important to highlight the points made in argument by both counsel, beginning with counsel for the Union.

Summary and Review of Union Argument

67. The Union argued that the language of the MOA was not ambiguous and hence, extrinsic evidence could not be led as an aid to interpretation. The Employer argued to the contrary. As is usual in such cases, I reserved on the issue of ambiguity and allowed counsel for both parties to lead extrinsic evidence.

68. The Union submitted that the MOA way clearly provided for an increase to all wages including those wages paid to the Minimum Wage Employees.

69. The Union cited *United Nurses of Alberta, Local 85 v. Capital Health Authority (Sturgeon Community Hospital)* [2011] A.J. No 903 a decision of the Alberta Court of Appeal for the proposition that the "proper approach to interpreting collective agreements is to ascertain the purpose of the provision being interpreted either from its words or from its context in the collective agreement. Having ascertained the provisions purpose, one interprets the plain and ordinary meaning of the provision to see if it undermines the purpose of the provision previously ascertained."

70. The Union also cited the case of *Southern Alberta Institute of Technology (Board of Governors) v. SAIT Academic Faculty Assn* [2011] A.J. No. 953 2013 ABCA 161 where Arbitrator Wallace was quoted at paragraph [18] as follows:

> We are to seek the intention of the parties as they have expressed it in their collective agreement, and it is the "cardinal assumption" of interpreting the agreement that the parties are assumed to have intended what they have said. It is presumed the words are used in their normal or ordinary meaning; but that presumption may be overcome by the context of the agreement. The context may and should be sought from the entire agreement. All words are presumed to carry meaning so superfluity and redundancy are to be avoided if possible. Identical words are presumed to carry identical meaning, different words different meaning; but again, context can displace this presumption.

71. There is no doubt that an arbitrator must seek out the plain and ordinary meaning of the words used by the parties to the collective agreement. That is what the "plain meaning rule" is all about and further that the parties will be assumed to mean what they said in the agreement which they entered.

72. That said, context is also an important consideration and in this case part of the context was the wage increase granted by the Employer to the Minimum Wage Employees prior to the roll out of the minimum wage increase by the Government of Alberta. This occurred early

in the swirl of events around the bargaining between the parties.

73. The Union's argument quoted Arbitrator Sims in *Aecon Lockerbie Industrial Inc. v. International Brotherhood of Electrical Workers Local Union 424* [2011] (Overtime Grievance) A.G.A.A. No 22 as follows:

> This chair, in the *ATA case, (supra)* ruled at p.9
>
> The following passage holds that the context in which a contract is entered into is part of the interpretive process; something to be considered in deciding on whether a contract is ambiguous.
>
> > [54] A consideration of the context in which the written agreement was made is an integral part of the interpretive process and is not something that is resorted to only where the words viewed in isolation suggest some ambiguity. To find ambiguity one must come to certain conclusions as to the meaning of the words used. A conclusion as to the meaning of the words used in a written contract can only be properly reached if the contract is considered in the context in which it was made: see McCamus, *The Law of Contracts* (Toronto: Irwin Law 2005) at 710-11
>
> Later on, Arbitrator Sims went on to say the following:
>
> > [55] There is some controversy as to how expansively the context should be examined for the purpose of contractual interpretation: see Geof R. Hall, "A Curious Incident in the Law of Contract: The Impact of 22 Words from the House of Lords" 2004 40 Can. Bus. L.J. insofar as written agreements are concerned, the context, or as it is sometimes called, "factual matrix" clearly extends to the genesis of the agreement, its purpose, and the commercial context in which the agreement was made: *Kentucky Fried Chicken Canada v. Scott Food Services Inc.* (1998), 114 O.A.C. 373 at 363 (C.A.).
> >
> > [56] I would adopt the description of the interpretive process provided by Lord Justice Steyn, "The Intractable Problem of the Interpretation of Legal Texts", Supra at 8:
> >
> > > In sharp contrast with civil legal systems the common law adopts largely objective theory to the interpretation of contracts. The purpose of the interpretation of a contract is not to discover how the parties understood the language of the text, which they adopted. The aim is to determine the meaning of the contract against its objective contextual scene. By and large the objective approach to the question of construction serves the need of

commerce. [2]

