

2013 CarswellBC 1909
British Columbia Arbitration

Board of Education of School District No. 39 and IUOE, Local 963 (Azul), Re

2013 CarswellBC 1909, [2013] B.C.W.L.D. 5987, [2013] B.C.W.L.D.
5988, [2013] B.C.W.L.D. 5990, [2013] B.C.W.L.D. 5991, 115 C.L.A.S. 86

**International Union of Operating Engineers, Local 963, Union
Board of Education of School District No. 39 (Vancouver), Employer**

James E. Dorsey Member

Heard: January 09, 2013; January 10, 2013; January 11, 2013; April 02, 2013; May 08, 2013; May 10, 2013

Judgment: June 7, 2013

Docket: None given.

Counsel: Richard L. Edgar, for Union

Peter A. Csiszar, for Employer

Michael Lemaire, for Employees

Subject: Public; Labour

James E. Dorsey Member:

1. Grievance and Jurisdiction

1 In September 2009, the employer decided it had been incorrectly giving seniority priority in job selection competitions for coveted Monday to Friday day shifts in Head Custodian positions since the 1980's. Without notice to the union or employees, the employer unilaterally changed its approach. The union supports the employer's prior approach and has had to explain to employee's selected under the employer's new approach why their selection is in dispute and the union is advocating they be displaced in favour of other applicants.

2 The union and employer agree I am properly constituted as an arbitrator under their collective agreement and the *Labour Relations Code* with jurisdiction to finally decide the merits of six grievances consolidated for hearing at a single arbitration.

3 The union gave notice of this arbitration to six incumbent Head Custodian employees who might be displaced from their positions because of the union's grievances. Five of them attended the arbitration. They selected one to be the spokesperson for them collectively; to question witnesses; and to make submissions for them. The employer called each of the five to testify. Each was given an opportunity at the conclusion of his testimony to make any additional statements under oath he wished to have considered as part of the evidence.

2. Dispute Is Selection for Coveted Head Custodian Day Shift Positions

4 The difference is over the use of the seniority date on the Building Engineer seniority list to compete for Head Custodian positions. The union does not assert Building Engineers can use an earlier seniority or service date they might have had as Custodians. Some employees are hired directly into Building Engineer positions and have not had a Custodian seniority or service date.

5 The union is the bargaining agent for employees working in groups of positions that were once separately certified bargaining units. This dispute concerns Engineer Custodial Staff. Their working conditions, allocation of work, wage rate schedule and other provisions are addressed in Article 11 of the 2010-12 collective agreement. The Engineer Custodial Staff

includes Building Engineers and Assistant Building Engineers; Head Custodians and Assistant Head Custodians; Maintenance Engineers; Custodians (Full-Time, Steady Part-Time and Temporary) and Carpet Cleaner Custodian.

6 Under the 2010-12 collective agreement, Building Engineers are paid one of seven salary rates according to the gross area of the schools where they work, which range from <14,000 ft² to 350,000 ft². The bi-weekly rates are in seven steps from \$1,674.20 to \$2,207.14. (Article 11(C)(1); Summary of Wage Rates)

7 Head Custodians are paid one of three rates based on three ranges of gross area: <14,000 ft²; 14,001 to 28,000 ft²; and 28,001 to 42,000 ft². The respective bi-weekly rates for Head Custodians are \$1,617.45, \$1,673.48 and \$1,720.83. (Summary of Wage Rates)

8 The division of work allocation between Building Engineers and Head Custodians is expressly addressed by limiting the work areas of Head Custodians as follows:

All schools hot water heated, forced air heated, under 42,000 sq. ft. and all annexes (excluding portables) shall be designated as Head Custodian schools. All schools over 42,000 sq. ft. (excluding portables) shall be designated as Building Engineer schools. (Article 11(A)(1))

9 Assistant Building Engineers are paid a salary based on their assigned position. Assistant Building Engineer III positions are in large secondary schools or equivalent buildings. Assistant Building Engineer II positions are in schools to which they are assigned day to day. Assistant Building Engineer I positions are on an afternoon shift at an elementary or small secondary school. The respective bi-weekly rates are \$1,797.98, \$1,704.07 and \$1,653.11. (Article 11(A)(1)(c)(d) and (e); Summary of Wage Rates)

10 Assistant Head Custodians are assigned to schools at which there is a Head Custodian and which have an entitlement to a full-time Assistant. Like Assistant Building Engineers, they are paid a position salary. The bi-weekly rate is \$1,587.56. (Article 11(A)(1)(f); Summary of Wage Rates)

11 Some area based bi-weekly salary rates for Head Custodians are higher than the position based rates for Assistant Building Engineers, although all Assistant Building Engineers are required to have a higher heating certificate than Head Custodians.

12 There are shift differentials for afternoon (39¢ per hr.) and night (80¢ per hr.) shifts. (Article 11(C)(5); Summary of Wage Rates)

13 During the school year, Building Engineers, Head Custodians, some Assistant Building Engineers and a few Custodians work day shifts. Some Assistant Building Engineers and most Custodians work afternoon shifts. (Article 11(A)(2))

14 Day shift is a very attractive feature of the Head Custodian position, which is also a financial advancement for Custodians, whose bi-weekly salary position rate is \$1,562.11. The Assistant Head Custodian bi-weekly rate is only \$25.44 higher.

15 Without factoring in shift differentials, the highest Head Custodian area rate is more than the Assistant Building Engineer I position rate. An Assistant Building Engineer II or III or a Building Engineer moving to a Head Custodian position will incur a reduction in salary. For some, this might be a fair price to pay for a permanent day shift and, perhaps, a school closer to home.

3. Merged Bargaining Unit and Relief from "Featherbedding" — 1980's

16 The approach the employer changed in September 2009 in selecting among applicants competing for Head Custodian positions had been consistently followed since the mid-1980's. It began after the creation and initial staffing of the Head Custodian position.

17 In the 1970's, Custodians, previously represented by another union, were included in the Building Engineers and Assistant Building Engineers' bargaining unit represented by the union.

18 The job positions in the bargaining unit before the 1982-83 collective agreement were: Engineer-Custodian, Assistant Engineer-Custodian III, II and I, Intern Assistant Engineer-Custodian and Custodian.

19 An Engineer-Custodian, an Assistant Engineer-Custodian III, II and I and an Intern Assistant Engineer-Custodian were required to have a Class "B", Class "A" or higher Heating Certificate. (Articles V(A)(1), (2), (5), (6) and (7)) Comparable heating certificates are now required for Building Engineers and Assistant Building Engineers III, II and I.

20 Custodians could move to an Engineer-Custodian position through the Intern Assistant Engineer-Custodian position after completing firing time:

A Custodian who completes firing time with the Board is promoted to the position of Intern Assistant Engineer-Custodian. He must then obtain a Class "B" or higher Boiler Operator's Certificate within three months, which period may be extended only in circumstances deemed to be justifiable by the Operations Superintendent. (Article II(G)(1))

This Intern-Custodian position had been agreed in the 1978-79 collective agreement for employees who had completed their firing time by January 1, 1977 and new employees with appropriate certification (Article XII(M)).

21 The Intern Assistant Engineer-Custodian position was transitional. An employee could not stop progression and stay as an Intern. Failure to complete the Class "B" Certificate and "Vancouver School Board Training Schedule I" resulted in reverting to a Custodian position or severing employment. Promotion was to Assistant Engineer-Custodian. (Article II(G)(3))

22 The 1982-83 collective agreement also addressed Firemen Trainees:

A committee consisting of equal representation from the Union and the Board will meet at the request of either party, to consider the training of men selected by the School Board for firing time on steam boilers and to consider the suitability of this training for Engineer-Custodial work. (Article XIII(A)(1))

23 In a significant agreement in 1981, the employer and union agreed to include two new positions called Head Custodian and Assistant Head Custodian in the 1982-83 collective agreement. The required training and certification for the positions was less than required for an Assistant Engineer-Custodian.

Head Custodian:

Duties: The Head Custodian is assigned to take charge of heating and cleaning school which has been listed by mutual agreement of the Union and the employer.

Required Training: Completion of approved V.S.B. courses and successful completion of the Boiler Operators course (Building Operators Certificate). (Article V(A)(3))

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Assistant Head Custodian:

Duties: Heating and cleaning. Assistant in a school to which a Head Custodian is assigned and which has the entitlement of a full-time Assistant Head Custodian.

Required Training: Completion of approved V.S.B. courses and successful completion of the Boiler Operators course (Building Operators Certificate). (Article V(A)(4))

24 The collective agreement had extensive provisions about these new positions and the transition to these new positions displacing areas of work with incumbent Engineer-Custodians and Assistant Engineer-Custodians.

Head/Assistant Head Custodian Provisions

- (a) It is agreed that the concept of advancement by Custodians into higher levels of responsibility, job-designation and consequently pay scale which is acceptable to both the Union and Vancouver School Board.
- (b) It is, therefore, agreed that as an initial step in the direction of establishing the classification of Head and Assistant Head Custodian the following class of school units would be made available for manning by such designated personnel:
- (1) Annexes
 - (2) Forced warm air heated schools/units
 - (3) Hot water heated schools/units up to 50,000 sq. ft.
- (c) The total number of Custodian designated school/units will be those listed by the employer in the Vancouver School Board proposal of October 6, 1981, plus the annexes. (addendum) This total number to be for the life of the collective agreement commencing January 1, 1982, and not exceeded thereby.
- (d)
- (1) Qualification for Assistant Head Custodian in the units mentioned in (b) above would be successful completion of Vancouver School Board special course(s) as proposed by the employer.
 - (2) Qualification for Head Custodian in the units mentioned in (b) would be:
 - (i) Successful completion of Vancouver School Board special course(s) as proposed by the employer and
 - (ii) Successful completion of the "theory" or "classroom" segment of the Provincial Government of B. C. Boiler Branch course of the lesser degree (or better). This course may be undertaken by either correspondence or physical attendance at the Vancouver Vocational Institute or other approved institution.
- Costs of (i) to be borne by the employer and costs of (ii) to borne by the individual concerned.
- (e) Incumbent personnel, regardless of classification, in any school/unit/annex affected will not suffer removal by transfer, demotion, etc. excepting by voluntary volition, except, in the case of annexes where changes may be made by September 1, 1982, notwithstanding.
- (f) It is agreed that Head Custodian or Assistant Head Custodian will not relieve Engineer/Custodians or Assistant Engineer/Custodians in other schools/units outside of Custodian/designated listing.
- (g) Where regulatory contravention, present or future, is evoked as a result of this change, then such contravention is to be rectified immediately by the employer in a manner acceptable to the Union and in conformity with said regulation.
- (h) The employer shall post all vacancies for Head Custodian and Assistant Head Custodian.
- (i) The employer shall maintain a seniority list of Custodians and supply, from time to time, updated lists of seniority status to the Union, especially as it would apply to Head Custodian and Assistant Head Custodian as qualifications are completed and registered.
- (j) The employer shall conform to all appropriate legislation and not show bias to any applicant, for the positions of Head Custodian or Assistant Head Custodian because of gender.

