**IN THE MATTER OF A GRIEVANCE ARBITRATION RELATING TO APRIL 30, 2013 DOUBLE OVERTIME GRIEVANCE ARISING OUT OF COLLECTIVE BARGAINING AGREEMENT EFFECTIVE NOVEMBER 1, 2012 TO OCTOBER 31, 2015**

**BETWEEN:**

**GRAIN AND GENERAL SERVICES UNION (ILWU-CANADA)**

**- and -**

**VITERRA INC.**

**Ronni A. Nordal** — **for Grain and General Services Union (ILWU-Canada)**

**Raylene Y. Palichuk** — **for Viterra Inc.**

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**AWARD** — **January 9, 2014**

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## INTRODUCTION

[1] Grain and General Services Union (ILWU-Canada) ("GSU") and Viterra Inc. ("Viterra") jointly agreed to submit a policy grievance to arbitration pursuant to the terms of the Collective Bargaining Agreement to determine an employee's right to double overtime on non scheduled days off. Specifically, the policy grievance stated:

> The union on its own behalf and on behalf of its members, hereby grieves the company's refusal to pay double overtime after four hours at time and one-half is a violation of, but not limited to, Article 18.4 of the collective bargaining agreement covering Operations and Maintenance employees.

[2] The parties agreed to appoint a single arbitrator to determine the issues pursuant to Article 6 (Step 4), of the Collective Bargaining Agreement. They agree that the arbitrator is properly appointed and has jurisdiction to hear and decide the issues raised on this policy grievance.

[3] The arbitration arose out of a disagreement between the parties regarding the obligation by Viterra to pay double overtime on a day other than a regularly scheduled day of work after the first four (4) hours of overtime worked. Viterra's position was that it was not required to pay double overtime until its employee had worked twelve (12) hours at one and one half times (1 1/2 X) his or her regular salary.

## ISSUES

[4] The parties are agreed that the policy grievance raises the following issues:

1. What is the proper interpretation of the current Collective Bargaining Agreement in respect of an employee's entitlement to double overtime on non scheduled days off pursuant to Article 18 and specifically Article 18.4 of the Collective Bargaining Agreement?

2. Is Article 18.4 of the Collective Bargaining Agreement ambiguous regarding the entitlement to double overtime on non scheduled days off with the result that extrinsic evidence may be considered to determine the intention of the parties, and if so;

3. Does the doctrine of equitable estoppel apply to prevent GSU from claiming double overtime in the circumstances of the current Collective Bargaining Agreement?

***Relevant Provisions of the Collective Bargaining Agreement***

> **ARTICLE 7 - ARBITRATION BOARD**
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> 7.1 The Arbitration Board under Article 6 (Step 4) shall not have authority to alter or change any of the provisions of the Agreement, or to insert any new provisions, or to give any decision contrary to the terms and provisions of the Agreement, but it is agreed that where disciplinary action is involved the

Arbitration Board shall have the power to award a penalty or amend a penalty imposed by the Company.

....

**ARTICLE 18 - HOURS OF WORK AND OVERTIME**

18.1 Hours of Work

The Company retains the right to schedule hours of work of employees as is necessary to ensure efficient operations and to provide coverage for the determined hours of operation.

18.2 Regular Work Schedules and Modified Work Week Schedules

Regular work schedules for employees shall be defined as five (5) days per week consisting of eight (8) hours per day and forty (40) hours per week.

The Company may implement modified or variable hours of work schedules provided the Union is notified and the affected employees agree to vary or modify their hours of work as provided in Part Ill of the Canada Labour Code.

Subject to section 18.6 below, the typical workweek shall consist of 40 hours of work paid at the employee's straight hourly rate and the work day shall normally consist of eight (8) hours work paid at the straight time hourly rate.

...

18.4 Overtime

Overtime is defined as time worked in excess of an employee's regularly scheduled hours of work. When employees are required to work in excess of their regular scheduled hours of work they shall be paid at the rate of one and one half times (1 1/2 X) their regular straight time hourly rate for the first four (4) hours of overtime worked beyond the regular hours of their shift. For overtime hours worked beyond four (4) hours, employees shall be paid two times (2 X) their regular straight time hourly rate of pay.

When the needs of the operation require it, employees may be required to work overtime. However, all overtime is voluntary after an employee has worked twelve (12) hours in any shift or forty-eight (48) hours in any week.

Employees shall be paid for all overtime worked at the appropriate overtime rate of pay as described in this Article. However, with the agreement of the Company, employees may bank their overtime worked, at the appropriate overtime rate, to be taken as paid time off work.

18.5 Averaging

The hours worked by employees may be averaged over four (4) weeks or a longer period provided the Union and affected employees are informed of the circumstances and terms of the proposed averaging; and, provided the affected employees approve of the averaging as provided in Part Ill of the Canada Labour Code with respect to modified work schedules.

> The hours worked by employees in the Assistant Manager or higher positions may be averaged over an eight (8) week period. All hours worked in excess of 320 hours in the eight (8) week period shall be deemed to be overtime work and shall be paid for or banked at the rate of one and one half times (1½ X) the employee's regular rate of pay as directed by the employee.
>
> 18.6 Maximum and Minimum
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> The hours of work as stated in this Article are not to be construed as a guaranteed minimum of hours to be worked.
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> 18.7 General/Statutory Pay for Modified Work Week Schedules
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> Employees working a Modified Work Week Shift Schedule or whose work is averaged over multiple weeks as described in Article 18.5 shall receive eight (8) hours pay at their regular rate in addition to overtime at the rate of one and a half times (1 1/2 X) their regular rate of pay for all hours worked on a general holiday. Such employees who do not work on a general holiday, will receive eight (8) hours pay at their regular rate of pay.