Dumbrell v. The Regional Group of Companies Inc. 2007 Ont. C.A. 59

74. Although the text of the case clearly refers to a commercial matter, in my view it would apply equally to other areas of the law including to a labour law matter. The rules of contract interpretation should not and do not, to my knowledge, vary between different branches of the law. In this instance, the MOA was prepared in the context of a then current round of collective bargaining and an increase in pay for the Minimum Wage Employees. That raise came about because the Employer unilaterally increased the wages of those employees in the knowledge that the Government of Alberta was going to raise the minimum wage to $15.00 per hour. It did so in order to keep its Minimum Wage Employees in its employ.

75. It was clear that the Union was aware that the Minimum Wage Employees had received a relatively large percentage raise immediately prior to the commencement of collective bargaining.

76. The Union also argued that the use of the words "general wage increase" meant that the negotiated wage increase would be applicable to all employees including the minimum wage employees. The Union also argued that the collective agreement was not "ambiguous". There was, it stated, "no uncertainty regarding the meaning of the heading "general wage increase" or the scope of application. The Union went on to state that there was "no language that could reasonably support an interpretation where the annual wage increases do not apply to the Minimum Wage Employees".

77. The Union also spoke to the issue of the admissibility of extrinsic evidence as an aid to interpretation. It argued that extrinsic evidence could not be used to interpret unambiguous language such as the language used in the MOA. It cited the Alberta Court of Appeal decision in the case of *Alberta Teachers Assn. v. Buffalo Trail Public Schools Regional Division No 29 [2014] AJ No 1337* as follows at paragraph 10:

> Arbitrators are generally prohibited from using extrinsic evidence to interpret unambiguous provisions in a collective agreement: *United Brotherhood of Carpenters and Joiners, Local 579 v. Bradco Construction Ltd.,* 1993 2 SCR 316 at 342. Using extrinsic evidence to interpret a collective agreement where no ambiguity exists essentially amounts to varying the terms of the agreement, which is prohibited by s. 142 of the Labour Relations Code, RSA 2000, c. L-1: *United Food and Commercial Workers Union Local 401 v. Canada Safeway Ltd.*, 2007 ABCA 331 at para 17, 417 AR 392.

78. It was the Union's position that the language of the MOA was not ambiguous and that the Minimum Wage Employees were entitled to the same wage increase that other bargaining

unit employees were entitled to receive.

79. The Union argument also canvassed the issue of what constituted an ambiguity. That is, obviously, an important issue to be considered. It cited the case of *Re United Steelworkers of America, Local 1005 and Steel Co. of Canada Ltd.et al* 20 O.R. (2d) 205 where Mr. Justice Grange said at p. 206 and 207:

> An ambiguity whether patent or latent implies at least two meanings of one word or phrase. A patent ambiguity is an ambiguity on its face; a latent ambiguity does not become one until evidence shows it to be so. The evidence here sought to be adduced is not intended to point out a latent ambiguity or to clear up an ambiguity either patent or latent; it is tendered to show that words unambiguous in meaning were not intended to apply to a particular factual situation. Contracting parties must live with the words they have used if those words are clear and no mistake or other vitiating element is involved.

80. The Union argued that during collective bargaining the Employer did not suggest that the minimum wage employees would be exempted from "all steps and scales" on the anniversary dates. There was, counsel argued, "no expressed consensus" that the minimum wage rate would be exempted from the increase to all steps and scales on the anniversary dates of the collective agreement.