(k) Working conditions which exist in the current collective agreement as applied to Engineer/Custodians and Assistant Engineer/Custodians will prevail and be attached to the positions of Head Custodian and Assistant Head Custodian.

(l) The salary schedule for the position of Head Custodian will reflect the upward graduation as presently exists within the square footage formula as agreed between the Union and the employer, as attached hereto.

25 The creation of these new positions in a limited number of agreed locations provided an advancement avenue for Custodians outside the Engineer-Custodian and Assistant Engineer-Custodian positions that required higher credentials and certification. This was a benefit the union was achieving for Custodians recently included in the bargaining unit at a cost to higher certified Engineer-Custodians and Assistant Engineer-Custodians.

26 For the employer, creation of these positions addressed problems Operations Superintendent J.G. Hannan had identified in the summer of 1981 in a memorandum to Director of Employee Relations Gordon Wilson in anticipation of upcoming collective bargaining.

We recommend the union agreement be changed to provide opportunities for semi-trained men (i.e. without steam operators' certificates) to operate small hot-water heated schools (18 positions).

Purposes:

(a) With the conversion of many schools from steam to hot water heat it is no longer appropriate to require stationary steam engineers for small schools. This will lessen the increasing difficulty we are experiencing in finding suitable employees with steam certificates.

(b) The union are anxious to provide better opportunities for custodians who are now members of local 963.

27 While Mr. Hannan identified this change for 18 positions in non-steam schools as no-cost/no-savings, the union calculated there would be savings for the employer. The agreed salary rate for Assistant Head Custodian was deliberately the same as the rate for Intern Assistant Engineer-Custodian. A position salary rate differential between Assistant Head Custodian and Assistant Building Engineer continues in the 2010-12 collective agreement.

28 On December 1, 1981, after a tentative collective agreement was negotiated, Mr. Wilson reported to Trustees' Standing Committee IV, in part, as follows:

The union has conceded certain changes which will also assist some of its members in promotion and career development within the system.

The major concession has been for the union to concede that certain schools do not require a steam engineer's certificate. In the past all schools were required by the agreement to have an engineer custodian with a steam certificate under the Boiler Act. The Board has been required to train custodians by providing firing time which, at 1982 rates, would cost \$5,655 per trainee. The practice was not unlike featherbedding, which term arose when the railway steam locomotive changed over to oil and the fireman was made redundant. The fireman was continued in the contract and as he had nothing to do he carried a bed onto the train and the lightest to carry was a feather bed, and hence the term, "featherbedding".

The union has agreed that the annexes, Teachers' Centre, and ten elementary schools for this contract term would be eligible for a new classification of Head Custodian and Assistant Head Custodian where applicable. The 23 persons would not require firing time which will ultimately save the Board \$130,000 and more as other schools are added to the list. Moreover the difference in pay between the Head Custodian and the engineer custodian is approximately \$90 per month or a saving of \$24,840 a year making a total initial saving of \$154,905 or 1.5% of the salary and bonuses for this category of employee.

In order to achieve this major concession which, incidentally, is also beneficial to the custodian who now will be able to qualify and, therefore, look forward to promotion and career development unavailable in the past, the two year contract was front-end loaded. It produced an end rate higher than would otherwise have been the case. The cost, however, for 1982 is approximately what was anticipated if the above saving is included.

29 After discussing the settlement against the benchmark IWA two-year settlement of 15% and 13%, Mr. Wilson continued:

The bargaining committee, therefore, has attempted to achieve a major breakthrough in rearranging the custodial coverage in the schools so that an increasing number of schools may be supervised by Head Custodians who do not require firing-time or a steam ticket. Each will be required to qualify on a school Board designed course and also a course provided by the Boiler Vessel Institute at the V.V.I. The course provides training for hot air and hot water systems not requiring a boiler certificate.

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The target date for appointment of Head Custodians in the annexes and the ten schools is not later than September 1, 1982. The courses will be designed and put into operation early in the new year and it is understood that the V.V.I. courses will be available in the spring. The shift differential was increased to \$.35 and \$.70 for afternoon and evening shifts which still is lower than most shift differentials in similar occupational groups.

30 The 1982-83 collective agreement included provisions for implementing this change by September 1, 1982:

Phasing In and Establishing Seniority for Head Custodian and Assistant Head Custodian

(a) The employer agrees to initiate a training Program and course for full-time, permanent continuously employed Custodians of Vancouver School Board who elect to avail themselves of such facility.

(b) At the employer's discretion in terms of dates, number of students, timing, etc. a course of instruction for Custodians as outlined in the Vancouver School Board proposals (addended to this agreement) dated October 6, 1981, will commence.

(c) The employer will use seniority reckoned from the date of commencement of continuous employment including military service as the basis for selecting the students who will attend the training course

(d) A seniority list will thus be established for those students who successfully complete the course and become eligible for reclassification to Assistant Head Custodian.

(e) At a date later than September 1, 1982 any vacancy created at the Custodian /designated school/units for Assistant Head Custodian will be filled by such qualified personnel.

(f) At a date later than September 1, 1982, any vacancy created at the Custodian /designated school/units for Head Custodian will be filled by such qualified personnel as outlined in the counter proposal or by an Assistant Head Custodian on an acting basis.

(g) For the life of the collective agreement effective January 1, 1982, the employer will restrict the number of employees to the training program to a total of not more than fifty (50).

(h) Notwithstanding the above it is accepted that an employee is required to pass the Building Operator course examination set by the Boiler Inspection Branch to qualify as a Head Custodian.

31 In the 1982-83 collective agreement, as in the 2010-12 collective agreement, seniority was the priority factor in making transfers, assignments, demotions and promotions:

In making transfers, assignments, demotions and promotions, in order of priority, seniority, job qualifications and job record of the employee shall be the primary consideration and where the last two factors are considered to be equal, length of service shall be the determining factor. (Article VI(C)(1)(a))

32 The use of seniority for other purposes and seniority lists were addressed in the 1982-83 collective agreement. There were three seniority lists, including one for Custodians, which was changed to accommodate the new positions of Assistant Head and Head Custodian. The new positions were not included on the Engineer-Custodian seniority list.

(e) Seniority for purposes of benefits shall be calculated from the date from which the employee commences continuous employment with the Board. The employer agrees to maintain seniority lists based on each of three factors which are: the date of employment with the Board, which seniority list shall provide all members of the Union seniority for purposes of vacations and other Benefits as well as applications for training. The second shall be a seniority list for engineer-custodians as provided in (f) which follows. The third list shall be of those custodians described in (g) which follows.

(f) Seniority on the Engineer-Custodian list shall start when an employee holds a valid boiler operator's or stationary steam engineer's certificate and is employed in a position requiring same (Intern Assistant Engineer-Custodian or higher).

(g) Seniority on the Custodians' list shall be the same as in (f) above except for those who successfully complete the course to qualify for the positions of Head Custodian and Assistant Head Custodian, in which case seniority shall be from the date of the course. Custodians who have the same course date may then depend on seniority as defined in (f) above. (Article VI(C)(1)(e) — (g))

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(j) Seniority Lists:

The employer will provide seniority lists to the Union by January 1st of each year. The Union will have sixty (60) days in which to agree or disagree as the case may be, with the seniority lists. (Article VI(C)(1)(j))

33 The agreed list of schools and annexes identified 10 Head Custodian and 7 Assistant Head Custodian positions for the term of the 1982-83 collective agreement, close to the 18 Mr. Hannan referred to. However, as Mr. Wilson stated in his memorandum to the Trustees, the number was to increase to 23.

34 Applications to take the training were made in January 1982 for courses starting in February and ending in April. Over 50 employees applied. The senior 25 were selected for training. The training was not available to Assistant Engineer-Custodians or Engineer-Custodians. Sixteen of 24 employees passed the April examination. Six of the 16 were women. The union was given an Engineer-Custodian seniority list by April.

35 By May 18th, 3 employees had completed the VVI requirement. The "final deadline" to complete that requirement was December 31st. By the end of June, all 16 had positions beginning in September. The July 1983 minutes of the Labour-Management Committee report the "Head Custodian program" demonstrated the employer was an equal opportunity employer. Another course was scheduled for the fall. Custodians could take the VVI course requirement before the Vancouver School Board courses.

36 The next collective agreement was for the 1984 calendar year. The duties, required training and qualifications of the Assistant Head and Head Custodian positions were described differently than in the 1982-83 collective agreement. The transition and implementation had been accomplished.

Head Custodian:

Required Training — Completion of approved Schedule I of Vancouver School Board Training Courses.

Required Heating Certificate: Boiler Operators Program Certificate from Vancouver Vocational Institute or higher. (Article XI(A)(1)(a))

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Assistant Head Custodian

Duties: Heating and cleaning. Assistant in a school to which a Head Custodian is assigned and which has the entitlement of a full-time Assistant Head Custodian.

Required Training: Schedule I of Vancouver School Board Training Courses.

Required Heating Certificate: Boiler Operators Program Certificate from Vancouver Vocational Institute or higher. (Article XI(A)(1)(e))

37 A Custodian with the qualifications to be an Assistant Head or Head Custodian was identified on the Custodian seniority list in the 1982-83 collective agreement (Article VI(c)(1)(g)). This continued in the 1984 collective agreement as Article XI(B)(3)(a)(vii). Subsequently, at a time not identified in the evidence, this provision was removed from the collective agreement.

38 In 1982 and 1983, Assistant Engineer-Custodians did not participate in the Head Custodian program and could not compete for a Head Custodian position. The 1984 agreement recognized Assistant Engineer-Custodians could work in areas designated for Assistant Head and Head Custodians.

Qualifications and Job Posting

The Board and the Union agree that applications may be made by any qualified member for positions which are posted. Areas designated for Head Custodians and Assistant Head Custodians may be used as the first promotional step for Assistant Engineer Custodians. An employee who is promoted to a position of Assistant Engineer Custodian II shall be required to obtain experience in that position for not less than one (1) year before qualifying to apply for a more senior promotional position. (Article XI(A)(1)(j))

39 It is noteworthy that the December 29, 1983 memorandum of settlement was worded differently. It was conditional on increasing the previous list of areas where Assistant Head and Head Custodians could work and, thereby, decreasing the work areas for Assistant Building Engineers.

