ARBITRATION AWARD

BETWEEN:

THE PUBLIC SERVICE ALLIANCE OF CANADA,
UNDE LOCAL 90120
(hereinafter called the "Union")

AND:

I.M.P. GROUP LIMITED
AEROSPACE DIVISION
GANDER, NEWFOUNDLAND AND LABRADOR
(hereinafter called the "Company" or the "Employer")

GRIEVOR: Terry West

COUNSEL: For the Union

Leslie Robertson

For the Employer

Kate Hopfner

ARBITRATOR: James C. Oakley, Q.C.

1 The arbitration hearing was held at Gander on September 21, 2017. The parties agreed as follows:

- The Arbitrator was acceptable.
- There was no issue with respect to jurisdiction of the Arbitrator.
- The grievance procedure was properly followed or any requirements waived.
- The Arbitrator would remain seized of the matter for sixty (60) days following publication of the Award within which time either party could notify the Arbitrator in the event of an issue of interpretation or compensation arising from the Award.

2 The following exhibits were entered at the hearing:

Consent 1 -	Collective Agreement between I.M.P. Group Limited, Aerospace Division, Gander, Newfoundland and Labrador and the Public Service Alliance of Canada, UNDE Local 90120, dated July 1, 2011 to June 30, 2015
Consent 2 -	Grievance Form, UNDE Local 90120, dated August 24, 2015 together with Employer replies to the grievance
MC - 1	Letter dated October 26, 2016 from Erin Sirett, PSAC Negotiator to Kim Maguiness, Director, Human Resources, I.M.P. Group, Aerospace Division
BW - 1	MOB Gander, Employee Overtime Report Forms
BW - 2	ISSC Deployment/MRP Trip Report Forms with notes of Barry Wadman
BW - 3	MOB Gander, Employee Overtime Report Form, August 10 and 11, 2015, Employee Terry West
BW - 4	Letter dated November 16, 2016 from Kim Maguiness, Vice President, Human Resources, Aerospace Division to Erin Sirett, PSAC negotiator
BW - 5	Email exchange between Laura Armes, Manager, Human Resources, I.M.P. Aerospace and Barry Wadman, Site Manager, MOB Gander, August, 2015

Nature of the Grievance

3 The Union grieves that the Grievor, Terry West, is entitled to compensation, at time and one half, for shift change premium on August 11, 2015, under Article 17.02 of the Collective Agreement. The parties dispute whether the shift change premium in Article 17.02 applies to deployments, based on the interpretation of the language and on past practice. The Employer submits that if the Union's interpretation of Article 17.02 is correct, then the Union is estopped from claiming the shift change premium on deployment before the expiry of the current Collective Agreement.

Collective Agreement

4 The relevant Articles of the Collective Agreement are as follows:

. . .

Article 5 Management Rights

5.01 The Union acknowledges that it is the exclusive right of the Company, subject to the terms of this Agreement, to: determine the policy of the Company; manage and direct its operations; maintain order, discipline and efficiency; and hire, discharge, classify, transfer, promote, demote and layoff employees. All function, rights, power and authority, which the Company has not specifically abridged, deleted or modified by this Agreement, are recognized by the Union as being retained by the Company.

. . .

Article 17 Hours of Work

17.01 The parties agree that the work schedule shall be based upon forty (40) hours per week, excluding a lunch period, over a period not to exceed thirteen (13) weeks.

17.02 The shift schedule will be posted fourteen (14) days in advance and no less frequently than every thirteen (13) weeks. Seven (7) days prior to posting, the Union will be provided a copy of the proposed schedule for their review and comment. With the exception of deployments, an Employee's schedule will not be changed during that period without the employee having seven (7) days notice of change. If an employee is given less than seven (7) days advance notice, the employee shall receive a premium rate of time and one half (1½) for work performed on the first changed shift.

Shift Exchange

17.03 Shift exchanges between Employees who have qualifications, authorization and ability to do the work shall be permitted, subject to advance notification and where there are no additional costs to the Employer.

Article 18 Overtime

18.01 For the purposes of this Article 18, "Overtime" is defined as time worked by an Employee in excess of his/her scheduled hours of work.

18.02 An Employee is entitled to overtime compensation for each completed fifteen (15) minute period of overtime worked by the Employee.

18.03 Subject to clause 18.04, an Employee who is required to work overtime shall be compensated at the rate of one and one-half times (1.5X) the Employee's regular hourly rate.

. . .

Article 31 MRP/SAR OPS Deployment

31.01 For MRP/SAR Ops deployment, the Employer will endeavour for an equitable distribution of duties for all replacement crews subject to the requirement that all employees on the replacement crew(s) have the ability, qualifications, and authorizations required to perform the specific duties required for that deployment.

Evidence

5 The witnesses called by the Union were Terry West, AVN Technician and the Grievor, and Martin Coady, AVN Technician and the Local Union President. The witness called by the Employer was Barry Wadman, Site Manager, I.M.P. Group Limited, Gander, Newfoundland and Labrador.