81. I disagree with the Union, in part, on this point. I believe that the testimony of the Employer's spokesman at bargaining, buttressed by his notes that were entered as exhibits, make it clear that the Employer was steadfastly, opposed to providing a raise to the Minimum Wage Employees. The testimony of the Union's witness was not as clear on this point.

82. The Union, again citing Arbitrator Casey in *Cardinal Coach Lines* [2018] A.G.A.A No. 1 stated:

> … The intention must be gathered from the written instrument. The function of the court is to ascertain what the parties meant by the words they have used to declare the meaning of what is written in the instrument, not what was intended to have been written; to give effect to the intention as expressed, the expressed meaning being for the purpose of interpretation, equivalent to the intention.

83. The Union argued that the board was statutorily prohibited from adding words to the MOA. The board, it said, was bound by the words used by the parties and could not add the words such as "These employees will not receive additional increases until they have worked enough hours to exceed $15.00 on the existing wage scales." or anything similar.

84. I agree with the Union that the Board is restricted to interpreting the words of the MOA.

It cannot either add to or subtract from the words of the MOA.

85. The Union closed its case by stating that while extrinsic evidence can be used to resolve an ambiguity that does not compel the admission of extrinsic evidence in every case. It stated that "In this case there is no basis for the admission of extrinsic evidence as an aid to interpretation (since there is no ambiguity) and even if there was, the extrinsic evidence of bargaining history does not reveal a consensus between the Union and the Employer to ascribe a particular meaning to any ambiguous language…"

Summary and Review of Employer Argument

86. The Employer had a diametrically different interpretation of the provisions of the MOA. The Employer argued that the correct interpretation was that the negotiated percentage wage increases applied to all previously negotiated steps and scales as set out in the expired collective agreement between the parties. Employees who were making less than $15.00 per hour under the prior steps and scales would be paid the minimum wage of $15.00 per hour but would only receive additional negotiated pay increases once the scales and steps as they were in the final year of the previous collective agreement plus the negotiated contract increases exceeded $15.00 per hour. Given that interpretation some of the Minimum Wage Employees would not receive a wage increase for an extended period.

87. The key to the Employer's argument was that the "steps and scales" referred to in the MOA were the steps and scales set out in the collective agreement which had expired on April 9, 2018 (the Old CBA) but which had continued in effect by operation of law.

88. The Employer's argument sets out its position in some detail. It reads as follows:

> Pincher Creek Co-op submits the correct interpretation of Article 13 in the MOA is that the negotiated percentage wage increase apply to all previously negotiated steps and scales as set out in the expired collective agreement. Employees who were making less than $15 per hour under those prior steps and scales would be paid the minimum wage of $15 per hour (which came into force on October 1, 2018 but was implemented by the company earlier on July 22, 2018) but would only receive additional pay increases thereafter once the scale steps as they were on April 2017 (namely the final year of the prior collective agreement) plus the negotiated contract increases exceed $15 per hour.

89. At first blush, this argument appears to fly in the face of the wording of the MOA of a "general wage increase". The Employer also argued that the wording of the MOA was ambiguous and, accordingly, extrinsic evidence could be called to elucidate the meaning of the MOA. The argument that the MOA was ambiguous was, I thought, rather strange

in that the MOA had been drafted by Tom, the Employer's spokesman during negotiations. His recollection of the relevant events was very clear and his notes which were entered as exhibits were impeccable. In any event, as arbitrators almost always do, I allowed the extrinsic evidence to be led on the understanding that if I determined the language of the MOA to be unambiguous, I would give no weight to such evidence.

90. The Employer's argument was multi-faceted and sets out, in great detail, the history of the bargaining, both current and past, and the manner in which the Employer dealt with previous increases to the minimum wage and the impact of those increases on the steps and scales set out in the then current collective agreement. All of that led, ultimately, to the MOA which was ratified by the Union membership and which is the subject matter of this arbitration. Without attempting to replicate the Employer's argument the following are its highlights.