Qualifications and Job Posting

The Board and the Union agree that applications may be made by any qualified member for positions which are posted. Those areas previously designated for Head Custodians and Assistant Head Custodians may be used as the first promotional step for Assistant Engineer Custodians provided that the list of such positions is extended by six (6) additional units during the term of this agreement. The Board and the Union further agree that a member who is promoted to a position of Assistant Engineer Custodian II shall be required to obtain experience in that position for not less than one (1) year before qualifying to apply for a more senior promotional position.

40 The agreed list of schools and annexes in the 1984 collective agreement was expanded to allow the employer to employ 29 Head Custodians and 11 Assistant Head Custodians. This was an increase from 23 to 40 positions converted from Engineer-Custodian work areas to Head Custodian work areas.

41 There was no change to the seniority lists. Under the language of the collective agreement, an employee employed as an Assistant Head or Head Custodian would have a valid boiler operator's certificate and be eligible to be on the Engineer-Custodian seniority list described as follows:

Seniority on the Engineer-Custodian list shall start when an employee holds a valid boiler operator's or stationary steam engineer's certificate and is employed in a position requiring same (Intern Assistant Engineer-Custodian or higher). (Article XI(B)(3)(a)(vi))

42 In 1983, there was legislated public sector restraint. The union and employer agreed that in 1984 "layoffs shall not be necessary, other than for cause, and any reduction of staff shall be accomplished by attrition." They agreed to jointly seek an exemption order under the recently enacted *Public Service Restraint Act*. They agreed for this purpose: "... that there are three (3) basic seniority listings: engineer custodians, head custodians and custodians: and further, that senior positions in the first and second mentioned shall, for seniority reasons only, retain the right to move into positions for which they are qualified in the other or other two seniority groups."

43 This was reciprocal seniority between the Engineer Custodian and Head Custodian seniority lists with a greater likelihood the higher certified Engineer Custodians would have more mobility than "semi-trained" employees without firing-time or a steam ticket working areas designated for Assistant Head and Head Custodians.

44 In the circumstances of restraint and possible staff reductions, this mobility allowed the employer to retain employees with steam certificates that it was having "increasing difficulty" recruiting. Engineer Custodians could also relieve in areas designated for Assistant Head and Head Custodians, who could not relieve outside their designated areas.

4. Application of Seniority for Head Custodian Vacancies (1985 — 2008)

45 No seniority list prior to January 1986 was entered into evidence. There are 29 employees on the January 1986 Head Custodian seniority list.

46 The three most senior employees have seniority dates pre-dating April 30, 1982. G. Wanless had a seniority date of December 1, 1977. He was the most senior and successful applicant on a Head Custodian vacancy in May 1985 for which there were 15 applicants. Three of the other applicants were Engineer-Custodians; 8 were Head Custodians; 2 were Custodians; and 1 is unidentified.

47 The second most senior employee, R. Narain, had a seniority date of March 10, 1979. He was the most senior and successful applicant on a Head Custodian vacancy in January 1985 for which there were 16 applicants. Four of the other applicants were Engineer-Custodians; 9 were Head Custodians; and 2 were Custodians.

48 The third most senior, J.D. McCulligh, had a seniority date of January 4, 1982. There is no evidence when this employee became a Head Custodian.

49 The remaining 26 employees on the Head Custodian seniority list had seniority dates from April 30, 1982 to April 10, 1984. Ten of them had the same seniority date, April 12, 1983, suggesting this had been a course date.

50 There was significant attrition from the first 16 Custodians who qualified in June 1982. Only 7 employees on the January 1986 Head Custodian seniority list had dates between April 30 and June 30, 1982.

51 The total number of employees in Assistant Head and Head Custodian positions increased to 30 by January 1987. The three senior employees on the January 1986 Head Custodian seniority list were no longer on that list. They were back on the Engineer-Custodian seniority list with asterisks to identify them as three of four Engineer-Custodians working in Head Custodian positions. The fourth, K. Kwan, had a seniority date of July 1, 1980. The January 1987 Head Custodian seniority list had 26 employees with seniority dates from April 30, 1982 to November 7, 1985.

52 A year later, in January 1988, there were 34 employees in Assistant Head or Head Custodian positions. Twenty-four were on the Head Custodian seniority list. One of the four new names, Philip K. Wong, had a seniority date of December 7, 1987. He had been on the January 1986 Custodian seniority list with a seniority date of January 16, 1984. He appears to have been the first Custodian hired after 1983 to progress to Head Custodian.

53 The remaining 10 were on the Engineer-Custodian seniority list with asterisks indicating they were in Head Custodian positions. Their seniority dates were from May 17, 1976 to March 26, 1982. The trend was established. As the positions that could be staffed by Head Custodian increased, competition was open to all employees and the employer selected Engineer-Custodians. There was no program to train Custodians for the positions.

54 Engineer-Custodians, even very senior ones, continued to apply for Head Custodian positions. The employer was recognizing the priority of Engineer-Custodian seniority on the Engineer-Custodian seniority list and selecting senior Engineer-Custodians over both employees on the Head Custodian seniority list and less senior Engineer-Custodians working in Head Custodian positions.

55 In 1988,, the first or second most senior applicant was awarded the position in all 7 posted vacancies regardless whether the most senior applicant was on the Engineer-Custodian or Head Custodian seniority list. The second most senior was selected after the most senior declined or withdrew.

56 There were several applicants for each position. Some very senior Engineer-Custodians were successful applicants. The most senior employee on the Head Custodian seniority list to apply for any of the vacancies had a seniority date of October 26, 1982. This employee did not apply for the December vacancy at Tillicum for which an Engineer-Custodian with a November 1, 1982 seniority date was selected.

Summary - 1988 Head Custodian Vacancy Postings

<i>1988 Selection Date</i>	<i>Site</i>	<i>Total</i>	<i>Applicants on January 1988 Seniority Lists</i>		<i>Selected Applicant</i>	
			<i>Engineer- Custodian</i>	<i>Head Custodian</i>	<i>Seniority List</i>	<i>Seniority Date</i>
February 4	Carnarvon	13	11	2	Engineer-Custodian	16-Mar-82
March 9	Dickens Annex	18	11	7	Engineer-Custodian	13-Jun-66
April 27	Queen Victoria	14	11	3	Engineer-Custodian	01-Jun-80
September 29	Tyee	14	10	4	Engineer-Custodian	09-Mar-81
September 29	Douglas Annex	14	10	4	Engineer-Custodian	29-Mar-82
October 19	University Hill	11	9	2	Engineer-Custodian	12-Mar-79
December 16	Tillicum	12	10	2	Engineer-Custodian	01-Nov-82

57 There is no evidence of Head Custodian vacancy postings and selection from 1988 to 1990. In February 1991, there were still 34 employees in Head Custodian positions. Twenty-four were on the Head Custodian seniority list. The 4 junior employees had seniority dates in 1988, 1989 and 1990. By this time, the Engineer-Custodian classification was changed to Building Engineer. Ten employees on the Building Engineer seniority list were identified as working in Head Custodian positions.

58 Since 1988, some Building Engineer identified as working in Head Custodian positions with seniority dates earlier than April 30, 1982 were no longer on the Building Engineer seniority list. Presumably they left the employer's employ or the bargaining unit. Other Building Engineers with seniority dates earlier than April 30, 1982 were identified as working as Head Custodians. One Building Engineer with a seniority date of September 18, 1986, which is after April 30, 1982, was working as a Head Custodian.

59 From 1993 to 2010, there were 43 to 46 employees in Assistant Head or Head Custodian positions. The number of sites where a Head Custodian could be assigned in place of a Building Engineer had increased without the employer having to offer another program for Custodians to qualify to apply for Assistant Head or Head Custodian positions. The positions were being filled by Building Engineers.

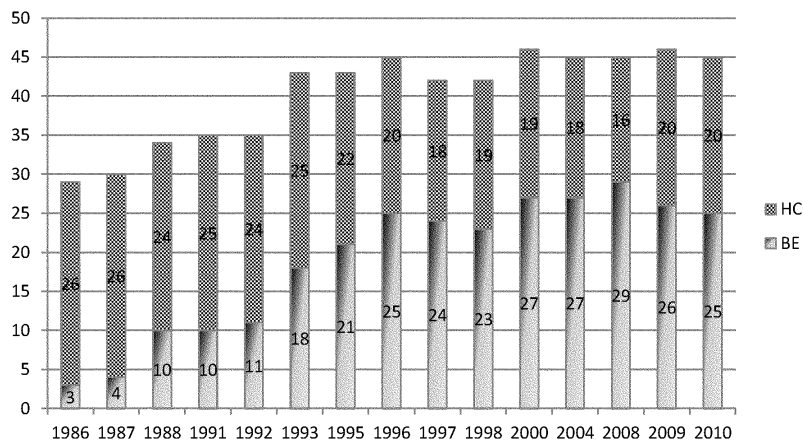
60 The evidence includes some, but not all, seniority lists from 1986 to 2010. The appended, non-exhaustive list of 125 employees who worked in Assistant Head and Head Custodian positions between 1986 and 2010 was compiled from the

seniority lists in evidence. In this cohort, 68 were on Building Engineer seniority lists and 57 were on Head Custodian seniority lists.

61 From 1986 to 2008, the ratio of Building Engineers in Head Custodian positions to employees on the Head Custodian seniority list shifted dramatically toward Building Engineers — from 3:26 to 29:16. The trend reversal in 2009 coincides with the employer's decision to not give priority to Building Engineer seniority in Head Custodian selection decisions that generated this dispute.

62 One employee, M. Khan, whose seniority date is September 27, 1999, appears at various times on both the Building Engineer and Head Custodian seniority lists. He has been included as a Building Engineer on the appended list and chart below showing the number of employees on the Building Engineer and Head Custodian seniority lists in a Head Custodian position from 1986 to 2010.

63 The 29 positions in 1986 is consistent with the 23 referred to in Mr. Wilson's December 1, 1981 memorandum after the 1982-83 collective agreement settlement and the additional 6 in the December 23, 1983 memorandum of settlement for the 1984 collective agreement. Perhaps, awaiting attrition of Building Engineers, the 1984 agreed increase to 40 positions was not achieved until 1993.



Graphic 1

64 There appears to have been three influencing factors for the ratio trend in favour of Building Engineers up to 2008. First, an increase after 1992 in the number of agreed designated areas at which a Head Custodian could work. Second, as the initial group of trained Custodians left Head Custodian positions, senior Building Engineers moved to Head Custodian positions for their pre-retirement years, a phenomenon union Business Manager Tim De Vivo identified in his testimony. He notes that Head Custodian positions are frequently in schools that do not have stairs; are smaller schools with fewer students; and elementary students do not create the required maintenance that older students do. Third, in the mid-2000's, for no reason explained in the evidence, less senior Building Engineers moved to Head Custodian positions. The second and third are deduced from the appended list.

5. Employer Identifies Quarter Century "Error" — Selects Mr. Cartagena (2009)

65 The union adduced evidence of 108 postings for Head Custodian positions from May 1985 to June 2009. Many of these postings generated competitions with 12 or more applicants.