6 The parties dispute the interpretation of Article 17.02 of the current Collective Agreement, dated from July 1, 2011 to June 30, 2015. The parties agree that the language of Article 17.02 in the current Collective Agreement is the same as the language in the two preceding Collective Agreements, which were dated from December 1, 2004 to June 30, 2006, and from July 1, 2006 to June 30, 2011.

7 The Union filed a grievance dated August 24, 2015 claiming compensation for shift change on behalf of Terry West. The grievance stated, in part, as follows:

> B: DETAILS OF GRIEVANCE: What gives rise to the grievance; Quote Article of Collective Agreement. Article 17.02 and all other related articles. On Aug 10, 2015 at approximately 2200hrs (his regular scheduled shift) Mr. West was deployed to St. John's, NL, to recover Cormorant Aircraft CSH149 905. He checked in to his hotel and reported for work the following day. He returned to MOB Gander the following day at approximately 1600hrs. When he requested that he be compensated at time and 1½ for his shift change he was denied.
>
> C: CORRECTIVE ACTION REQUESTED (Please use additional page if required) Request that Mr. West receive his proper compensation for his time worked as per the Collective Agreement and that he be made whole again.

8 The response to the grievance from Barry Wadman, Site Manager, dated September 10, 2015, stated as follows:

> Subject grievance is denied.
> Mr. West reported for duty at 1530 L on 10 August and deployed to St. John's NL in accordance with Article 31 to conduct a Mobile Repair Party (MRP) for aircraft CH 149905. He completed work in St. John's that night at midnight 0000 L. The following day, 11 August 2015, Mr. West commenced work at 0800 L and completed work at 1630 L.
> No overtime was incurred by Mr. West and Article 17.02 does not apply.

9 I.M.P. Group, Aerospace Division, provides maintenance services for Cormorant helicopters operated by Department of National Defence, 103 Search and Rescue Squadron, based at the Gander International Airport. Barry Wadman has held the position of Site Manager for the Company since April, 2004. He previously held the position of Deputy Site Manager from 2001 to 2004. Mr. Wadman testified that the Company performs all maintenance services required to ensure the helicopters are ready to provide air and sea rescue in the Atlantic Provinces, Eastern Quebec, Nunavut and East Coast offshore areas. The Company's maintenance employees attend for the launch and the recovery of aircraft from search and rescue operations. Recovery of the aircraft includes inspection, refueling and any maintenance required to ensure the aircraft is ready for the next mission. Mr. Wadman testified that the Aerospace Division of I.M.P. Group has a total of

1,200 employees. At the Gander site there are 41 employees, including 36 employees who are members of the bargaining unit. Maintenance services are provided by the Company 24 hours per day, 7 days per week, 365 days per year.

10 Mr. Wadman testified that employees are scheduled for regular shifts of 5 days per week, Monday to Friday. The day shift is from 7:30 a.m. to 4:00 p.m. and the evening shift is from 3:30 p.m. to 12:00 midnight. During the summer period, the regular schedule includes weekend shifts scheduled from 12:00 noon to 12:00 midnight. Mr. Wadman testified that employees may be required to respond to an emergency at any time. He testified that employees may be deployed outside Gander on short notice in the event of an aircraft breakdown. Such deployments are unplanned. There may also be planned deployments, such as training exercises, where employees usually receive more than one month's notice of the deployment.

11 Martin Coady is President of the Union Local at Gander. He commenced employment with I.M.P. Group in March, 2004. He testified that, every 3 months, Barry Wadman sends him by email the schedule for the next 3 months. Terry West, the Grievor, testified that he commenced employment with I.M.P. Group in November, 2002. He testified that his work schedule is usually one week of day shifts, followed by one week of evening shifts. He said the schedule rotates continuously and is posted on the Union bulletin board. He said he has volunteered to work the summer shift from 12:00 noon to 12:00 midnight.

12 The Grievor testified that, on August 10, 2015, he was scheduled to work the evening shift from 3:30 p.m. to 12:00 midnight. A Cormorant aircraft was broken down in St. John's and he agreed with the Crew Chief's request that he be deployed to St. John's. The Grievor flew to St. John's and arrived at about 11:30 p.m. The Grievor testified that they were unable to work on the aircraft that night. He proceeded to a hotel in St. John's and checked in at about 12:15 a.m. He was picked up at the hotel the next morning and commenced work at about 8:00 a.m. The aircraft was serviceable at about 1:00 p.m. and he flew back to Gander that day, arriving prior to 4:00 p.m. After he returned to Gander, the Crew Chief told him to go home for the day. On the following day he resumed work on his regularly scheduled evening shift.