## FACTS

[5] GSU is the certified bargaining agent for employees in Viterra's Operations/ Maintenance division as set out in Certification Order 9959—U and (the bargaining unit). GSU has represented Country Operations employees since 1937 and Maintenance employees since 1956. These employees work in grain facilities, agricultural retail centres and some of the Maintenance employees move from grain facility to grain facility as required.

[6] The terms and conditions of employment for the members of the bargaining unit are set out in the Collective Bargaining Agreement between the parties for the period November 1, 2012 to October 31, 2015.

[7] The facts are generally not in dispute. The evidence of Hugh J. Wagner, the General Secretary of GSU and Bill Roszell, Director Country Regional Management for Viterra, does not diverge in material matters of consequence. If anything, the positions are remarkably consistent except for what is determined as the "nub of the matter," the meaning of Article 18.4.

[8] The grain facilities normally operate six (6) days a week unless the employees are required to work loading grain cars or during harvest to receive grain. The agricultural retail centres are open Monday to Friday, 8:00 a.m. to 5:00 p.m.

[9] The employees' regularly scheduled hours of work are eight (8) hours per day, five (5) days a week, Monday to Friday or Tuesday to Saturday. However, employees' regularly scheduled hours of work may be modified to four (4) days of ten (10) hour shifts (Monday to Thursday). The modified shifts may also consist of a forty (40) hour week of twelve (12) hour shifts and a forty (40) hour week of 13.3 hour shifts, three (3) days a week.

[10] In addition to the above, there are a number of other regularly scheduled hours of work, all of which are based on forty (40) hours of work in a regular week.

[11] Article 18.2 defines the workday as five (5) days a week consisting of eight (8) hours per day and forty (40) hours per week.

## ANALYSIS

[12] There is no dispute between the parties on the proper interpretation of Article 18.4 as it applies to employees working overtime on a day of regularly scheduled work. That is, that an employee is entitled to overtime at one and one half times (1 1/2 X) his or her regular pay for the first four (4) hours beyond the regular hours of their shift and double overtime for hours worked beyond the four (4) hours paid at one and one half times (1 1/2 X) times regular pay.

[13] The issue in dispute on the interpretation of Article 18.4 pertains to the overtime rate to be paid when an employee works overtime on a non scheduled work day or a day of rest, that is scheduled days off.

[14] In the event that I must consider the issue of equitable estoppel, I will set out the extrinsic evidence surrounding the bargaining of Article 18.4 and its inclusion in its current form in the Collective Bargaining Agreement when dealing with that issue. Thus, I propose to deal with the issues in this order:

1. What is the proper interpretation of Article 18.4 in the Collective Bargaining Agreement in respect of an employee's entitlement to double overtime on a non scheduled workday?

2. If I decide there is an ambiguity in Article 18.4, I will then consider the extrinsic evidence to determine the intention of the parties in drafting Article 18.4.

3. If GSU's interpretation is correct I will then consider whether GSU is nevertheless estopped from relying upon Article 18.4 of the Collective Bargaining Agreement to collect double overtime as claimed.

[15] To reiterate, GSU contends that the Collective Bargaining Agreement, and in particular Article 18.4, is clear and unambiguous on its face and entitles employees to double overtime on non regular scheduled days off after four (4) hours per day of time worked or after four (4) hours of time worked after forty (40) hours per week of overtime at time and one half (1 1/2).

[16] In GSU's submission, Article 18.2 sets out that a regular work schedule is eight (8) hour shifts, five (5) days a week, for a total work week of forty (40) hours, but that Viterra has the right to modify shifts and to require employees to work overtime. It does not however, agree with Viterra's interpretation of Article 18.4.

[17] Viterra does not agree with GSU's interpretation of Article 18.4. It contends that an employee is only entitled to double overtime once the employee had worked four (4) hours beyond the regular hours of his or her shift and only applies on a day the employee was working a regular shift. Viterra submits the parties did not address the issue of overtime for non scheduled work days or days of rest.

[18] GSU objected to the receipt of extrinsic evidence to determine the proper interpretation of Article 18.4. It consented to the reception of extrinsic evidence solely on the basis that it be received to resolve any ambiguity should I find that there is an ambiguity, and that such evidence could be used to resolve the issue of equitable estoppel.