91. The Employer submitted that the evidence of its spokesman Tom Zabel ("Tom") should be preferred over the evidence of Rod Wood ("Rod") whose memory was not as crisp as Tom's and who did not take extensive notes during bargaining such as Tom did. It was also clear that Tom had more experience with collective agreements including minimum wage rates than Rod had. Although, in the end, that did not really matter, I agreed with the Employer's submission in that regard.

92. Tom testified that he explained to the Union committee during bargaining that if the minimum wage exceeded the scale step for an employee, the employee would continue to receive the minimum wage rate until his or her wage rate as set out in the steps and scales exceeded the minimum wage. He also stated that the practical effect would be that some employees pay rates would be frozen for a considerable period of time, perhaps for the life of the new collective agreement. Tom stated that he believed the Union clearly understood the employer's position and acknowledged it on three occasions.

93. Tom explained that the Employer needed time to absorb cost of the increases resulting from the increase to the minimum wage. Counsel argued that the Employer never changed its position on what it called the "wage freeze" but did adjust the percentage increases applicable to employees who's wage rates were above the minimum wage threshold. The Employer's position remained the same, she said, both before the first MOA was rejected until the conclusion of collective bargaining and the agreement by the Union membership to the second MOA.

94. It took a long time for the parties to draft the New CBA. As a result the Employer drafted a wage schedule for the first year of the New CBA for approval by the Union. It did that so retroactive wage payments could be processed. That wage schedule reflected the agreement which the Employer believed had been achieved at bargaining. It included no increase in wages for the Minimum Wage Employees but did reflect an increase for other employees. The Union agreed with the wage schedule but reserved its right to dispute

further calculations, if required.

95. The Employer provided evidence of how it had dealt with minimum wage related issues in the past. In summary, wage increases for persons who were receiving minimum wage were based upon the steps and scales in the then current collective agreement and not on the Government of Alberta minimum wage.

96. The Employer raised preliminary objections both with respect to the onus of proof and with respect to the timeliness of the grievance. Dealing with the issue of onus of proof first, the Employer cited the case of *Canada Safeway Ltd. and UFCW, Local 401* (Policy Grievance) Re at 2013 Carswell Alta 4173 (2013) A.W. L. 4170, 115 C. L. A. S. 374, an award by Arbitrator Phyllis Smith. At paragraph 196, Arbitrator Smith stated as follows:

> This case requires me to both interpret the provisions of the Letter of Understanding and to determine whether it has been breached, and if so, what the appropriate remedy is. The interpretive exercise in my view is not one that engages respecting the onus of proof but rather the task of interpreting the words used by the parties to determine their intention. The second issue, determining whether the collective agreement has been breached does engage the issue of onus. The onus clearly rests upon the Union to demonstrate on the balance of probabilities by clear convincing and cogent evidence that the collective agreement has been breached by Safeway and to show that damages have been suffered by reason of the breach if damages are being claimed.

97. I agree with Arbitrator Smith. In this case there is no particular onus upon the Union, any more so than on the Employer to interpret the words of the MOA as that is a question of law. There is an obligation upon the Union, assuming that its interpretation of the MOA is correct, to show a breach and that damages flow from the breach. In this case, that is not particularly difficult given that both parties agree that the Minimum Wage Employees have not been paid the same percentage wage increase awarded to other members of the bargaining unit.

98. The Employer raised a second preliminary objection that relates to whether the grievance was filed in a timely manner in compliance with the provisions of the Collective Agreement.

99. Article 10.3 of the collective agreement states that "Any grievance which is not presented within 10 calendar days following the event giving rise to such grievance shall be forfeited and waived by the grieving party." The collective agreement goes on to say, in that same Article, that "It is distinctly understood that the arbitrator is not vested with the power to change, modify or alter this agreement, but may only interpret the provisions of the agreement."