13 The Grievor was not paid a shift change premium of time and one half for work performed on the day shift on August 11, 2015, when he was deployed to St. John's. He understood that if he had changed his shift schedule to work on the day shift at the Gander site, he would have been paid

the time and one half shift change premium. The Grievor claimed 4 hours pay at the rate of $28.57 representing the amount of the shift change premium on August 11, 2015. He felt entitled to compensation because of the inconvenience to change his routine. He testified that, before he traveled to St. John's on deployment, he had to make arrangements for the care of his senior parents and the care of his dog. He was not paid any overtime for August 10 or 11, 2015. He was paid $25.00 each way for the flight from Gander to St. John's and return.

14 Barry Wadman testified that the Grievor submitted an Overtime Report for August 10 and 11, 2015. The Grievor's claim for overtime was denied for the reason that he did not work any hours outside his 8 hour shift, and the Employer did not pay a shift change premium for deployment. Mr. Wadman acknowledged that the Grievor had worked an evening shift on August 10, 2015, and that his shift was changed from an evening shift to a day shift on August 11, 2015.

15 Mr. Wadman testified that the Company provides an essential service. He said flexibility is needed to allow the Company to schedule employees when deployed outside Gander. He said that the Employer has never paid a premium for shift changes on deployment. He said the Employer pays for shift changes at the Gander site under Article 17.02. The purpose of the shift change premium is to compensate employees for making a last minute change of schedule. It is part of the nature of the work performed by the Employer that employees could be deployed anywhere at any time. Mr. Wadman testified that employees are selected for deployment based on trade qualifications, signing authority and expertise. Mr. Wadman testified that employees may be required to change their schedule to work at the Gander site on short notice. When there is a shift schedule change in Gander on less than 7 days notice, the Employer pays a shift change premium of one and one half times for the first shift. When there is a shift schedule change in Gander and the Employer gives more than 7 days notice to the employee, the Employer does not pay a shift change premium. In cases of deployment outside Gander, the Employer does not pay a shift change premium whether or not notice was given more than 7 days in advance of the shift change. Mr. Wadman testified that the Employer has not paid a shift change premium for a deployment at any time to his knowledge, and not since the first Collective Agreement came into effect in 2004.

16 Mr. Wadman referred to an exhibit showing occasions when the Employer paid a shift change premium for shift changes in Gander. For example, on one occasion the Grievor's shift was changed in Gander on less than 7 days notice and he was paid the shift change premium. Mr. Wadman testified that the Union did not file a grievance at any time alleging that the Company was

not allowed to change the shift schedule for employees working in Gander, where less than 7 days notice was given of the shift change.

17 Mr. Wadman referred to the ISSC Deployment/MRP Trip Reports. The Reports indicate trips where there was a deployment away from the main operating base at Gander. The Reports are submitted to DND. The Grievor had a shift change for MRP Deployment to Iqaluit in June, 2006 and was not paid for the shift change. In March, 2009, employees were deployed to support a major air disaster without 7 days notice and no shift change premium was paid. In March, 2010, employees were deployed to St. John's on less than 7 days notice and there was no shift change premium paid. In 2014, Martin Coady and 3 other employees were deployed to Iqaluit and changed their shifts from evening shifts to day shifts and there was no shift change premium paid. Mr. Wadman testified that there are usually 6 or less employee deployments per year. He testified that there had been no deployments in 2017 up to the date of the arbitration hearing. There were no prior grievances filed claiming payment of shift change premium for shift changes on deployment. The Grievor testified that he did not make any claim for a shift change premium on deployment prior to the filing of this grievance.

18 Mr. Wadman did not agree that the effect of Article 17.02 was that the Company was not permitted to change shifts in Gander when less than 7 days notice was given. He said the Company could not properly service the requirements of the aircraft if the Collective Agreement prohibited the Company from changing employee shift schedules.

19 After the grievance was filed, Erin Sirett, PSAC Negotiator, sent a letter dated October 26, 2016, to Kim Maguiness, Director Human Resources, IMP Group, which stated as follows:

> Re: Interpretation of Article 17.02
>
> The Union has filed a grievance on the interpretation of Article 17.02 that will be heard in Gander on November 4, 2016. Please take note that, effective immediately, the Union is putting the Employer on notice that it disagrees with the Employer's interpretation of Article 17.02.

The Union interprets Article 17.02 as follows:

- The goal of the article is to ensure employees and the Union have advance notice of work schedules. If employees are not provided with that notice, they are to be compensated for the inconvenience;

- With that in mind, the rule is that 7 days in advance of posting a schedule, the Union must receive a copy of the schedule for review and comment;

- The employer is required to give non-deployed employees 7 days' advance notice of any change to their schedule. The language is obligatory. Article 17.02 prohibits the employer from changing the schedule of non-deployed employees without giving them 7 days' advance notice of the change;

- The only employees who can be given less than 7 days' advance notice of a change in schedule are those that are deployed, so the last sentence of 17.02 necessarily only applies to them;

- Deployed employees who are not given 7 days' advance notice of their schedule change are entitled to the premium.