***Principles Regarding the Interpretation of the Collective Bargaining Agreement***

[19] The fundamental objective of an arbitrator in construing the terms of a collective agreement is to ascertain the intention of the parties. That intention must be ascertained from the written instrument itself. The parties are assumed to have intended what they said and the meaning of the subject clause is to be determined having regard for the express provisions and context of the Collective Bargaining Agreement. The language should read in its normal or ordinary sense. See Donald M. Brown, Q.C. and David M. Beatty, *Canadian Labour Arbitration*, 4th ed., loose-leaf (Aurora: Canada Law Book, 2009) at paras. 4:2104 and 4:2110. The Modern Approach to the Interpretation of Collective Bargaining Agreements applied by arbitrators is the approach described by Arbitrator David Elliott in *Communication, Energy and Paperworkers Union, Local 777 v. Imperial Oil Strathcona Refinery*, (Policy Grievance), [2004] A.G.A.A. No. 44; 130 L.A.C. (4th) 239 at paras. 39-47:

> Interpretive approach
>
> **39** I use as my approach to the interpretation of collective agreements the same principle that the Supreme Court of Canada has adopted for the interpretation of legislation.[13][*Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at 41]. I refer to this approach as the modern principle of interpretation. In my view, the modern principle of interpretation is a superior statement, as a guide to interpretation, than the rule stated in *Halsbury's Laws of England* to which Canadian texts refer,[14] [Donald M. Brown, Q.C. and David M. Beatty, *Canadian Labour Arbitration*, 3d ed., para 4:2100] which relies heavily on the "intention of the parties". The modern principle of interpretation is, I believe, particularly apt for interpreting collective agreements which, of course, are based upon legislation.

**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.
>
> Testing the interpretation
>
> **47** Once an interpretation is settled upon, it should be tested by asking these questions:
>
> - is the interpretation plausible - is it reasonable?
> - is the interpretation effective - does it answer the question within the bounds of the collective agreement?
> - is the interpretation acceptable in the sense that it is within the bounds of acceptability for the parties and legal values of fairness and reasonableness?

[20] In other words the principles are those adopted from the decision of the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27 at para. 21 where the court stated that interpretation is to be obtained by reading the words in their entire context and according to their grammatical and ordinary sense.

[21] The contextual approach set out by Arbitrator Elliott was summarized by Arbitrator Pelton in *Service Employees International Union-West, Locals 299 and 333 v. Extendicare (Canada) Inc.* (Marchessault Grievance), [2012] S.L.A.A. No. 3; 2012 CanLII 18354 (SK LA); 217 L.A.C.(4th) 381; 110 C.L.A.S. 122 at paras. 108 and 109.

[22] The Court of Appeal of Alberta described the general approach an arbitrator is to take to the interpretation of a collective agreement in *Foothills Provincial General Hospital v. United Nurses of Alberta, Local 115*, 1998 ABCA 358, at para. 32, leave to appeal to SCC dismissed, [1999] S.C.C.A. No. 31, as follows:

> While we do not suggest a specific procedure, some form of analysis is necessary in a case such as this. For instance, what was the purpose of the notice provision for layoff? What context surrounds the words in dispute? Do they appear elsewhere in the contract? How should they be interpreted having regard to the balance of the Article in which they appear? Does either of the proposed competing interpretations

> lead to an absurdity, an internal inconsistency, or a result which is contrary to the apparent purpose of the notice required, so as to lead the tribunal to choose one interpretation over the other?

[23] Examples that the context of the language under consideration and the purpose of the particular provision are also critical when ascertaining the intention of the parties can be found in:

- Brown & Beatty, *supra*, at paras. 4:2150 and 4:2300; and
- *Royal Canadian Mint v. Public Service Alliance of Canada, Local 50057*, [2011] C.L.A.D. No. 428 at paras. 27 and 28.

[24] As noted, there are many cases dealing with the interpretation of collective bargaining agreements but I am content to be guided by the principles set out above. Suffice it to say there is no issue between the parties as the proper approach to be taken in the interpretation of the Collective Bargaining Agreement: the words must be read in their entire context, in their ordinary and grammatical sense harmoniously within the scheme of the Collective Bargaining Agreement.

***Onus***

[25] The first sub-issue is the question of onus: when a party is claiming a monetary benefit, as GSU does here, must it establish clear and unambiguous language to the entitlement. (See: Brown and Beatty, *supra*, paras. 4:2120; *Re Wire Rope Industries Ltd. and United Steel Workers, Local 3910,* [1982] B.C.C.A.A.A. No. 317; 4 L.A.C. (3d) 323 and *Golden Giant Mine and United Steelworkers of America, Local 9364,* (Severance Pay Grievance), [2004] O.L.A.A. No. 600. In other words, an arbitrator ought not provide a monetary benefit to the union that the employer did not bargain to pay. The language of the Collective Bargaining Agreement must be clear and unambiguous that the employees are entitled to, in the circumstances of this case, double overtime.

[26] It is beyond doubt that the entitlement of an employee to overtime pay for working beyond a specified number of hours of work per day or in a week is a monetary benefit and must be established by specific articles in the Collective Bargaining Agreement. Overtime is part of the monetary benefits that an employee is entitled to and must be negotiated by the parties. See *Durham (Regional Municipality) v. Canadian Union of Public Employees, Local 1764* (Overtime Pay Grievance), [2012] O.L.A.A. No. 511 at para. 28.

***Position of the Parties re the Entitlement to Double Overtime***

[27] Not surprisingly, both parties contended that the language is clear and unambiguous in support of their respective positions. It is common ground in that Article 18.4 makes no mention of overtime pay for non scheduled hours of work or days of rest.

[28] GSU contends that applying the modern principles of interpretation and read in the context of the relevant provisions of the Collective Bargaining Agreement that it is clear on the face of Article 18.4, that employees are entitled to double overtime once an employee has worked four (4) hours of overtime at one and one half times (1 1/2 X) at his or her regular rate of pay on a regular scheduled day of work or on a non scheduled day of work and double overtime when an employee works beyond four (4) hours of overtime at time and one half (1 1/2) after forty (40) hours in a week.