66 In 38 postings, the employer selected a Building Engineer applicant, who was not working as a Head Custodian rather than a Head Custodian applicant. In each case, the Building Engineer the employer selected had an earlier seniority date on the Building Engineer seniority list than the seniority date a Head Custodian applicant had on the Head Custodian seniority list. The following is an example from March 2005 for a vacancy at Garibaldi Annex.

<i>Applicant</i>	<i>Current Position</i>	<i>Seniority List</i>	<i>Seniority/Service Date</i>	<i>Certificate</i>
Fok, T.	Temporary Custodian	Temp. Custodian	01-Jul-98	BSW/ENG-4P
Scott, C.	Assistant BE I	Building Engineer	15-May-00	
Kim, J.	Assistant BE I	Building Engineer	18-Dec-00	ENG-4
Torok, J.	Temporary Custodian	Temp. Custodian	01-Feb-01	
Tasaka, J.	Head Custodian	Head Custodian	04-Sep-01	ENG-4
Prasad, V.	Head Custodian	Head Custodian	13-Nov-01	BOP
Samra, B.	Assistant BE I	Building Engineer	08-Jul-02	BOP/ENG-5
Perry, T.	Head Custodian	Head Custodian	05-May-03	BOC/BSW
Villanueva, A.	Temporary Custodian	Temp. Custodian	01-Jul-03	ENG-5P
Malabuen, M.	Temporary Custodian	Temp. Custodian	-	ENG-4
Sharma, B.	Temporary Custodian	Temp. Custodian	01-Mar-03	BSW/ENG-4P
Ullah, S.	Temporary Custodian	Temp. Custodian	-	ENG-3

67 For an unexplained reason, the qualifications of successful applicant Cecil Scott are not included in the applicant lists in the several competitions in which he applied. Mr. Scott was selected based on his Building Engineer seniority date. There was a Temporary Custodian applicant with an earlier service date and three applicants on the Head Custodian seniority list.

68 Senior Human Resources Manager Joann Horsley-Holwill was Human Resources Manager responsible for support staff from 2001 to 2013. In 2001, the employer began identifying seniority dates on lists of applicants for Head Custodian posted vacancies it supplied to the union. Article 11(B)(3)(a)(2) states: "The Board shall notify the Union not later than one (1) working day after such appointment of the successful candidate together with a list of the unsuccessful applicants." The employer's notice had a column for "seniority." With agreed annual seniority lists the union could check the accuracy of the seniority dates the employer used in its selection.

69 In September 2005, Ms Horsley-Holwill wrote Assistant Building Engineer I Baljit Samra informing him of his successful application and "promotion" to Head Custodian at Elsie Roy Elementary — "Congratulations on your promotion!" In this competition, the senior applicant, Robert Cote, withdrew.

<i>Applicant</i>	<i>Current Position</i>	<i>Seniority List</i>	<i>Seniority/Service Date</i>	<i>Certificate</i>
Cote, R.	Head Custodian	Building Engineer	12-Jun-95	BOC
Fok, T.	Temporary Custodian	Temp. Custodian	01-Jul-98	BSW/ENG-4P
Samra, B.	Assistant BE I	Building Engineer	05-Nov-01	BOP/ENG-5
Prasad, V.	Head Custodian	Head Custodian	13-Nov-01	BOP
Torok, J.	Temporary Custodian	Temp. Custodian	01-Feb-01	BSW/ENG-4P
Sharma, B.	Temporary Custodian	Temp. Custodian	01-Mar-03	BSW/ENG-4P
Dharni, D.	Temporary Custodian	Temp. Custodian	01-Apr-03	BSW
Villanueva, A.	Temporary Custodian	Temp. Custodian	01-Jul-03	ENG-5P
Tang, G.	Assistant BE I	Building Engineer	19-Jan-04	ENG-5/ENG-4

The evidence does not explain why Mr. Samra's seniority date on this competition was November 5, 2001, when the date on the December 2004 Building Engineer seniority list was July 8, 2002. Head Custodian V. Prasad did not grieve.

70 The appointment letter informed Mr. Samra he was required to complete the Schedule I and II Vancouver School Board Training Course when next offered. If he did not, he would be reassigned to his previous classification. Ms Horsley-Holwill testified this should not have been included in her letter because the employer had not offered this training for a couple of decades. She testified this was a very old form letter that she signed without reading. The employer continued to use this form letter until June 2009.

71 Wayne (Wei jian) Shen is a Building Engineer with a February 2006 seniority date on the Building Engineer seniority list. In December 2007, January, February, May, August, September, and November 2008 he applied for Head Custodian positions.

He was successful in January 2009 in a competition for a position at Douglas Annex in which 6 employees on the Building Engineer seniority list applied. The senior applicant, Mr. Scott, withdrew; the next senior Building Engineer, Balinder Bhatia, declined; and the next senior Building Engineer, Mark Malabuen, withdrew. Mr. Shen was selected, although there was an applicant, with less seniority, on the Head Custodian seniority list.

<i>Applicant</i>	<i>Current Position</i>	<i>Seniority List</i>	<i>Seniority/Service Date</i>	<i>Certificate</i>
Scott, C.	Head Custodian	Building Engineer	15-May-00	
Torok, J.	Temporary Custodian	Temp. Custodian	01-Feb-01	BSW/ENG-4P
Bhatia, B.	Assistant BE I	Building Engineer	30-Aug-04	ENG-4
Malabuen, M.	Assistant BE III	Building Engineer	25-Apr-05	ENG-4
<i>Shen, W.J</i>	<i>Assistant BE I</i>	<i>Building Engineer</i>	<i>02-Feb-07</i>	<i>BSW, ENG-5</i>
Hayat, K.	Head Custodian	Head Custodian	29-Oct-07	BSW, ENG-4P
Bai, J.	Assistant BE I	Building Engineer	05-Nov-07	BSW, ENG-5
Stevenson, D.	Assistant BE I	Building Engineer	03-Dec-07	ENG-4

Like many before him, Mr. Shen was selected for a Head Custodian position based on his Building Engineer seniority ahead of other applicants on the Head Custodian list with less seniority.

72 In 2008, the union had engaged in discussions with the employer to establish a Power Engineer trainee program. Reminiscent of 1981, on July 8, 2008, Mr. De Vivo wrote the Chief Examiner, Boiler and Pressure Vessel Safety Program:

I represent a bargaining unit which includes power engineers holding 5th and 4th class certificates working for the Vancouver School Board ("VSB"). In an effort to expand opportunities for existing non-ticketed employees as well as to help alleviate personnel shortages the union and employer are developing a firing time program which will then permit testing and formal certification.

To date Local 963 has had several meetings with representatives of the VSB but are experiencing a great deal of difficulty working with them to develop specific criteria that would ultimately meet regulatory approval. We want to be assured that our members are equipped with the knowledge and skills that will foster success, however, our issues about the needs of both the on-site chief engineer and the "trainee" have not been met.

To be clear, we are simply trying to have written criteria regarding the roles and responsibilities of those involved, however, our experience so far has been that the employer is desirous of a very loose, informal process, if indeed it can be characterized as a "process" at all. By way of an example, when we have been raising the issue of how much time per day a chief engineer can be expected to spend with a trainee the VSB representatives have been unwilling to discuss, citing this as part of their job.

It is with this background that I am writing to seek your advice as to how to proceed with developing a firing time program in Vancouver schools. We want to be assured that both the union and the employer use criteria that will meet the regulatory requirements but disagree with the company that it can be done in such an informal manner.

Any suggestions you can offer that would guide us to developing a mutually agreeable program would be greatly appreciated.

73 The "personnel shortage" Mr. De Vivo was referring to was a problem recruiting Assistant Building Engineers similar to the problem Mr. Hannan referred to in 1981. Mr. De Vivo testified there was no problem recruiting Head Custodians as reflected in the high number of applicants for each vacancy over the years. The goal was to create a gateway for employees into Building Engineer positions which required certification and firing time.

74 The program agreed by the union and employer combined successful completion of an existing course of studies and examination under provincial legislation. Then, with the necessary firing time experience, the employee could acquire the required heating certificate/ticket to become an Assistant Building Engineer I. Mr. De Vivo testified it was never discussed in

committee that this would provide employees with credentials to become a Head Custodian. That was not the focus or goal of the program.

75 In April 2007, the employer and union, over the signatures of Ms Horsley-Holwill and Mr. De Vivo, applied to the Support Staff Education and Adjustment Committee (SSEAC) for funding for Power Engineer Level 5 Training. The application identified this is "Required by Collective Agreement for Assistant Building Engineer 1, 2, 3 and Building Engineer." There was no mention of a training need requiring subsidized funding for skills enhancement and training for Head Custodian recruitment.

76 In March 2008, the employer and union jointly asked employees for interest "in taking the Power Engineering — 5th Class Boiler Endorsement Program through BCIT distance education. The fees for this course would be supported by the Vancouver Board of Education and IUOE Local 963."

77 Ricardo Cartagena, who was working at the time as a Custodian on an afternoon shift, testified his ambition since he began employment in 1994 as a casual Custodian with no seniority rights was to get a day shift. In 1997, the union had negotiated the following service accrual collective agreement provision that enabled Mr. Cartagena and others to achieve placement on the Custodian seniority list with July 1, 1997 as their seniority date.

Temporary Employee Service Accrual

Temporary Custodians who have successfully completed 1,950 paid hours from July 1, 1997 over any twenty-four (24) month period shall be placed on the Custodian seniority list with 24 months seniority from the date they are placed on such list.

The Board shall provide the Union with seniority lists for Temporary Custodians and one for Custodians on an annual basis. (Article 11(B)(3)(c))

78 The seniority date the employer identifies for Mr. Cartagena is July 1, 1997, not his service date in 1994. This is the date the employer used when he unsuccessfully applied for a Head Custodian position at MacDonald Elementary in April 2007. In that competition, the employer selected a Building Engineer on the Building Engineer seniority list who was working in a Head Custodian position. There is no evidence Mr. Cartagena applied for any other Head Custodian position before 2009.

79 In 2008, Mr. Cartagena completed the form showing his interest. He saw this as a route to Head Custodian. There were 90 Custodians who similarly indicated an interest in taking the subsidized Power Engineering — 5th Class Boiler Endorsement Program through BCIT distance education.

80 By October 2008, the union and employer had made sufficient progress in obtaining funding from SSEAC that they scheduled a meeting for October 27th to announce what was ahead. Mr. De Vivo and Ms Horsley-Holwill attended the meeting. There are no minutes of the meeting. Mr. De Vivo made some notes.