20 Mr. Wadman referred to the October 26, 2016 letter sent by the Union to the Company setting out the Union's interpretation of Article 17.02. The Company did not agree with the Union's interpretation and felt the issues were best discussed in collective bargaining. Mr. Wadman testified that the language of Article 17.02 in the current Collective Agreement was identical to the language in the two previous Collective Agreements. During collective bargaining for the current and the two previous Collective Agreements, the Union had not given the Company notice that it interpreted Article 17.02 in the manner claimed in the grievance or in the letter. The Union had not given any notice to the Company of its interpretation prior to filing the grievance.

21 Martin Coady testified that if a member felt entitled to overtime pay or shift change premium pay, the Union would bring the concerns to management and try to resolve the issue without filing a grievance. Mr. Coady testified that it was a rare occurrence for employees to be deployed outside Gander. He said that when an employee is inconvenienced by a shift change, then compensation should be paid. Mr. Coady agreed that Article 17.02 was not raised in collective bargaining for the current Collective Agreement or the prior Collective Agreement.

22 Mr. Coady testified that when he was approached by the Grievor about the interpretation of Article 17.02, he read the language carefully, and was surprised that the requirement to pay the shift change premium for deployment had not been previously enforced. Mr. Coady testified that the Union's interpretation of Article 17.02 is that the Company is not permitted to change the schedule of an employee except in a case of deployment. He believed that the correct interpretation of the language of Article 17.02 was set out in the letter from the Union to the Employer. He said that in the past, whenever anyone questioned Mr. Wadman about payment of the shift change premium on deployment, Mr. Wadman replied that no shift change premium was paid for deployment.

Union Submission

23 The Union submitted that the Grievor, Terry West, was entitled to the shift change premium of time and one half for the shift worked on August 11, 2015. The Union claimed damages on behalf of the Grievor and a declaration that the Employer violated Article 17.02. The Grievor's shift was changed on less than 7 days notice. Article 17.02 is clear and unambiguous. The exception for deployment was not stated in the last sentence of Article 17.02. The Employer was adding language to Article 17.02 by adding "with the exception of deployment" to the last sentence in Article 17.02. The Union requested that the Arbitrator apply a purposeful approach and interpret the language within its context. The Collective Agreement required the schedule to be posted at least 7 days in advance. The reference to "with the exception of deployment" in the third sentence in Article 17.02 refers to the Employer's ability to change the schedule. Under Article 17.02, when 7 days notice is not given, and there is no deployment, then the Employer is not permitted to change the shift schedule. If necessary to provide services and have a sufficient number of employees available, the Employer may be required to hire more employees. The purpose of a shift change premium is to compensate an employee for the inconvenience of having the shift changed on short notice. To have a shift changed and be deployed to another location is a greater inconvenience than working at the Gander base. The employee needs to make arrangements for the deployment. The Union referred to the purpose of shift change premiums, as described in Brown & Beatty, *Canadian Labour Arbitration*, 4th edition and in *Muskoka Algonquin Healthcare v. Ontario Nurses' Association (Schmitz Grievance)* [2016] O.L.A.A. No. 421 (Monteith) (the "*Muskoka*" case). In the *Muskoka* case, the collective agreement allowed the employer to make a last minute shift change, but employees were entitled to premium pay for working a changed shift on short notice. The Union referred to the modern principal of interpretation as discussed in *C.E.P., Local 777 v. Imperial Oil Strathcona Refinery (Policy Grievance)* (2004) 130 L.A.C. (4th) 239 (Elliott) (the "*Imperial Oil*"

case). In this case, the language is clear and past practice is not applicable as an aid to interpretation. There are four requirements to rely on past practice as an aid to interpretation, as set out in *I.A.M., Local 1740 v. John Bertram & Sons Co.* (1967) 18 L.A.C. 362 (Weiler) (the "*John Bertram*" case). In this case, there was no longstanding practice and no Union acquiescence in the practice. The Grievor and Mr. Coady, Local Union President, testified that there were past occasions when they were not paid the shift change premium on deployment, but they had not considered the correct interpretation of Article 17.02 at the time. After the Local Union President spoke to other Union members, and realized the extent of the practice, the Union decided to enforce the Union's rights under the Collective Agreement. The Union submitted that estoppel did not apply. The Union did not make any representation to the Employer with the intent that it would be relied upon. There was no evidence of detrimental reliance by the Employer. The practice was infrequent. The Grievor had only been deployed twice. Where an incident happened infrequently, it was less likely that the parties turned their minds to the issue, *Crothall Services Canada Ltd. and Unifor, Local 4606 (Canada Day)* (2013) 242 L.A.C. (4th) 245 (Raymond). On the issue of estoppel, the Union also referred to *Great Lakes Pilotage Authority v. Corporation of Professional Great Lakes Pilots (Vacation leave accumulation Policy Grievance)* [2017] C.L.A.D. No. 141 (Albertyn), *Sunrise Health Region and HSAS (EMS Standby)* (2014) 247 L.A.C. (4th) 350 (Hood) and *Jasper Park Lodge and Unifor, Local 4534 (Nuez)* (2017) 131 C.L.A.S. 252 (Norrie). The Union submitted that it was not appropriate to consider the financial consequences of the interpretation of Article 17.02. The Union requested a declaration that the Employer had violated Article 17.02 by not paying the shift change premium to the Grievor on August 11, 2015. In the event that the Arbitrator agreed with the Union's interpretation, but found that estoppel applied against the Union, then the Union's interpretation of the language of the Collective Agreement would apply from the date of the Arbitration Award, or in the alternative from the date of the next Collective Agreement. The Union requested that the grievance be allowed.