[29] GSU notes that Article 18.2 provides that a regular work schedule is defined as five (5) days per week consisting of eight (8) hours per day or forty (40) hours per week. Viterra also has the right to implement modified hours of work schedule with the employee's agreement. It contends that when Article 18.2 is read in conjunction with the definition of overtime in Article 18.4, it (clearly) means overtime is defined as time worked in excess of an employee's eight (8) hours per day (or the modified hours of their shift), or forty (40) hours per week.

[30] For ease of reference, I repeat here that the overtime pay rate is set out in Article 18.4 as follows:

> 18.4 Overtime
>
> Overtime is defined as time worked in excess of an employee's regularly scheduled hours of work. When employees are required to work in excess of their regular scheduled hours of work they shall be paid at the rate of one and one half times (1 1/2 X) their regular straight time hourly rate for the first four (4) hours of overtime worked beyond the regular hours of their shift. For overtime hours worked beyond four (4) hours, employees shall be paid two times (2 X) their regular straight time hourly rate of pay.
>
> When the needs of the operation require it, employees may be required to work overtime. However, all overtime is voluntary after an employee has worked twelve (12) hours in any shift or forty-eight (48) hours in any week.
>
> Employees shall be paid for all overtime worked at the appropriate overtime rate of pay as described in this Article. However, with the agreement of the Company, employees may bank their overtime worked, at the appropriate overtime rate, to be taken as paid time off work.

[31] GSU contends that the reference to when employees are required to work in excess of their "eight (8) hours per day (or the modified hours of their shift) or forty (40) hours per week" they shall be paid at the rate of one and one half times (1 1/2 X) their regular straight time hourly rate for the first four (4) hours of overtime worked beyond the regular hours of their shift (meaning an eight (8) hour shift or modified hours of a workweek as set out in Article 18.2).

[32] Finally, GSU contends that the last phrase in Article 18.4 which reads: "For overtime hours worked beyond four (4) hours, employees shall be paid two times (2 X) their regular straight time hourly rate of pay," should be read as: For time worked in excess of the employee's regular eight hours a day (or the modified hours of their shift) or forty (40) hours per week beyond four (4) hours, employees shall be paid twice their regular hourly rate of pay.

[33] Read this way, GSU contends it is clear that after an employee has worked (forty) 40 hours per week or the modified shift (the regularly scheduled hours of work) and the employee works overtime, he or she is entitled to be paid one and one half times (1 1/2 X) the regular pay for the first four (4) hours and two times (2 X) regular pay for every hour worked beyond four (4) hours of overtime.

[34] In other words, if an employee works overtime on a day that is not a regular scheduled work day *i.e*, a day of rest, double overtime kicks in after four (4) hours work at one and one half (1 1/2 X) the regular straight time of pay.

[35] Not surprisingly, Viterra does not agree with this interpretation. It argues that the article on its face is:

(a) silent as to rates of pay for non scheduled workdays or days of rest; and,
(b) refers only to double overtime as it relates to the daily regularly scheduled hours of work.

[36] Succinctly stated, Viterra contends that Article 18.4 defines overtime in relation to time worked in excess of an employee's regularly scheduled hours of work. The Collective Bargaining Agreement provides for payment of double overtime only after an employee has worked beyond four (4) hours of regular hours of his or her shift. Viterra contends that this would only occur on a day the employee was working a regular shift.

[37] Thus, the principal difference between the parties, or the nub of the matter as it was described during the hearing, is whether double overtime is calculated on a daily or weekly basis. That is, is the threshold of four (4) hours of overtime at one and one half times (1 1/2 X) the regular rate of pay on a non scheduled work day, or is the threshold for double overtime after an employee has worked twelve (12) hours on a non scheduled day off at time and one half (1 1/2) or after four (4) hours of overtime at time and one half (1 1/2 ) after a modified shift.

[38] In order to deal with the first issue, it is necessary to interpret Article 18.4 in the context of this Collective Bargaining Agreement including, but not limited to Articles 18.2, 18.3 and Article 7.1. It is common ground that such an interpretation must be done contextually giving the words an interpretation consistent with the grammatical and ordinary meaning of the words within that context and scheme of the Agreement.

[39] In other words, the Collective Bargaining Agreement must be interpreted having regard not only for the words contained in Article 18.4 but also the other relevant provisions in the Collective Bargaining Agreement as well as the relevant provisions of the *Canada Labour Code*, R.S.C. 1985, c. L-2 and jurisprudence pertaining to the interpretation of the provisions in the Collective Bargaining Agreement.

[40] Article 7.1 provides that an arbitrator does not have the authority to alter or change any of the provisions of the Collective Bargaining Agreement or to insert any new provision or provisions in the Agreement.

[41] The matter is thus reduced to whether Article 18.4 is clear and unambiguous on its face as to the entitlement to double overtime on a non scheduled day of work. An examination of the relevant article makes it clear that double overtime is only payable when an employee works overtime beyond the four (4) hours of overtime at one and one half times (1 1/2 X) on a regularly scheduled shift.