81 Ms Horsley-Holwill spoke of the problem recruiting Building Engineers and creating opportunities for long time Custodians. There was information about funding and distance education. Mr. De Vivo recalls and noted that Human Resources Officer Judith Smith was explicit that employees who completed the program were expected to complete firing time. Ms Smith did not testify.

82 Mr. Cartagena attended the meeting and recalls Operations Supervisor Brian Bell identified that after completion of the program positions would be available at high schools. Mr. Cartagena did not explain why he thought there would be Head Custodian positions at secondary schools when the largest area for a Head Custodian is 42,000 ft². None of the vacancy postings adduced in evidence was identified as a Head Custodian position at one of the eighteen secondary schools.

83 Mr. Cartagena recalls Mr. Bell was asked and said successful completion of the BCIT course would qualify an employee for a Head Custodian position. He heard Mr. Bell say this was an opportunity for anyone who wants to upgrade their skills. "Right away I wanted to take that program."

84 Mr. Cartagena decided "right there and then" this was the opportunity he had been looking for. He testified he subsequently called Mr. Bell, who confirmed his understanding. Mr. Bell did not testify.

85 Mr. Cartagena testified that at the October 27th meeting he heard nothing about any difficulty recruiting Assistant Building Engineers or any mention of firing time. He had no intention to enter a firing time program. He would not have taken the course if there was no chance of getting a day shift position.

86 The union and employer entered into a Firing Time Program Letter of Understanding in March 2011 that became part of the collective agreement. It provides for Power Engineer Trainee positions. The first candidates were selected in 2011. There was only one applicant in 2012. Currently, there are 4 employees in the program.

87 When Mr. Cartagena and others completed the BCIT course in 2009, there was no Power Engineer Trainee position or firing time program. However, there were ongoing postings for Head Custodian positions.

88 In May 2009, in a competition for a Head Custodian position at McBride Annex, the senior applicant, Robert Cote, declined the position.

<i>Applicant</i>	<i>Current Position</i>	<i>Seniority List</i>	<i>Seniority/Service Date</i>	<i>Certificate</i>
Cote, R.	Head Custodian	Building Engineer	12-Jun-94	BOC
Cartagena, R.	Custodian	Custodian	01-Jul-97	-
Villanueva, A.	Temp. Custodian	Temp. Custodian	01-Jul-03	ENG-5P
Yoo, J.	Assistant BE I	Building Engineer	19-Jan-04	ENG-3
Tang, G.	Assistant BE I	Building Engineer	19-Jan-04	ENG-5/ENG-4
Turcotte, K.	Head Custodian	Building Engineer	05-Jun-06	ENG-4
Han, E.	Assistant BE I	Building Engineer	20-Nov-06	ENG-4
Rojo, R.	SPT Custodian	Temp. Custodian	01-Feb-07	ENG-5P
Khan, M.	Assistant BE I	Building Engineer	23-Mar-09	BOC/ENG-4

89 The employer selected James Yoo. The employer did not offer the position to Mr. Cartagena, who had an earlier Custodian seniority date than Mr. Yoo's Building Engineer seniority date, but had not completed the BCIT program to obtain a certificate.

90 Consistent with past selections, the employer did not offer the position to Temporary Custodian Arnold Villanueva, who had a certificate and Temporary Custodian seniority date that was earlier than Mr. Yoo's Building Engineer seniority date.

91 Human Resources Coordinator Mary Yung, who reported to Ms Horsley-Holwill, was responsible for administering Head Custodian selection since 2003 or 2004. In September 2009, Ms Yung administered a competition for a Head Custodian position at Laurier Annex, one of the three sites <14,000 ft². Mr. Cartagena, who had completed the BCIT course, and Messrs Villanueva, Han and Khan applied, as they had for the May vacancy at McBride Annex.

92 The senior Building Engineer applicant was Edward Han. Ms Yung offered the position to him. He declined. Ms Horsley-Holwill testified that rather than offer the position to Rolando Mesa, the next senior Building Engineer, Ms Yung asked her for advice and assistance.

93 Ms Yung did not testify. There is no explanation in the evidence why she asked for direction this time after administering the selection process for years. The only difference between the May and September postings was that Mr. Cartagena had obtained a Boiler Operator Program certificate subsidised by SSEAC funding.

94 Ms Horsley-Holwill recalls Ms Yung asked her if Mr. Cartagena should be the successful applicant on the Laurier Annex posting. There was no Head Custodian applicant. Ms Horsley-Holwill selected Mr. Cartagena based on his job qualifications, job record and length of service. This was the first time a Custodian was selected when a Building Engineer was a competing

applicant. Ms Horsley-Holwill testified it was contrary to the collective agreement for a junior Building Engineer to be selected over a senior Custodian.

<i>Applicant</i>	<i>Current Position</i>	<i>Seniority List</i>	<i>Seniority/Service Date</i>	<i>Certificate</i>
Cartagena, R.	Custodian	Custodian	01-Jul-97	BOP
Villanueva, A.	Temporary Custodian	Temp. Custodian	01-Jul-03	ENG-5P
Han, E.	Assistant BE I	Building Engineer	20-Nov-06	ENG-4
Burguillos, E.	Temporary Custodian	Temp. Custodian	01-Feb-07	BSW
Mesa, R.	Assistant BE I	Building Engineer	07-May-08	ENG-3/ENG-4
Khan, M.	Assistant BE I	Building Engineer	23-Mar-09	BOC/ENG-4

95 Ms Horsley-Holwill testified she had an insight that there had been a longstanding failure by the employer to correctly apply and administer the collective agreement. She testified she acquired this insight and made this selection changing the employer's approach to interpreting and administering the collective agreement alone in her office without speaking to Mr. Bell, any union representative or anyone else.

96 She testified she asked Ms Yung about the past selection process and Ms Yung told her it was inconsistent — sometimes Head Custodians were given preference and sometimes they were not. She did not testify that Ms Yung said a Custodian had even been selected when there was a competing Building Engineer or Head Custodian applicant.

97 Ms Horsley-Holwill concluded that she, Ms Yung, and all their predecessors since the creation of the Head Custodian position in the 1980's had been acting contrary to the collective agreement in making selections on the basis they had. Having come to this realization, she had to act on it and administer the collective agreement correctly — this is why she is in the responsible position she is. She selected Mr. Cartagena.

98 Only when the union grieved did she research her new approach to the interpretation, application and administration of the collective agreement and discuss it with management colleagues, all of whom she testified agree with her.

99 On cross-examination, Ms Horsley-Holwill agreed this was an enlightening moment in September 2009 prompted by Ms Yung's question. Until then, she was ignorant of the fact selections she had made, those she had overseen from 2001 to 2009 and those made by predecessors were contrary to the collective agreement.

100 Ms Horsley-Holwill recalls she did look at the seniority lists in September 2009, but did nothing to correct the error she realized the employer had been making in preparing the lists. She did not transfer Building Engineers in Head Custodian positions from the Building Engineer seniority list to the Head Custodian seniority list as she testified was what should have been done for decades. Through what is later described to the union by Mr. Bell as a clerical error, there was no change to the format of the December 2009 or December 2010 seniority lists.

101 Mr. Mesa and the union grieved the employer's selection of Mr. Cartagena. Mr. Bell denied the grievance after a grievance meeting on November 12, 2009. Recognizing seniority was a priority factor in making promotions, he determined Mr. Cartagena's Custodian seniority gave him priority over Mr. Mesa's Building Engineer seniority. He wrote, in part:

After careful review, I am unable to agree with the union's position.

- 1) Article 11(A)(I)(k) - Qualifications and Job Posting, states that applications may be made by any qualified member
- 2) Article 11(B)(3)(a)(l), defines in order of priority the three factors to be used in making promotions, seniority, qualifications, job record.
- 3) Article 11(B)(3)(a)(4), defines seniority as the date the employee commenced continuous employment with the Board. It also identifies the three seniority lists to be kept, 1) an overall seniority list based on date of employment, 2) a Building Engineers seniority list, 3) a Head Custodians seniority list.

Neither Mr. Cartagena nor Mr. Mesa were on the Head Custodians seniority list when they applied for the position at Laurier Annex. Both were qualified for the position according to the requirements of the collective agreement, and both have unblemished job records.

Mr. Mesa had chosen the Assistant Building Engineer career path and was on the Building Engineers seniority list. This does not entitle him to reciprocal seniority on the Head Custodians seniority list; he is not an Assistant Head Custodian or a Head Custodian.

As neither candidate held a position on the Head Custodians list, overall seniority was used to make the selection and Mr. Cartagena's date of employment is October 26, 1998. He is clearly the senior candidate and as such, was correctly awarded the position.

There has been no violation of the collective agreement. Therefore, this grievance is denied at Stage 1.

Ms Horsley-Holwill denied the grievance at the next stage in February 2010.

102 One other Custodian, Michael Lemaire, completed the BCIT program in the first session in 2009. Thirteen others who had registered did not complete the program. In a second session, 16 registered and 3 completed the program.

5. Mr. Lemaire Selected for McBride Annex (2011)

103 Mr. Lemaire started employment as a Temporary Custodian. He graduated to Custodian with a seniority date of April 1, 1998. His goal was to advance to a day shift job. He testified only Head Custodians, approximately 10 Custodians and Chief Building Engineers at high schools have day shifts.

104 He completed the application for funding support after hearing Mr. Bell at the October 27, 2008 meeting. He does not recall any discussion of firing time at that meeting. He completed the BCIT course October 14, 2009. He testified he likely would not have taken the course if he was required to go to an Assistant Building Engineer position. He took the course to become a Head Custodian.

105 On December 14, 2009, Mr. Lemaire became a Head Custodian in a competition for a vacancy at Shannon Park Annex leased by the Hebrew Academy, one of the three sites with <14,000 ft². No Building Engineer applied. This took him off the Custodian seniority list and on to the Head Custodian seniority list.

106 In April 2010, the employer posted a Head Custodian position at Queen Elizabeth Annex, another of the three sites with <14,000 ft². Mr. Lemaire and 4 others applied. The employer prepared a list of applicants in the following format in descending order of seniority.

<i>Applicant</i>	<i>Seniority</i>	<i>Position</i>	<i>Certificate</i>
Lemaire, M.	01-Apr-98	Head Custodian	BOP
Malabuen, M.	25-Apr-05	Assistant BE III	ENG-4
Han, E.	20-Nov-06	Assistant BE I	ENG-4
Khan, M.	19-Oct-09	Assistant BE I	BOC/ENG-4
Jiang, W.		Temp. Custodian	BOP/BSW

April 1, 1998 is Mr. Lemaire's seniority date on the Custodian seniority list. His seniority date on the Head Custodian seniority list is December 14, 2009. It is not explained why Mr. Khan's earlier seniority date was March 23, 2009; on the December 2009 Building Engineer seniority list, his seniority date is February 9, 2009; and on this list it is October 19, 2009.