Employer Submission

24 The Employer submitted that the language of Article 17.02 supports the Employer's interpretation. In the event the language was found to be ambiguous, then the Arbitrator could apply past practice to support the Employer's interpretation. In the alternative, if the language was found to support the Union's interpretation, then estoppel applied against the Union. The Employer had followed a consistent practice for 12 years over three Collective Agreements not to pay a shift change premium for deployment under Article 17.02 . The practice was known to the Union. The

Union did not object to the practice until it filed the current grievance. The Employer did not dispute that the shift change premium was not paid when the Grievor was sent on deployment on August 11, 2015. Due to the nature of the work performed by employees, flexibility to change shifts is required. The nature of the Company's operation requires that a deployment may be necessary. Employees need to be available when required. The Company is providing an essential service. The aircraft need to be ready to fly when there is an emergency. The Company has the authority to assign shift schedules within its management rights under Article 5.01. Barry Wadman testified about how the Employer applies the Collective Agreement. The Employer has not paid a shift change premium when there is a deployment, whether or not more than 7 days notice of the shift change has been given. When there is a shift change and an employee is not on deployment, a shift change premium is paid when less than 7 days notice is given, but no shift change premium is paid when more than 7 days notice is given. It had been the understanding of Union witnesses prior to the grievance that the Employer did not pay a shift change premium for deployment. The practice was the common understanding of the parties. The language of Article 17.02 supports the Company's interpretation. The Union's interpretation of Article 17.02 is that when less than 7 days notice is given, then the Company is not permitted to change the shift, except for deployments. However, employees may be needed to change shifts in Gander on less than 7 days notice. The Union's interpretation does not result in a practical outcome and is not consistent with the past practice. The purpose of the shift change premium is to provide compensation for the shift change. The past practice, as set out in Exhibits BW-1 and BW-2, show that no shift change premium has been paid for deployment. In the event the Employer's interpretation of the language is not accepted, or the language is found to be ambiguous, then past practice supports the Employer's interpretation. The four requirements in the *John Bertram* case were met. The Union acquiesced in the practice. There was a common understanding of the parties. The Union did not file a prior grievance about the practice. The Employer submitted that the Arbitrator should look at the context of the language when determining if there is an ambiguity. In the alternative, the Employer submitted that estoppel applied against the Union. Had the Employer known about the Union's interpretation of Article 17.02, then the Employer would have had the opportunity to address the language of Article 17.02 in collective bargaining. It was unfair to permit a sudden reversal of the Union's position. The letter from the Union to the Employer was an admission that the past practice was contrary to the Union's interpretation. Even though a practice may be infrequent, it may still amount to a past practice that may be used to interpret the agreement or give rise to an estoppel, *Durham Catholic District School Board v. Ontario English Catholic Teacher's Association (Breaugh Grievance)* [2014] O.L.A.A. No. 257 (Chauvin) (the "*Durham*" case). The Union had both actual and constructive knowledge of the

practice over a period of three Collective Agreements. On the issues of interpretation and estoppel, the Employer also referred to *International Brotherhood of Electrical Workers, Local 1615 v. Cablelync Inc. (Vehicle Usage Grievance)* [2014] N.L.L.A.A. No. 2 (Oakley) (the "*Cablelync*" case) and *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals* [2011] 3 S.C.R. 616 (the "*Nor-Man*" case). The Employer requested that the grievance be dismissed.

Considerations

25 The issues before the Arbitrator are, (1) the interpretation of Article 17.02 of the Collective Agreement, (2) whether past practice may be used as an aid to the interpretation of the Collective Agreement, and (3) in the event the Union's interpretation of Article 17.02 is correct, whether the Union is estopped from relying on the interpretation in this grievance.

26 The employees of the Employer in Gander have regularly scheduled hours of work. The regular shifts are day shifts from 7:30 a.m. to 4:00 p.m. and evening shifts from 3:30 p.m. to 12:00 midnight. The Employer provides services as required by its client, the Department of National Defence and 103 Rescue Squadron, 24 hours per day, 7 days per week, 365 days per year. The Employer provides maintenance services as required, on an emergency basis in the event of an aircraft breakdown. The nature of the work performed by employees may require shift changes or additional hours of work.