[42] Overtime is defined in the first line of Article 18.4 of the Collective Bargaining Agreement as "time worked in excess of the employee's regularly scheduled hours of work." It then deals with the entitlement to overtime and sets out that employees are entitled to the rate of one and one half times (1 1/2 X) the regular straight time hourly rate for the first four (4) hours worked beyond the regular hours of their shift, not an unscheduled shift.

[43] The Article then goes on to provide that double overtime is payable when overtime is worked beyond four (4) hours at one and one half times (1 1/2 X) the regular pay rate. The threshold for the payment of double overtime on a regularly scheduled shift is eight (8) hours at regular pay and four (4) hours at one and one half times (1 1/2 X) the regular pay. The question is therefore, beyond what, in the context of this Agreement, does the phrase "beyond four (4) hours of the regular hours of their shift" means. In Viterra's submission, the phrase "beyond four hours" in the last sentence in Article 18.4 refers to "beyond the regular hours of their shift." If this phrase does not refer back to "the regular hours of their shift," in Viterra's submission, it is meaningless. The argument is that "beyond four (4) hours" refers to "regular hours of their shift" with the result that the subject Article only refers to double overtime when an employee works beyond four (4) hours of their regular shift and not on a non scheduled work day.

[44] To accept Viterra's interpretation however, ignores Article 18.2 of the Collective Bargaining Agreement which defines regular work schedules as five (5) days per week consisting of eight (8) hours per day and forty (40) hours per week. Reading Article 18.2 and Article 18.4 together the effect of the use of the words "beyond the regular hours of their shift" would indicate an intention that the overtime rates specified in Article 18.4 applied to overtime worked on the days when an employee is working on a regular scheduled shift and/or during a week when an employee has worked forty (40) hours.

[45] While Article 18.4 provides a broad definition of overtime as to both weekly and daily overtime, it then defines only daily overtime rates on scheduled workdays, that is, rates that apply when an employee works "beyond the regular hours of their shift" but that does not restrict overtime to being calculated on a weekly basis by reason of Article 18.2.

[46] The reference in Article 18.4 to overtime being voluntary after an employee has worked "twelve (12) hours in any shift or forty-eight (48) hours in any week" reinforces this interpretation when read in conjunction with Article 18.2.

[47] In interpreting Article 18.4, it is useful to contrast it with Article 18.3. Article 18.4 deals only with daily overtime on a scheduled work day. The parties have specifically addressed the non scheduled workdays by referring to them as "days of rest" but did not deal with when overtime was to be paid and at what rate it was to be paid on non scheduled work days. Viterra argues that if the parties had intended that double overtime would be paid for work on non scheduled work days or days of rest, then they would have specified rates of pay applicable to days of rest. In its submission, this reinforces that overtime rates in Article 18.4 specifically address only those rates on days when an employee is scheduled to work a shift.

[48] Viterra argues that a proper interpretation of Article 18.4 would only entitle an employee on a day off to double overtime after having worked the number of hours of his or her normal shift plus four (4) hours of overtime at time and one half (1 1/2). In my opinion, such an interpretation would effectively require ignoring Article 18.2 and the opening sentence of Article 18.4.

[49] In the result, the interpretation of the Collective Bargaining Agreement submitted by GSU is clear on its face and I so find. The employees are entitled to double overtime after having worked four (4) hours beyond their regular shift (or the modified hours of their shift) or four (4) hours beyond forty (40) hours in a week.

## EQUITABLE ESTOPPEL

[50] That however is not the end of the matter. Having found that the interpretation to the entitlement to double overtime is that contended by GSU, I must determine if GSU is estopped from asserting its rights under Article 18.4 by reason that it had made specific representations to Viterra regarding the effect of the version of Article 18.4 it proposed at bargaining which Viterra relied on to its detriment.

[51] It is clear from the evidence as presented by Mr. Wagner for GSU and Mr. Roszell for Viterra that at the crucial time which was when the parties were attempting to resolve the few remaining items outstanding during bargaining the 2012 collective agreement, Mr. Wagner made certain representations to Viterra, in particular to Mr. Roszell and Ms. Joline Horedja, that resulted in Viterra accepting the wording of Article 18.4 as presented by GSU. The representation made by Mr. Wagner was that the clause proposed and as presented by GSU represented, and was in fact, Viterra's position. It is important to note that Viterra had maintained its position throughout bargaining and had never deviated from that position. (See *infra* at para. 56). GSU stated through Mr. Wagner that it preferred its wording because it was simpler and clearer than Viterra's language.

[52] While it is not necessary to deal with all of the evidence leading up to this crucial moment in bargaining, it is however necessary to set out certain salient facts to determine if GSU is estopped from relying on its interpretation of Article 18.4. Counsel for GSU clearly set out in her Memorandum of Argument the facts leading up to the acceptance by Viterra of GSU's proposal that the parties use Article 18.4 as drafted by Mr. Wagner. The reasons given by Mr. Wagner were that his version was simpler, and more importantly, that the version of Article 18.4 that he proposed represented Viterra's position.

[53] The chronology leading up to the settlement of the current Collective Bargaining Agreement began with the resolution of what was described as the 2011 grievance dealing with when double overtime was to be paid to employees working a modified or compressed work week. That settlement was set forth in an email exchange between Mr. Wagner and Ms. Horedja as follows:

> To pay double time overtime to employees after 12 hours worked with the exception of employees working schedules of 3 x 13.3 hours. For those employees, they would be entitled to double time after 13.3 hours worked.