107 On May 13, 2010, the employer sent the union a list of applicants showing the applicants' names and seniority dates and that Mr. Lemaire was the accepted applicant. Kate Vincent, the administrative person dealing with these matters in the union

office, emailed Ms Yung that the list was incorrect. The employer had used Mr. Lemaire's Custodian seniority date not his Head Custodian seniority date. Ms Yung replied the same day: "You're right therefore he should not be successful candidate for the position. I'll have to rectify that asap and contact the senior candidate. Thanks for catching that. You're my lifesaver!"

108 Because Ms Yung did not testify, it is not known why she concluded Mr. Lemaire should not be the successful applicant or why she did not contact the senior candidate, who was Mark Malabuen.

109 Neither Mr. Malabuen nor Messrs Han and Khan were contacted. There was no selection change. This is the first time a position was not offered to a Building Engineer with more seniority than a Head Custodian.

110 On July 7th, the union grieved on behalf of the three Building Engineers whose seniority dates on the Building Engineer seniority list are prior to Mr. Lemaire's seniority date on the Head Custodian seniority list. Mr. Bell denied the grievance on July 12th:

After careful review, I am unable to agree with the union's position.

1) Article 11(B)(3)(a)(4), identifies the three seniority lists to be kept:

- a. The date of employment with the Board, which seniority list shall provide all members of the Union seniority for the purposes of vacations and other benefits as well as applications for training;
- b. A seniority list for Building Engineers; and
- c. A seniority list for Head Custodians.

2) Article 11(B)(1)(a)(6) states that seniority on the Head Custodian list shall start when an employee holds a valid Boiler Operator Program certificate and is employed in a position requiring same (as Head Custodian or Assistant Head Custodian)

Mr. Malabuen was not on the Head Custodian seniority list when he applied for the position at Queen Elizabeth Annex. Mr. Malabuen had chosen the Building Engineer career path and was on the Building Engineer seniority list. This does not entitle him to reciprocal seniority in the Head Custodian seniority list; he is not an Assistant Head Custodian or a Head Custodian. The same applies to the other two candidates the union mentions in the grievance.

Mr. LeMaire was the only candidate who held a position on the Head Custodian seniority list at the time the posting was awarded. As such he was correctly awarded the position.

With regard to the union's assertion that the employer is excluding Building Engineers from applying for Head Custodian positions. At no time did the employer make such a statement. Building Engineers are entitled to apply for Head Custodian positions, and where no one currently on the Head Custodian seniority list had applied, the position would then be awarded to the most senior Building Engineer.

There has been no violation of the collective agreement. Therefore, this grievance is denied at Stage 1.

111 It appears Mr. Bell assumed Mr. Malabuen had chosen the Building Engineer career path because he was an Assistant Building Engineer. Mr. Malabuen had applied for two Head Custodian positions in March 2005; and one position in December 2007, November 2008 and January 2009, when his withdrawal put Mr. Shen, who was not on the Head Custodian seniority list, on a Head Custodian career path.

112 Mr. Bell's statement that "Building Engineers are entitled to apply for Head Custodian positions, and where no one currently on the Head Custodian seniority list had applied, the position would then be awarded to the most senior Building Engineer" is completely inconsistent with the employer's selection decisions for decades.

113 Ms Horsley-Holwill denied the grievance at the next stage on September 29, 2010. She offered a resolution for the future:

However, in an attempt to resolve this grievance and all others that may arise of a similar nature, the Board proposes that all postings be filled in accordance with Article 11(B)(3)(a)(1) which outlines overall seniority and qualifications. In addition because of the length of time that has gone by since the original posting, that Mr. Lemaire remain at Queen Elizabeth Annex.

She testified by "overall seniority" she meant length of service — in effect one seniority list for all employees. She recognizes there is a difference between seniority and length of service and that length of service in competitions is only to be used if seniority is not a deciding factor and job qualifications and record are equal.

114 A Head Custodian posting at McBride Annex closed May 12, 2011. On May 25th, Ms Yung informed the union that Mr. Lemaire had been selected.

<i>Applicant</i>	<i>Current Position</i>	<i>Seniority List</i>	<i>Seniority/Service Date</i>	<i>Certificate</i>
Azul, N.	Assistant BE III	Building Engineer	18-Dec-00	ENG-4
Mihajlovic, M.	Temp. Custodian	Temp. Custodian	01-Aug-03	
Cajiuat, R.	Assistant BE I	Building Engineer	26-Feb-07	BSW/ENG-3
Mesa, R.	Assistant BE II	Building Engineer	07-May-08	ENG-3/ENG-4
Khan, M.	Assistant BE I	Building Engineer	19-Oct-09	BOC/ENG-4
<i>Lemaire, M.</i>	<i>Head Custodian</i>	<i>Head Custodian</i>	<i>14-Dec-09</i>	<i>BOP</i>
Villanueva, A.	Head Custodian	Head Custodian	28-Jun-10	ENG-5P

115 Arnold Villanueva had a certificate before he began employment as a Temporary Custodian. His seniority date on the Temporary Custodian seniority list was July 1, 2003. From September 2004 to June 2009, he unsuccessfully applied for 23 of the 37 position postings since September 2004 for which the union introduced evidence.

116 In 2010, Mr. Villanueva successfully applied for the position of Head Custodian at Shannon Park Annex that became vacant when Mr. Lemaire was selected for the vacancy at Queen Elizabeth Annex. That selection of Mr. Villanueva was not grieved.

117 In accordance with Article 11(B)(3)(a)(2), Ms Yung sent notice on May 24th that Mr. Villanueva was the successful applicant on the McBride Annex competition. She had his seniority date as July 1, 2003. Ms Vincent contacted her to point out this was his Temporary Custodian seniority date. The next day, Ms Yung revised her notice. Mr. Lemaire was selected. The union grieved that Nestor Azul was not selected. Mr. Bell denied the grievance because Mr. Azul and the other Building Engineer applicants were not on the Head Custodian seniority list.

6. Mr. Villanueva Selected for Collingwood Elementary (2011)

118 In May 2011, the employer posted a Head Custodian position at Collingwood Elementary. The closing date was May 19th. Mr. Villanueva, who wanted a workplace closer to home, was one of 6 applicants.

<i>Applicant</i>	<i>Current Position</i>	<i>Seniority List</i>	<i>Seniority/Service Date</i>	<i>Certificate</i>
Prasad, V.	Head Custodian	Head Custodian	13-Nov-01	BOP
Han, E.	Assistant BE I	Building Engineer	20-Nov-06	ENG-4
Cajiuat, R.	Assistant BE I	Building Engineer	26-Feb-07	BSW/ENG-3
Mesa, R.	Assistant BE II	Building Engineer	07-May-08	ENG-3/ENG-4
<i>Villanueva, A.</i>	<i>Head Custodian</i>	<i>Head Custodian</i>	<i>28-Jun-10</i>	<i>ENG-5P</i>
Carlos, R.	Head Custodian	Head Custodian	14-Sep-11	BSW/BOP/Eng-4P

119 The employer offered the position to Mr. Prasad, who declined. It then selected Mr. Villanueva, who started in the position on July 13, 2011. The union grieved. Mr. Bell denied the grievance because Mr. Han and the other Building Engineer applicants were not on the Head Custodian seniority list.

7. Mr. Shen Selected for False Creek Elementary (2011)

120 Mr. Shen began his employment as a casual employee in 2005. In 2006, he completed the BCIT program at his own cost and initiative. He applied and was reimbursed by the union for the cost of the tuition.

121 In 2007, Mr. Shen obtained a full-time Assistant Building Engineer I position and a Building Engineer seniority date of February 26, 2007.

122 In December 2007, he was one of 15 applicants for a Head Custodian position at Emily Carr Elementary. He applied for at least 8 more positions before he successfully obtained the position at Douglas Annex in January 2009. As listed in a table above, there were 8 applicants for that position. Mr. Shen was the fourth in seniority. Because January 2009 was before Ms Horsley-Holwill's insight, he was selected prior to an applicant in a Head Custodian position on the Head Custodian seniority list.

123 Mr. Shen is listed on the December 2009 and 2010 Building Engineer seniority lists as a Building Engineer working as a Head Custodian.

124 In September 2011, the employer posted a vacancy at False Creek Elementary. This is in the largest gross area group of Head Custodian schools with the highest Head Custodian salary. Mr. Shen was the successful applicant.

<i>Applicant</i>	<i>Current Position</i>	<i>Seniority List</i>	<i>Seniority/Service Date</i>	<i>Certificate</i>
Evans, A.	Head Custodian	Head Custodian	21-Sep-91	BOC
Bacani, W.	Head Custodian	Head Custodian	21-Sep-92	BOC
Prasad, V.	Head Custodian	Head Custodian	13-Nov-01	BOP
Perada, F.	Building Engineer	Building Engineer	02-Jan-01	BOC/BSW
<i>Shen, W.J</i>	<i>Head Custodian</i>	<i>Building Engineer</i>	<i>02-Feb-07</i>	<i>BSW, ENG-5</i>
Revelle, P.	Building Engineer	Building Engineer	20-Apr-09	ENG-4
Khan, M.	Assistant BE I	Building Engineer	19-Oct-09	BOC/ENG-4
Lemaire, M.	Head Custodian	Head Custodian	01-Apr-98	BOP
Zhang, W.Y.	Building Engineer	Building Engineer	15-Nov-10	ENG-4/BSW
Torok, J.	Head Custodian	Head Custodian	21-Feb-11	BSW/ENG-4P/ENG-5

125 Each of the three senior Head Custodians on the Head Custodian seniority list was offered the position and declined. Florencio Perada, who was senior to Mr. Shen on the Building Engineer seniority list, was not offered the position. Instead, the position was offered to Mr. Shen, who was on the Building Engineer seniority list in a Head Custodian position. Mr. Shen was not on the Head Custodian seniority list.

126 Mr. Shen says this was fair because, as the employer says, Mr. Perada is in a Building Engineer career path. And Mr. Perada did not have any Head Custodian experience.

127 If the same assumption and approach had been applied starting with the Douglas Annex competition in January 2009, rather than in September 2009, Mr. Shen would have been passed over for that position because he was in a Building Engineer career path with no Head Custodian experience although his clear goal was to be a Head Custodian. At that time, he was in a Building Engineer position and on the Building Engineer seniority list. Because of his seniority he was selected ahead of Mr. Hayat who was in a Head Custodian position, on the Head Custodian seniority list and, presumably, in a Head Custodian career path.

128 There is no evidence whether, like Mr. Shen, it is Mr. Perada's goal to be a Head Custodian. Mr. Perada had unsuccessfully applied for a Head Custodian position, at least 10 times before September 2011 (March 2004; September 2004; November 2004;

February 2005; March 2005; January 2006; April 2007; March 2008; May 2008; and February 2009). On the evidence, this is more unsuccessful applications than Mr. Shen made before January 2009.