27 Deployment occurs when employees are assigned to perform maintenance work on aircraft in locations outside the Company base in Gander. Deployments usually occur when there is a breakdown of an aircraft. The Cormorant helicopters serviced by the Company provide search and rescue operations in Atlantic Canada, eastern Quebec, Nunavut and areas of the East Coast offshore. Deployments are usually unplanned. There may also be a planned deployment in the event of a training exercise. This grievance concerns an unplanned deployment.

28 The facts related to the events of August 10 and 11, 2015, are not in dispute. The Grievor, Terry West, was scheduled to work the evening shift, from 3:30 p.m. to 12:00 midnight. There was a mechanical breakdown of an aircraft in St. John's. The Grievor was requested to deploy from the base in Gander to St. John's on the evening of August 10th. He arrived in St. John's late in the evening of August 10th. It was determined that the repairs to the aircraft would commence the following morning. The Employer provided hotel accommodation for the Grievor in St. John's. He

commenced the repair work at 8:00 a.m. the next day. The work was completed by about 1:00 p.m. and the Grievor returned to the Gander base. His shift ended on or before 4:00 p.m. On August 11th, the Grievor did not work any time before or after the regular hours of the day shift. The Grievor did not work any extra hours of work outside the regular hours of work on August 10th or August 11th. The Grievor's shift was changed on August 11, 2015 to the day shift from his previously scheduled evening shift. The Grievor's shift on August 11th was changed on less than 7 days notice.

29 The context of the Collective Agreement includes the nature of the services provided by the Employer and the nature of the work performed by employees. There is reference to deployment in Article 31 where it is stated that "the Employer will endeavour on deployment to have an equitable distribution of duties for replacement crews".

30 The parties dispute whether the Employer violated Article 17.02 by not paying the Grievor, Terry West, the shift change premium for his shift change on deployment on August 11, 2015. Article 17.02 states as follows:

> 17.02 The shift schedule will be posted fourteen (14) days in advance and no less frequently than every thirteen (13) weeks. Seven (7) days prior to posting, the Union will be provided a copy of the proposed schedule for their review and comment. With the exception of deployments, an Employee's schedule will not be changed during that period without the employee having seven (7) days notice of change. If an employee is given less than seven (7) days advance notice, the employee shall receive a premium rate of time and one half (1½) for work performed on the first changed shift.

31 The Employer's interpretation of Article 17.02 is that the shift change premium is payable to employees provided less than 7 days notice, subject to the exception stated in the third sentence, "with the exception of deployments". The Union's interpretation of Article 17.02 is that the exception stated in the third sentence, "with the exception of deployments", applies only to the statement in the third sentence that a schedule "will not be changed during that period without the employee having 7 days notice of change". The Union submits that the exception stated for "deployment" does not apply to the last sentence of Article 17.02 where it states that "if an employee is given less than 7 days advance notice, the employee shall receive a premium rate of time and one half for work performed on the first changed shift". The Union's interpretation, to give meaning to the words "with the exception of deployments", is that a schedule cannot be changed without 7 days

advance notice for work to be done at the Gander base. The Union's interpretation of Article 17.02 is that there is an absolute prohibition against the Employer changing an employee's shift schedule, without giving 7 days notice, except for deployments. The Union submits that the Employer has options, other than shift changes, to provide the employees needed to meet the requirements of the customer at the base in Gander. The Employer's interpretation is that the exception for deployments, stated in the third sentence of Article 17.02, applies to the last sentence of Article 17.02. The Employer's interpretation is that an employee's shift may be changed whenever necessary, whether or not the Employer gives 7 days notice and whether or not there is a deployment. The Employer submits that Article 17.02 permits a shift change and also states when a shift change premium is payable. The Employer's interpretation is that, where an employee receives less than 7 days notice for a shift change at the base in Gander, then a shift change premium is payable, however the shift change premium is not payable in the case of deployments, regardless of when notice of shift change is given.

32 I have considered the principles of collective agreement interpretation as discussed in Brown & Beatty, *Canadian Labour Arbitration*, 4th edition. Those principles include that the language should be given its normal or ordinary meaning (paragraph 4:2110) and that the language should be interpreted within the context of the collective agreement as a whole (paragraph 4:2150) and the industrial relations practices of the parties (paragraph 4:2300). I have considered the principles of interpretation as discussed in *C.E.P., Local 777 v. Imperial Oil Strathcona Refinery (Policy Grievance)* (2004) 130 L.A.C. (4th) 239 (Elliott) (the "*Imperial Oil*" case). The Award states, in part, as follows:

> Interpretive Approach
>
> . . .
>
> 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.
>
> . . .
>
> 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.
>
> . . .
>
> Other information
>
> 68 The modern rule of interpretation calls on "other information" to be considered that can throw light on the text to discern its meaning, recognizing that the text is paramount and the "other information" can only help interpret the text, not change it.