[54] In cross-examination, Mr. Wagner confirmed that the settlement as applied to an employee who worked a 13.3 hour shift would result in the employee being entitled to double overtime after working twelve (12) hours.

[55] Evidence was presented regarding language in prior collective bargaining agreements leading up to the settlement of the 2011 grievance. For example, the 2006 Collective Bargaining Agreement specifically provided for rates of pay applicable to hours worked on regular scheduled days and on days of rest. Article 18.4 of the 2008 Collective Bargaining Agreement applied to overtime worked on a regularly scheduled day of work and overtime worked right on a scheduled day of rest.

[56] The collective bargaining that resulted in the 2012 Collective Bargaining Agreement began with GSU proposing that all overtime, whether worked on a regular scheduled day of work or on a scheduled day off, would be paid at double time the employee's rate of pay. Viterra's proposal, from which it never deviated was that:

(a) employees working a regular work schedule as outlined in Article 18.2 are entitled to the following:

(i) employees will receive pay at the regular rate for all hours worked up to eight (8) hours in a day or forty (40) hours in a week;
(ii) employees who work in excess of eight (8) hours a day and forty (40) hours in a week will receive overtime at the rate of one and one half times (1 1/2 X) their regular rate of pay;
(iii) employees who work in excess of twelve (12) hours in a day will receive overtime at the rate of two times (2 X) the regular rate of pay. This provision does not apply to assistant managers or higher classified employees .

(b) employees working a modified workweek shift scheduled as outlined in Article 18.2 are entitled to the following:

(i) employees will receive pay at their regular rate for all hours worked up to their regularly scheduled shift or forty (40) hours in a week;
(ii) employees who work in excess of their regularly scheduled shift and forty (40) hours in a week will receive overtime at the rate of one and one-half times (1 1/2 X) their regular rate of pay;
(iii) employees who work in excess of four (4) hours beyond their regularly scheduled shift will receive overtime at the rate of two times (2 X) their regular rate of pay. This provision does not apply to assistant managers or higher classified employees.

[57] During bargaining, Viterra reviewed a number of spreadsheets with GSU to illustrate the application of its proposal, all of which were consistent with the position it stated at the beginning of bargaining. These dealt with many examples of what would result when an employee worked overtime on a non scheduled work day. Many of these examples were included in the joint book of documents filed as exhibits before me and a representative sample was referred to during the testimony of both Mr. Wagner and Mr. Roszell. While Mr. Roszell was hazy on the amount of time spent on these during bargaining, Mr. Wagner testified that they were only referred to once, on September 27th, for less than an hour.

[58] The language proposed by Viterra in its "in going proposal" did not change throughout bargaining including when it tabled its Amended Proposal on September 28, 2012.

[59] GSU tabled amended proposals which did contain significant amendments to Article 18 involving hours of work and overtime including abandoning its claim for double overtime for all overtime worked. It proposed a wording for Article 18.4 headed "Overtime" which in effect became the basis for Article 18.4 in this Collective Bargaining Agreement. GSU's proposal was the first

proposal to contain a definition of overtime. That proposed definition was agreed to in the final wording of the Collective Bargaining Agreement. Viterra did not agree to GSU's October 15, 2012 Amended Proposal. That proposal was further amended on November 15, 2012 to read as follows:

> 18.4 Overtime
>
> Overtime is defined as time worked in excess of an employee's regularly scheduled hours of work. When employees are required to work in excess of their regular scheduled hours of work they shall be paid at the rate of one and one half times their regular straight time hourly rate for the first four (4) hours of overtime worked beyond the regular hours of their shift. For overtime hours worked beyond four (4) hours, employees shall be paid two times (2 X) their regular straight time hourly rate of pay.

[60] It was Mr. Wagner's testimony that GSU understood that Viterra's proposal was that double overtime would not be paid until an employee had worked four (4) hours of overtime at time and one half (1 1/2). Mr. Wagner further testified that GSU's position was that an employee had regular hours of a shift, either 8, 9, 10 1/2 or 13.3 hours on a scheduled day of work and that all employees had regularly scheduled hours of work of forty (40) hours. In his opinion, GSU did not consider hours worked on a scheduled day off to be a regular shift.

[61] The parties were at an impasse and agreed to meeting in a smaller group consisting of Mr. Wagner as General Secretary of GSU and Ms. Carolyn Illebrun, GSU's President representing GSU and Mr. Roszell and Ms. Horejda representing Viterra.

[62] At the "two on two" meeting of December 4, 2012, Mr. Roszell testified that Mr. Wagner described the wording suggested by GSU in Article 18.4 as "being the company's proposal, only in simpler language." It is significant that Mr. Wagner did not dispute having made a statement along those lines within the context of employees having to work four (4) hours of overtime beyond their regular shift.

[63] The Memorandum of Settlement was signed by the parties on December 17, 2012 and the wording of Article 18.4 set out in the Memorandum of Settlement is the article proposed by GSU and is the article that is the subject matter of this grievance.

[64] During cross-examination Mr. Wagner indicated that in his view, coming in on a Saturday is not a regular shift and in GSU's opinion, that is the nub of the grievance. In his opinion the proposed language was in keeping with the settlement of the 2011 grievance and is clear on its face.