100. It is crystal clear that Article 10.3 of the Collective Agreement is mandatory and not directory. Failure to comply with the time limits set out in the Collective Agreement result in forfeiture and waiver of a grievance. The question is: "When did the time limit begin to run?" The corollary to that question is "Did the Union file the grievance within that period of time?" We know that the grievance was filed on April 26, 2019. What must be determine is whether there was a breach of the MOA in the period beginning on April 16, 2019. If there was no such breach, then the grievance was not timely and must fail.

101. The issue of compliance with the mandatory time limits set out in the Collective Agreement is a difficult one. The parties engaged in an extended period of discussions, while putting the new Collective Agreement into its final form. This raises the question of: "When exactly did the Union know that the Employer would not be paying what the Union believed was the correct rate of pay to the Minimum Wage Employees?" When did the clock begin to run?

102. There is also a question of whether this grievance is a "continuing grievance". Such grievances are generally said to continue when an employer fails to pay the appropriate rate of pay to employees. If the grievance is "continuing" in nature it can be said that every employee affected, every day has a new grievance and thus the grievance would have been filed in compliance with the provisions of Article 10 as the Minimum Wage Employees were never paid what the Union believed was the correct rate of pay. In that sense, the issue of timely filing rises and falls with the Board's decision about the meaning of the MOA.

103. The Employer cited the case of *Edmonton (City) vs. C.S.U., Local 52* [1999] A.G.A.A. decision of Arbitrator Ponak. In that case he found that the time limit started running when the Grievor knew or ought to have known the important elements that make up the grievance. I agree with Arbitrator Ponak but the question remains as to when the Union actually knew the important elements of the dispute.

104. Counsel for the Employer argued that the event which should have been grieved occurred on October 25, 2018 or alternatively on April 4, 2000, or at the very latest on April 7, 2019. If counsel for the Employer is correct, even applying the latest date to which she referred, the grievance would not be timely. The fact, however, that counsel gave three dates upon which the Union ought to have known that there was a dispute and filed a grievance would indicate that the matter was not exactly crystal clear.

105. On October 25, 2018 the Employer notified the Union of the Employer's position regarding rate of pay for the for the Minimum Wage Employees. Following that, the Employer did not change its position. Further, on April 7, 2019 Rod notified the Employer that the Union did not agree with the Employer's proposed wage schedule and the Union reserved the right to resolve the dispute. Upon the assumption that the grievance was not a continuing

one, the dispute clearly crystallized at that time. Given that the Union filed its grievance on April 26, 2000 it was not timely. Counsel for the Employer pointed out that although the grievance procedure permits extensions during the step procedure there is no equivalent to that language with regard to the original filing time of the grievance.

106. Counsel for the Employer cited *Capital Health (Alberta Health Sciences) and AUPE Local 54 (Brennan) Re*, 2010 CarswellAlta 2848 for the test used to determine if a grievance is, in fact, a continuing grievance as follows:

> …Continuing violations consist of repetitive breaches of the collective agreement rather than simply a single or isolated breach. They may arise in such circumstances as an illegal strike, failure to insure a safe workplace, nonpayment of money or benefit premiums, or in connection with decisions based on an improper seniority date or the assignment of work… In any event, the test most commonly used in determining whether there is a continuing violation is the one derived from contract law, namely, that there must be a recurring breach of the duty and not merely recurring damages.

107. If the Union is correct and the Employer is not paying the Minimum Wage Employees correctly, there is no doubt that "damages" occur each time they are paid the "wrong" amount. The issue to be determined is whether there is also a recurring breach of the MOA. "Does a breach occur each and every time the Employer fails to pay the Minimum Wage Employees the correct rate of pay? If the Union is correct and the Employer was obliged to pay the general wage increase, I believe it does.