129 The union grieved November 8, 2011. Mr. Bell denied the grievance on November 25th. His response states, in part, that Mr. Perada was not on a Head Custodian career path and the seniority lists contained a clerical error:

Mr. Perada was not on the Head Custodian seniority list when he applied for the position at False Creek Elementary. Mr. Perada had chosen the Building Engineer career path and was on the Building Engineer seniority list. This does not entitle him to reciprocal seniority on the Head Custodian seniority list; he is not an Assistant Head Custodian or a Head Custodian.

Although the Union was correct that Mr. Shen's name appears on the Building Engineer's seniority list, this is in fact a clerical error. As Mr. Shen held the position Head Custodian at Douglas Annex when he applied for False Creek, according to Article 11(B)(3)(a)(6) he was on the Head Custodian seniority list. Therefore, Mr. Shen was the senior candidate from the Head Custodian seniority list and was correctly awarded the position. There has been no violation of the collective agreement.

However, in an attempt to resolve this grievance and all others that may arise of a similar nature, the Board is willing to re-extend the offer made by Human Resources Manager, Joann Horsley-Holwill in her letter of September 29, 2010 regarding the Head Custodian posting at Queen Elizabeth Annex. Specifically that all postings be filled in accordance with Article 11(B)(3)(a)(1) which outlines overall seniority and qualifications. Additionally, that due to the time delays, Mr. Shen remains at False Creek Elementary,

130 The clerical error Mr. Bell refers to was in the December 2010 seniority lists prepared by the employer and provided to the union with which the union had agreed in accordance with Article 11B(3)(a)(9).

131 Ms Horsley-Holwill testified she looked at the seniority lists in late 2010 or early 2011 and discovered past errors were being perpetuated. She directed that revised Building Engineer and Head Custodian seniority lists be prepared. She identified that there is an error in the December 2011 Head Custodian seniority list because it includes seniority dates for Building Engineers in Head Custodian positions from the Building Engineer seniority list.

132 There are 43 employees on the December 2011 Head Custodian seniority list. The 22 formerly on a Building Engineer seniority list are identified with an asterisk on the list appended to this decision. If Ms Horsley-Holwill is correct, these 22 employees will lose their Building Engineer seniority date. For future competitions for Building Engineer positions, they will be behind all Building Engineers who are on the Building Engineer seniority list at the time they apply for a Building Engineer position.

133 In addition, their Head Custodian seniority date will have to be changed to the later date on which they started a Head Custodian position. A new seniority ranking on the Head Custodian seniority list will follow because an employee who became Assistant Head or Head Custodian before a senior Building Engineer moved to a Head Custodian position will move ahead of that Building Engineer on the new Head Custodian revised seniority list. Some Building Engineers on the revised Head Custodian seniority list who were senior to other Building Engineers on the Building Engineer seniority list will be junior to them on the Head Custodian seniority list.

134 The union does not agree with the new lists. The union gave the employer notice on May 22, 2012 that it did not agree with these new lists. It has grieved and the grievance has been referred to arbitration.

135 In collective bargaining that concluded in September 2012, the employer proposed a single seniority list "based on the date of employment" for vacations, other benefits and "bidding for vacancies." There was no agreed change to the collective agreement.

8. Mr. Carlos Selected for Douglas Annex (2012)

136 Ramon Carlos began employment as a Temporary Custodian. His seniority date as a Steady Part-Time Custodian was March 3, 2003. He began studying for his Boiler Operator Certificate in 2008. He studied in the morning and worked afternoon shifts. He received his Certificate of Trades Training in Power Engineering General from BCIT in November 2010 when he was on the Temporary Custodian seniority list. The union reimbursed his tuition costs.

137 In February 2011, the employer posted a Head Custodian vacancy at John Henderson Annex. The closing date was Monday, February 21st. Two employees applied by the deadline. Mr. Carlos applied late on Thursday, February 24th. Ms Horsley-Holwill accepted his late application on March 2nd without notifying the union.

138 She testified it is the employer's job to administer the process and the union has no interest in this type of administrative decision. On cross-examination, she acknowledged the employees who made timely applications might have an interest and, perhaps, the union on their behalf. But the employer frequently accepts late applications.

139 Ms Horsley-Holwill testified if she had not accepted Mr. Carlos' late application, the senior Building Engineer would have been selected. Mr. Carlos was selected by Ms Horsley-Holwill because he had the overall greatest length of service. Mr. De Vivo testified he had never seen a prior selection for Head Custodian based on length of service. Except arguably in Mr. Cartagena's selection in the Laurie Annex competition, there is no evidence length of service was ever the basis for selection before Ms Horsley-Holwill selected Mr. Carlos in this competition.

<i>Applicant</i>	<i>Current Position</i>	<i>Seniority List</i>	<i>Seniority/Service Date</i>	<i>Certificate</i>
Carlos, R.	STP Custodian	Temporary Custodian	01-Mar-03	BSW/BOP/Eng-4P
Zhou, Y.	Assistant BE II	Building Engineer	25-Sep-06	<unknown>
Khan, M.	Assistant BE I	Building Engineer	19-Oct-09	BOC/ENG-4

140 Ms Yung notified the union the outcome of this competition in an email that identified the three applicants and their seniority dates. A copy of the March 11th appointment letter to Mr. Carlos was sent to the union. There was no grievance by Ying Zhou or Mohammed Khan.

141 This uncontested selection placed Mr. Carlos on the Head Custodian seniority list with a March 14, 2011 seniority date. In January 2012, the employer posted a Head Custodian vacancy at Douglas Annex. There were 8 applicants.

<i>Applicant</i>	<i>Current Position</i>	<i>Seniority List</i>	<i>Seniority/Service Date</i>	<i>Certificate</i>
Perada, F.	Assistant BE I	Building Engineer	02-Jan-01	BOC/BSW
Dhami, D.	Temp. Custodian	Temp. Custodian	01-Apr-03	BSW/ENG-5P
Han, E.	Assistant BE I	Building Engineer	20-Nov-06	ENG-4
Revelle, P.	Assistant BE I	Building Engineer	20-Apr-09	ENG-4
Khan, M.	Assistant BE I	Building Engineer	19-Oct-09	BOC/ENG-4
Lemaire, M.	Head Custodian	Head Custodian	14-Dec-09	BOP
Torok, J.	Head Custodian	Head Custodian	21-Feb-11	BSW/ENG-4P/ENG-5
Carlos, R.	Head Custodian	Head Custodian	14-Mar-11	BSW/BOP/Eng-4P

142 The position was offered first to Mr. Lemaire and then to John Torok. Each declined. Mr. Carlos was selected in February. Mr. Perada grieved March 27th. Mr. Bell denied the grievance April 13th stating, in part:

Mr. Perada was not on the Head Custodian seniority list when he applied for the position at Douglas Annex. Mr. Perada had chosen the Building Engineer career path and was on the Building Engineer seniority list. This does not entitle him to reciprocal seniority on the Head Custodian seniority list; he is not an Assistant Head Custodian or a Head Custodian.

Mr. Ramon Carlos was on the Head Custodian seniority list at the time the posting was awarded and was correctly awarded the position. Additionally, postings are not awarded according to the level of heating ticket held by the applicant. The language in the collective agreement speaks to "Required Heating Certificate" for each position; it does not address any form of ticket seniority. As such, there is no violation of the collective agreement.

143 In contrast to Mr. Perada's prior 10 unsuccessful applicants, there is no evidence Mr. Carlos applied for a Head Custodian position prior to his successful late application in February 2011.

9. Mr. Dharni Selected for Henderson Annex (2012)

144 Darshan Dharni had a seniority date of January 4, 2003 on the Temporary Custodian seniority list, ahead of Mr. Carlos. He applied for Head Custodian positions in September 2005; February 2006; September 2006; and January 2012 when Mr. Carlos was selected because Mr. Carlos was in a Head Custodian position.

145 In March 2012, the employer posted a Head Custodian position at Henderson Annex. Assistant Building Engineer Mohammed Khan, who had been a Head Custodian in previous periods of employment with the employer, applied. Assistant Building Engineer Peter Revelle applied. Ms Horsley-Holwill testified she selected Mr. Dharni in April because he had the greatest length of service with the employer.

<i>Applicant</i>	<i>Current Position</i>	<i>Seniority List</i>	<i>Seniority/Service Date</i>	<i>Certificate</i>
Dharni, D.	Temporary Custodian	Temporary Custodian	01-Apr-03	BSW/ENG-5P
Revelle, P.	Assistant BE I	Building Engineer	20-Apr-09	ENG-4
Khan, M.	Assistant BE I	Building Engineer	19-Oct-09	BOC/ENG-4

146 Mr. Revelle grieved May 14, 2012. The employer denied this and any and all future grievances of a similar nature because earlier grievances had been referred to arbitration. Mr. Dharni was given notice of, but did not attend, the arbitration.

10. Union Overlooked One Selection (January 2011)

147 The employer posted a Head Custodian position at the Roberts Annex in January 2011. There were five applicants.

<i>Applicant</i>	<i>Current Position</i>	<i>Seniority List</i>	<i>Seniority/Service Date</i>	<i>Certificate</i>
Torok, J.	Temporary Custodian	Temporary Custodian	01-Feb-01	BSW/ENG-4P/ENG-5
Carlos, R.	Temporary Custodian	Temporary Custodian	01-Mar-03	BSW/BOP/Eng-4P
Yoo, J.	Head Custodian	Building Engineer	19-Jan-04	ENG-3
Mesa, R.	Assistant BE II	Building Engineer	07-May-08	ENG-3/ENG-4
Khan, M.	Assistant BE I	Building Engineer	19-Oct-09	BOC/ENG-4

148 Head Custodian James Yoo withdrew and Mr. Torok was selected on the basis of his length of employment ahead of applicants on the Building Engineer seniority list.

149 Mr. De Vivo was told about this selection, but he forgot to grieve on behalf of Ronaldo Mesa, who had previously unsuccessfully applied for Head Custodian positions.

150 As a consequence of being selected, Mr. Torok acquired a position on the Head Custodian seniority list that is reflected above in the False Creek Elementary and Douglas Annex competitions.