[65] Mr. Roszell, on behalf of Viterra, testified that Viterra had given up significant rights including the unilateral right to impose and amend modified work schedules and most importantly giving up the averaging "tool." He conceded that Viterra had voluntarily eliminated averaging "on a trial basis for at least a one year period" effective October 13, 2008 and had not reinstated it during the life of that collective agreement, however, he considered it to be a significantly advantageous management right to be able to control overtime by averaging an employee's hours of work. There is no question that there was no bad faith on the part of any of the persons who bargained this Agreement. There may have been a misunderstanding as to what the clause was intended to mean but, as Mr. Wagner stated, it represented management's proposal in simpler language.

[66] The question of whether equitable estoppel can be applied by arbitrators in resolving disputes between management and unions is beyond dispute. The Supreme Court of Canada recently confirmed that in *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616. There, the dispute centred on whether a 20 year employee of the Nor-Man Regional Health Authority, whose work history included casual service, was entitled to a top up bonus week of vacation pay pursuant to the collective bargaining agreement between the Health Authority and the union representing its employees. The employer refused the claim based on the Regional Health Authority's past practice of excluding casual service in calculating vacation benefits. It therefore decided the employee was not entitled to a bonus week of

vacation. The arbitrator held this practice violated the terms of the collective agreement, however, found that the union's acquiescence raised an estoppel for the duration of the collective agreement and barred the union over the life of the agreement from contending that the practice was in breach of the agreement.

[67] Mr. Justice Fish, speaking on behalf of the Court assessed the role of estoppel in grievance arbitration. He noted that it is within the remedial authority of arbitrators to adapt and apply the principles of estoppel, bearing in mind a number of contextual considerations peculiar to this field of dispute resolution. He said:

> [5] Labour arbitrators are not legally bound to apply equitable and common law principles—including estoppel—in the same manner as courts of law. Theirs is a different mission, informed by the particular context of labour relations.
>
> [6] To assist them in the pursuit of that mission, arbitrators are given a broad mandate in adapting the legal principles they find relevant to the grievances of which they are seized. They must, of course, exercise that mandate reasonably, in a manner that is consistent with the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievance.

[68] Mr. Justice Fish also observed the role of arbitrators is distinctive in that the mandate extends to fostering peace in industrial relations. He summed it up, by referring in para. 48, the need to have regard to an ongoing relationship between the employer and employees. He also made reference, at para. 50, to the following comments of arbitrator Paul C. Weiler, Chairman of the British Columbia Labour Relations Board who explained the place of estoppel in grievance arbitration:

> ... a collective bargaining relationship is quite a different animal. The union and the employer deal with each other for years and years through successive agreements and renewals. They must deal with a wide variety of problems arising on a day-to-day basis across the entire spectrum of employment conditions in the workplace, and often under quite general and ambiguous contract language. By and large, it is the employer which takes the initiative in making operational decisions within the

> framework of the collective agreement. If the union leadership does not like certain management actions, then it will object to them and will carry a grievance forward about the matter. The other side of that coin is that if management does take action, and the union officials are fully aware of it, and no objection is forthcoming, then the only reasonable inference the employer can draw is that its position is acceptable. Suppose the employer commits itself on that assumption. But the union later on takes a second look and feels that it might have a good argument under the collective agreement, and the union now asks the arbitrator to enforce its strict legal rights for events that have already occurred. It is apparent on its face that it would be inequitable and unfair to permit such a sudden reversal to the detriment of the other side. In the words of the Board in [*Corporation of the District of Burnaby and Canadian Union of Public Employees, Local 23*, [1978] 2 C.L.R.B.R. 99, at p. 103], "It is hard to imagine a better recipe for eroding the atmosphere of trust and co-operation which is required for good labour management relations, ultimately breeding industrial unrest in the relationship—all contrary to the objectives of the Labour Code"....
>
> (*Re Corporation of the City of Penticton and Canadian Union of Public Employees, Local 608* (1978), 18 L.A.C. (2d) 307 (B.C.L.R.B.), at p. 320).

[69] Interestingly enough, the question of the application of the doctrine of estoppel was also considered by the Saskatchewan Court of Appeal in a case involving these very parties, *GSU v. Viterra,* 2013 SKCA 93; 2013 CarswellSask 617. Chief Justice Richards for the Court stated at paras. 41 and 42:

> **41** The basic features of the doctrine of promissory estoppel are solidly established. In *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50, the Supreme Court said that the doctrine engages when there is both (a) a representation intended to affect legal rights and be acted upon, and (b) reliance on that representation. Sopinka J. explained the nature of the doctrine as follows at p. 57:
>
> > The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position. In *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607, Ritchie J. stated, at p. 615:
> >
> > > It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to

> suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.
>
> This passage was cited with approval by McIntyre J. in *Engineered Homes Ltd. v. Mason*, [1983] 1 S.C.R. 641, at p. 647. McIntyre J. stated that the promise must be unambiguous but could be inferred from circumstances.
>
> **42** The Supreme Court's recent decision in *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616 confirms that labour arbitrators are entitled to employ the doctrine of estoppel even though it is equitable in nature.

[70] Chief Justice Richards also referred to Mr. Justice Fish's comments in *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals, supra*, that arbitrators are to be accorded a healthy measure of deference in relation to their efforts to apply estoppel in the labour relations context. Mr. Justice Fish stated:

> [45] On the contrary, labour arbitrators are authorized by their broad statutory and contractual mandates—and well equipped by their expertise—to adapt the legal and equitable doctrines they find relevant within the contained sphere of arbitral creativity. To this end, they may properly develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievances of which they are seized.