33 Having regard to the ordinary meaning of the language within its context in the Collective Agreement, I note that the words "with the exception of deployments" is placed in the third sentence, and not the last sentence, of Article 17.02. Had the parties intended to make an exception for deployments, and not pay a shift change premium for a shift change on deployment, with less than 7 days notice, then that intention would have been more clearly stated had the parties placed the words "with the exception of deployments" in the last sentence of Article 17.02. The ordinary meaning of the last sentence of Article 17.02, when the words are read by themselves, is that an employee is paid a shift change premium on any occasion for change of shift on less than 7 days notice. The ordinary meaning of the third sentence of Article 17.02, when the words are read by themselves, is that an employee's shift may not be changed on less than 7 days notice, with the exception of deployments. The meaning of the language also needs to be considered in the context of reading Article 17.02 and the Collective Agreement as a whole, and the context of the labour relations practices of the parties. In particular, the last two sentences of Article 17.02 are related, and need to be given meaning together. The Union and the Employer differ in their interpretation of the two sentences. The Employer's interpretation is that the words "with the exception of deployments", are intended to apply to the payment of the shift change premium. The Employer's interpretation has the effect that the last two sentences of Article 17.02 mean, "with the exception

of deployment, if an employee's schedule is changed on less than 7 days advance notice, the employee shall receive a premium of time and one half for work on the first shift." However, such an interpretation would require a change of the language of Article 17.02.

34 I will consider the effect of each interpretation, in particular, the effect of having a shift change premium payable on less than 7 days notice where the shift change occurs at the base in Gander, but not payable in the case of deployments. The evidence indicates that deployments have occurred regularly for the past 12 years. Exhibit BW-2 shows one to four deployments of groups of employees per year from 2006 to 2016, except for three years that did not have deployments. Deployments are usually unplanned occurrences of aircraft breakdown in which the Employer does not have control over the location of the work. When there is an aircraft breakdown at a location outside the Gander base, then the Employer has available to do the work only the employees sent on deployment. This situation may be distinguished from assignment of work at the base in Gander where there is no similar limitation. On the other hand, from an employee's perspective, the shift change is an inconvenience, whether the shift change is for work in Gander or work on deployment. If the shift change premium is intended to compensate an employee for the inconvenience of a shift change on short notice, there is no basis to make an exception for deployments. When the interpretations are applied in practice, effect may be given to the Union's interpretation.

35 I have considered whether past practice may be used as an aid to interpretation of the Collective Agreement. The parties operated under the same language during the terms of two prior Collective Agreements. According to the evidence, on all previous occasions where employees were deployed on less than 7 days notice, the Employer did not pay a shift change premium. Also, when the Employer changed the shifts of employees at the base in Gander on less than 7 days notice, the Employer paid the shift change premium. The practice was in effect since 2004, when the first Collective Agreement came into effect. There have been no objections by employees or by the Union and no grievance filed prior to the current grievance. The Local Union President knew that the Employer did not pay a shift change premium in the case of deployment, whether or not 7 days notice was given. The Employer assigned the Local Union President, the Grievor and other employees on prior deployments with shift changes and did not pay a shift change premium. The practice was in effect prior to the negotiation of the current Collective Agreement. To consider past practice as an aid to interpretation, under the test set out in *I.A.M., Local 1740 v. John Bertram & Sons Co.* (1967) 18 L.A.C. 362 (Weiler) (the "*John Bertram*" case), the first issue is whether the words in Article 17.02 are ambiguous. Past practice may not be used to change the words in Article

17.02. I find that the words in Article 17.02 may be interpreted by applying the principles of interpretation. The words are not ambiguous. Therefore, past practice will not be considered as an aid to interpretation.

36 I will interpret Article 17.02 to give effect to the words used by the parties. I find that it is appropriate to give effect to the ordinary meaning of the words in Article 17.02. The last sentence of Article 17.02 provides for payment of a shift change premium, and makes no exception for deployments. As a result, I find that the Union's interpretation is correct.

37 Having found that the Union's interpretation is correct, I will consider the issue of estoppel. The issue is whether the Union is estopped from relying on its interpretation of Article 17.02, because the Union did not object to the Employer's longstanding practice to not pay a shift change premium to employees sent on deployment. It is also noted that the Union did not object to the Employer changing the shifts of employees at the Gander base on less than 7 days advance notice.

38 The requirements of estoppel are (1) a clear and unequivocal representation, by words or conduct, which may be made by silence, (2) intent that the representation be relied upon, which may be implied or presumed, and (3) the party to whom the representation is made, relies on the representation to its detriment (Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, paragraph 2:2211).