108. Since Employer believes that the correct interpretation of the MOA is that the Minimum Wage Employees are not entitled to the general wage increase, the Employer continues to pay them at the minimum wage rate every payday. It seems to me, again based on the supposition that the Union is correct, that there would be both a breach of the MOA and damages every time the Employer issues pay to the Minimum Wage Employees. Whether the grievance was, timely depends upon the correct interpretation of the MOA. If the Union is correct, the grievance was timely. If the Union is wrong the grievance was not timely.

Decision

109. In this Arbitrator's 50 years of experience in the labour relations field, the language used in the MOA is not uncommon. Parties to collective agreements often use the phrase "steps and scales" in connection with rates of pay spelled out in the wage table of a collective agreement. In fact, the word "scales" appears in the first line of Appendix "A" to the Old Collective Agreement where it states: "The following items shall apply for all "scales."

110. In "collective agreement speak" a "scale" is a series of rates of pay for a particular occupational classification. In the Old Collective Agreement, the first scale in Appendix "A" is that of Head Grocery Clerk. That scale begins with a first step rate of $12.88 and concludes after 36 months with a step rate of $20.06. In between the first step rate and the last step rate there are a number of intervening steps rates or wage increases at six-month intervals. In summary then, a "scale" is a series of rates of pay for a particular occupational classification and a "step" is a rate of pay within that scale based upon the duration of an employee's employment with the Employer in that classification.

111. As stated above, prior to the Government of Alberta increasing the minimum wage to $15.00 per hour, the Employer determined to increase the rate of pay for all Minimum Wage Employees and it did so. It did not negotiate that wage increase and it did not purport to amend the Old Collective Agreement. In fact, the Employer could not unilaterally amend the Old Collective Agreement. The only way that the Old Collective Agreement could be amended would be by mutual agreement of the parties through collective bargaining. It appears that, given the benefit to its members via the unilateral wage increase, the Union did not object to the Employer's action although it could have done so and filled a grievance.

112. The reality was that when the parties bargained what they believed to be the "New Collective Agreement" via the MOA there was no "minimum wage scale" of $15.00 per hour set out in the steps and scales of the "Old Collective Agreement" that could be increased by the negotiated percentage. It is true that there were some $15.00 rates of pay in set out in the steps and scales of the Old Collective Agreement but those were negotiated when the Old Collective Agreement was concluded, several years before.

113. When the Employer acted unilaterally as it did, there was no step and scale of $15.00 per hour inserted into the Old Collective Agreement for the Minimum Wage Employees. The result of that fact was that, for the Minimum Wage Employees, was that there was no step and scale to which the negotiated general wage increase could be applied.

114. The facts lead to the conclusion that the MOA is not ambiguous. To the contrary, it is clear. It is simply not possible to increase a step and scale that does not exist. No doubt the Employer unilaterally created a rate of pay of $15.00 per hour before it was imposed by the Government of Alberta however that act was not create a "step and scale". The only extant "steps and scales" were those set out in the Old Collective Agreement.

115. In short, the Minimum Wage Employees who received the wage increase to $15.00 per hour, prior to the Province of Alberta implementing that sum as the minimum wage, were not entitled to receive the negotiated general wage increase.

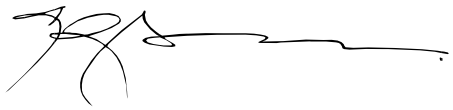
116. Further, since I have found that the Employer's interpretation of the MOA is correct, the grievance filed in this grievance is not a continuing grievance. The grievance was not filled in accordance with the provisions of the New CBA. Given my finding on the merits, this finding is largely irrelevant.

117. The general wage increase does not apply to the Minimum Wage Employees. The grievance is, therefor, denied.

118. I am retaining jurisdiction if there is any problem with respect to implementation of this award. I must add that I do not expect any problems. Reserving jurisdiction has become my normal practice.

119. My thanks to counsel for both parties for the excellent and extensive briefs which both of them provided to me.

DATED at the City of Calgary, in the Province of Alberta, this 26th day of January, 2021.



A. Robson Garden, Q.C.
Arbitrator