[71] As noted above, Mr. Wagner made specific representations at the bargaining table regarding the effect of Article 18.4 which he represented as being Viterra's position but in simpler language. It was on this basis that Viterra accepted the new wording of Article 18.4 and in return for GSU accepting management's position on overtime, Viterra gave up certain management rights which had been included in previous collective agreements, notably the provision on averaging the hours of work.

[72] There are a number of cases which have dealt with the issue of the interpretation of words in issue at the bargaining table as the basis for finding that one party or the other is estopped from adopting an adverse position. See for example: *Dow Chemical Canada Inc. and Energy and Communication Workers, Local 672*, [1988] O.L.A.A No. 27 (paras. 21-27); 2 L.A.C. (4th) 234 and *Nova Scotia Nurses' Union v. District Health Authority No. 8* (Sick Leave Credits Grievance), [2001] N.S.L.A.A. No. 10; 97 L.A.C. (4th) 75.

[73] The issue is reduced to whether or not, in the circumstances of this case, there was a representation made by GSU which was relied upon by Viterra which resulted in Viterra granting certain concessions to GSU. Bearing in mind what I said earlier about there being no bad faith, it is clear however from the evidence, and I so find, that Mr. Wagner clearly represented to Mr. Roszell and Viterra's bargaining committee that the wording he proposed represented Viterra's position expressed in simpler language. Viterra accepted that representation and as a result granted certain concessions to GSU and Article 18.4 in its present form found its way into the Collective Bargaining Agreement.

[74] It is worth noting that GSU contends that the doctrine of estoppel does not apply by reason that there was no unequivocal representation made by GSU to Viterra. GSU contends it understood Viterra's proposal to be that an employee would not be entitled to double overtime unless he or she had already worked four (4) hours of overtime. The representation of Mr. Wagner was based on that understanding. Mr. Roszell on the other hand, testified that he had never put his mind to the issue of an employee working on a scheduled day off. GSU contends that never having put his mind to the issue, nothing said at the bargaining table could have caused Viterra to adopt a different position regarding overtime for working on a scheduled day off. The position is inconsistent with the evidence. Viterra's position never changed throughout bargaining. It clearly only contemplated double overtime in two circumstances:

(a) when an eight (8) hour regular employee work beyond twelve (12) hours in a day; or

(b) when modified shift employees worked beyond four (4) hours of their regularly scheduled shift.

[75] It is equally clear that GSU represented that it preferred its simpler language which it clearly represented to Viterra to represent Viterra's position. That representation was clear and unequivocal and Mr. Wagner did not resile from it during his testimony. The representation was not couched in exceptions or conditions and Mr. Roszell made it clear that he would not have given up the overtime averaging rights had he known of the interpretation being argued by GSU on Article18.4.

[76] There is an equally strong reason for the application of the doctrine of estoppel in this case. That is, that the issue is one of compensation. As noted above (*supra*, para. 26), the payment of overtime, indeed payment of double overtime, is clearly an issue of compensation. That is significant because compensation is only dealt with by GSU and Viterra through bargaining. Arbitrator Pineau described the situation as follows in *Sterling Place and United Food and Communication Worker Locals 175/633 (Bailey) (Re)* (1997), 62 L.A.C. (4th) 289 (Pineau) at pp. 304 and 305:

> In the present case, as in *Maple Lodge Farms* [(1991), 24 L.A.C. (4th) 211 (Ont. Arb.) (Brown)], the provision of meal benefits on a daily basis is a form of compensation. Compensation is normally not subject to unilateral alteration during the course of a collective agreement. Considering the existence of a six-year practice of paying meal benefits, the absence of any mention at the bargaining table that these benefits would be discontinued made it reasonable for the union to assume that the practice could continue. Considering that the practice continued for a period of eleven months after the collective agreement came into force, to be discontinued only by the successor employer, it is also reasonable to assume that the benefits were intended to continue, at least for the life of the collective agreement.

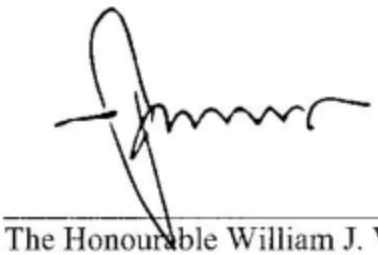
[77] Thus, for all of these reasons, I find that GSU is estopped from claiming double overtime based upon its interpretation of Article 18.4 and is rather, restricted to double overtime on the basis

of the interpretation placed on the Collective Bargaining Agreement by Viterra for the duration of the Collective Bargaining Agreement.

## SUMMARY

[78] In the result, I find that Article 18.4 of the Collective Bargaining Agreement is clear on its face and that a reasonable interpretation of the Article supports the interpretation placed on it by GSU. I have also found however, that GSU is estopped from asserting its rights under the current Collective Bargaining Agreement based on that interpretation for the duration of the Agreement for all the reasons outlined above.

[79] I would be remiss if I did not thank counsel for their very thorough and well prepared briefs of argument as well as the very professional manner in which they conducted themselves during the course of the hearing. It was a pleasure to preside over the hearing.



The Honourable William J. Vancise, Q.C
Arbitrator