39 The application of estoppel by a labour arbitrator was discussed in *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals* [2011] 3 S.C.R. 616 (the "*Nor-Man*" case). The Supreme Court of Canada found that an arbitrator has flexibility to apply the doctrine of estoppel in a manner appropriate to the field of labour relations, and not to be bound by rules applied by the Courts. The Supreme Court of Canada upheld an arbitration award that found the union's interpretation of the collective agreement to be correct, but also found that the union was estopped from enforcing the correct interpretation.

40 The issue in dispute in *Nor-Man* was the calculation of service for the purpose of vacation entitlement. The employer had openly and consistently calculated length of service from the seniority date, which excluded casual employment prior to the employee being placed on the seniority list. The arbitrator found that the correct interpretation was to include casual employment when calculating length of service, with the effect that the grievor was entitled to a greater paid

vacation. However, the arbitrator denied the grievance on the basis of estoppel. The arbitrator found that the employer was entitled to assume that the union had accepted the practice and to rely on the assumption in not seeking to negotiate a change in the language. The Supreme Court of Canada in *Nor-Man* noted that the arbitrator cited two arbitral precedents, which had applied estoppel in similar situations, and referred to the precedents as follows:

> 19 Both arbitrators were alive to the foundational principles of estoppel. Essentially, they both found that the union was fixed with knowledge -- constructive, if not actual -- of the employer's mistaken application of the disputed clauses throughout the relevant time; that the union's silence amounted to acquiescence in the employer's practice; that this sufficiently fulfilled the intention requirement of estoppel; that the employer could reasonably rely on the union's acquiescence; that the employer's reliance was to its detriment; and that all of this had the effect of altering the legal relations between the parties.

41 The Supreme Court of Canada in *Nor-Man* also noted that arbitrators have authority to adapt principles of estoppel in a labour relations context. The Court found that the arbitrator was not required to find that the union intended to alter its legal relationship with the employer, and could find an estoppel by silence in response to the employer's longstanding practice.

42 In this case, the Employer's practice was open and consistent for 12 years over three Collective Agreements. The practice was that the Employer did not pay a shift change premium to employees on deployment for a shift change on less than 7 days notice. The practice was applied in the past to the Grievor, to the Local Union President and to other employees. The Union did not object to the practice before it filed the current grievance. Also, the Employer's practice was to change shifts at the base on less than 7 days notice, and the Union did not object. Both practices are relevant to how the Employer applied Article 17.02. The silence by the Union in these circumstances amounts to a representation that it did not object to the practice, and fulfills the intention requirement of estoppel. The Employer relied on the representation to its detriment, because the Employer did not seek to negotiate a change in the language of Article 17.02 in collective bargaining. I find that the requirements of estoppel are established on the facts of this case.

43 I find that the Union's authorities on estoppel may be distinguished on the facts of each case. In *Crothall Services Canada Ltd. and Unifor, Local 4606 (Canada Day)* (2013) 242 L.A.C. (4th) 245 (Raymond), there was only one prior occasion when the practice occurred, and at that time, the union was not aware of the impact of a statute on the collective agreement. In *Sunrise Health Region and HSAS (EMS Standby)* (2014) 247 L.A.C. (4th) 350 (Hood), there was no past practice known to the union, and the practice was isolated and inconsistent. In *Jasper Park Lodge and Unifor, Local 4534 (Nuez)* (2017) 131 C.L.A.S. 252 (Norrie), the local union president had no knowledge of the practice and had assumed the practice had stopped following the resolution of previous grievances. In this case, the practice of changing shifts on short notice in Gander occurred frequently, and the practice of not paying shift change premiums on deployment occurred consistently over a period of 12 years.

44 As a result of the Union filing the grievance, and sending the letter to the Employer, the Employer has been placed on notice of the Union's interpretation of Article 17.02. The Employer does not have any opportunity to negotiate the issue for the duration of the current Collective Agreement. The parties may address the issue in the next round of collective bargaining. In the meantime, the effect of the application of estoppel is that the Employer's current practice may continue until the expiry of the Collective Agreement. The Union is estopped from grieving the practice. As a result, the grievance of Terry West will be denied.

45 I find that the correct interpretation of Article 17.02 is that the shift change premium is payable in the case of deployments, where less than 7 days notice is given of the shift change. The Employer sent the Grievor, Terry West, on deployment on August 11, 2015 and gave him less than 7 days notice of the shift change. Under the correct interpretation of Article 17.02, the Employer would be obligated to pay the shift change premium to the Grievor. However, the Union is estopped by the fact it did not object to the Employer's consistent practice over 12 years to not pay the shift change premium on deployment. The Employer was not previously put on notice of the Union's interpretation and did not seek to address the issue in prior rounds of collective bargaining. It would be appropriate that the Employer have the opportunity to address the issue in the next round of bargaining.

Decision

46 The grievance is denied for the reasons stated in the Award.

DATED this 29th day of November, 2017.

James C. Oakley, Q.C.
Arbitrator