11. Union and Employer Submissions

151 The union submits Building Engineers may use their seniority on the Building Engineer seniority list to compete for Head Custodian positions. Seniority is an important negotiated right that confers benefits as defined by the terms of the collective

agreement. (*Delta School District No. 37 v. C.U.P.E., Local 1091* (1999), 58 C.L.A.S. 408 (B.C. Arb.) [1999 CarswellBC 3233 (B.C. Arb.)] (McPhillips), ¶28) The employer has failed to respect the agreement and has blurred the line between seniority and service. (*Ottawa Civic Hospital v. C.U.P.E., Local 1580* (1996), 59 L.A.C. (4th) 159 (Ont. Arb.) (Herlich), p. 188)

152 The union submits the employer has done so without clear language required to limit the Building Engineers' seniority rights that lies in and behind the language the union and employer used to establish those rights. (*British Columbia Railway v. C.U.T.E., Local 6* (1988), 2 L.A.C. (4th) 331 (B.C. Arb.) (Hope), p. 342) The extensive, consistent evidence of the past administration of the collective agreement by the employer as accepted by the union is the best and decisive evidence in this dispute of the true mutual intention of the union and employer. (*Nanaimo Times Ltd. v. G.C.I.U., Local 525-M*, [1996] B.C.L.R.B.D. No. 40 (B.C. L.R.B.), ¶ 27-32)

153 Ms Horsley-Holwill, with an inspirational insight, simply chose to depart from that mutual intention. She testified she did not research the background; explore the employer's files; speak to the union; or consult any of her predecessors, including her grandfather Gordon Wilson who negotiated for the employer in the 1980s. This is inconsistent with maintaining a collective bargaining relationship and administering a collective agreement in accordance with the mutual intention of negotiated, sometimes ambiguous, language which gives rise to workplace expectations after decades of consistent practice. (*C.E.P., Local 444 v. B.C.N.U.*, [2012] B.C.C.A.A. No. 48 (B.C. Arb.) (Dorsey), ¶ 55 — 62 review dismissed [*BCNU and CEP, Local 444, Re*] [2012] B.C.L.R.B.D. No. 280 (B.C. L.R.B.) reconsideration denied [2013] B.C.L.R.B.D. No. 11 (B.C. L.R.B.)) It is also an approach that will inevitably lead to error. In the selection of Mr. Lemaire, it is contrary to what Ms Yung knew: "...he should not be successful candidate for the position."

154 The employer decided only Head Custodians may use their seniority when applying for a Head Custodian position, although the collective agreement does not say this. The employer decided Building Engineers are limited in using their seniority to applying for Building Engineer positions, although the collective agreement does not say this. And if a Building Engineer and Custodian are competing for a Head Custodian position, length of service is to be used ignoring the agreed priority for seniority.

155 The union submits both Head Custodians and Building Engineers have seniority when applying for Head Custodian positions. Custodians have no seniority that can be used when applying for a Head Custodian position because their seniority is limited for use for vacations and other benefits (Article 11(B)(3)(a)(4)) and competitions between Custodians (Article 11(A)(1)(k)).

156 The union acknowledges the language of the collective agreement is "not entirely clear." However, the collective agreement provides for seniority lists with disparate rights attached to them and a selection process that makes seniority the priority consideration when it can be used for selection. The collective agreement created seniority rights for Head Custodians at the same time it provided that Head Custodian could be a promotional step for Building Engineer. The seniority to be used in that promotional step is Building Engineer seniority.

157 The Temporary Custodian seniority list was not agreed until 1997. The other three were in effect in 1984 with reciprocal seniority rights for Building Engineers and Head Custodians reflected in the agreement to obtain a wage restraint exemption order.

158 This was the consistent selection and seniority list maintenance practice until September 2009. This practice is so extensive it "must drive a conclusion about the proper interpretation" of the collective agreement.

159 There is no support in the collective agreement for the employer's position that an applicant is limited to applying for positions on a "career path", a phrase foreign to the collective agreement, or to promotions the employer deems to be promotions. Nor is there any support in the collective agreement for the employer's proposition that movement or progression from a Building Engineer position to a Head Custodian position is not a promotion. To the contrary, the collective agreement says it is in Article 11(A)(1)(k).

160 The union submits:

Ambiguous language, little help from the bargaining history, but an uninterrupted multi decade practice that clearly shows the mutual intent of the parties who negotiated the collective agreement. A sudden change in "interpretation" without any meaningful inquiry into the true intent. A blind rush to impose that "interpretation" without ever checking on how this had been done all these years.

That is not conducive to arriving at a proper interpretation of the collective agreement.

The employer has not done so. (*Union Outline of Argument*)

161 The employer submits the language of the collective agreement is clear and unambiguous and not capable of more than one interpretation. The interpretation the union advocates wipes out any value to the service given by the five incumbent employees selected by the employer who testified. It treats them as a lower class of employee in the bargaining unit.

162 While there is no real evidence of collective bargaining history, there is a context from the 1980s that is strikingly similar to the recent SSEAC training intended to enable Custodians to enhance their skills and advance their careers.

163 There are separate and distinct seniority lists that do not bestow super-seniority on any one group of employees and there is no provision any seniority lists are to be combined. The "seniority" in Article 11(B)(3)(a)(1) is seniority held on any of the three seniority lists. An employee holds seniority on only one list. An employee does not carry seniority from one list to another. The seniority given priority is the one in the classification in which there is a position vacancy. If no applicant has seniority, then it is length of service that is determinative among qualified applicants.

164 The employer acknowledges the logic it advocates was not the manner in which it administered the collective agreement before September 2009. Despite this, the employer submits the language of the collective agreement is clear and unambiguous. The established approach to interpreting the words is as set out in *Health Employers Assn. of British Columbia v. H.E.U.*, [2002] B.C.C.A.A.A. No. 130 (B.C. Arb.) (Gordon); *Board of School Trustees of School District No. 75 (Mission)* (Foley, unreported October 4, 2002); *Greater Victoria School District No. 61 and Greater Victoria Teachers' Assn., Re* [1992 CarswellBC 3064 (B.C. Arb.)], (Kinzie, November 30, 1992, A-323/92)),

165 A mutuality of intention cannot be extracted from past practice when the language of the collective agreement is clear. (*Nanaimo Times Ltd. v. G.C.I.U., Local 525-M*, [1996] B.C.L.R.B.D. No. 40 (B.C. L.R.B.), upheld on reconsideration [*Nanaimo Times Ltd., Re*] [1996] B.C.L.R.B.D. No. 151 (B.C. L.R.B.)); *Coquitlam School District No. 43 v. C.U.P.E., Local 561* (1988), 1 L.A.C. (4th) 301 (B.C. Arb.) (Hope); *Kamloops (City) v. C.U.P.E., Local 900*, [1994] B.C.L.R.B.D. No. 140 (B.C. L.R.B.); *School District No. 48 and Howe Sound Teachers' Assn., Re*, [1995] B.C.C.A.A.A. No. 165 (B.C. Arb.), (Williams))

The Collective Agreement is clear and plain. There are multiple seniority lists for Engineer Custodial Staff, and seniority as calculated under these lists is the primary consideration when effecting transfers, demotions, and promotions.

Reliance on the strict language of the collective agreement is particularly acute in matters of seniority. As noted in Brown and Beatty, *Canadian Labour Arbitration*, 3rd Edition at 6:000, when reviewing seniority entitlements under a collective agreement, "all arbitrators start from the premise that [...]seniority should only be affected by very clear language in the collective agreement concerned and that arbitrators should construe the collective agreement with the utmost strictness wherever it is contended that an employee's seniority has been forfeited, truncated or abridged under the relevant sections of the collective agreement."

Consistent with the above authorities and interpretative principles, the seniority provisions of the Collective Agreement should be construed and applied with the utmost strictness.

To the extent that the Union seeks to rely on Article 11(A)(1)(k) for the proposition that the Collective Agreement is ambiguous, we say that the Collective Agreement is unequivocal and the consideration of extrinsic evidence is not warranted. Further, we say that relying on past practice would contradict the very clear wording of the collective agreement.

With respect to question of ambiguity, past practice cannot be used to create rights or impose obligations on a party that were not negotiated if language of the Collective Agreement is clear. The Collective Agreement must not be clear in order for the seniority provisions of the Collective Agreement to not be given effect. The Collective Agreement contains no such lack of clarity. (*Employer's Outline of Argument*, ¶19-23)

166 The employer submits there is nothing lurking under the language of the collective agreement that requires explanation by reference to any extrinsic evidence.

167 Mr. Lemaire submits, on behalf of the five incumbent employees, that each of them applied within the vacancy posting system after taking the necessary steps to upgrade their qualifications. If the employer was administering the collective agreement and making wrong selections for 24 years that is something that should be corrected. By dismissing their Custodian seniority and length of service, the union is making them lesser employees than other Engineer Custodial Staff.

12. Discussion, Analysis and Decisions

168 Today, the expression of the acquisition and use of seniority by Engineer Custodial Staff in Article 11 of this collective agreement is complex. The language inherited from successive rounds of collective bargaining is ambiguous. It is not clear what "seniority" is intended to be given priority in making promotions under Article 11(B)(3)(a).

169 In this dispute the employer has a logic based in classification seniority that gives it support for the interpretation of the language that it advocates. The union has a history and consistent practice that gives it support for the interpretation of the language it advocates. The arbitral task is to find the mutual intent of the union and employer in negotiating and using the language they did within the scheme and context of all provisions of the collective agreement.

170 The collective agreement states the job duties and required training for 11 Engineer Custodial positions: (1) Building Engineer, (2) Head Custodian, (3) Maintenance Engineer, (4) Assistant Building Engineer III, (5) Assistant Building Engineer II, (6) Assistant Building Engineer I, (7) Assistant Head Custodian, (8) Custodian, (9) Carpet Cleaner — Custodian, (10) Steady Part-Time Custodian, and (11) Temporary Custodian.

171 For the purposes of benefits, an Engineer Custodial employee's seniority is the date the employee commenced continuous employment (Article 11(B)(3)(a)(4)). The employer does not regularly produce and provide to the union an all Engineer Custodial Staff seniority list. The employer maintains in its Human Resources Information System all employees' date of continuous employment for "purposes of vacations and other Benefits as well as applications for training" (Article 11(B)(3)(a)(4)).

172 The date an employee commences continuous employment is the employee's date for "length of service" if that becomes a factor in "making transfers, assignments, demotions and promotions" (Article 11(B)(3)(a)(1)). Otherwise the service dates and seniority dates for vacations, benefits and training carries no rights when making promotions.

173 The employer must provide seniority lists to the union by January 1st each year and the union has 60 days to agree or disagree with the lists (Article 11(B)(3)(a)(9)). One purpose of this agreement to provide and agree or disagree within an agreed time is to establish lists annually that must be used by the employer and not later disputed by either the union or employer when determining seniority based rights and entitlements under the collective agreement.

174 The issue is how seniority on lists provided and agreed is to be used in "making transfers, assignments, demotions and promotions" (Article 11(B)(3)(a)(1)).

175 There is a hierarchy of positions among the Engineer Custodial Staff. Externally hired Custodian employees are placed on the Temporary Custodian seniority list. When they have accumulated the required paid hours, they are moved to the Custodian seniority list "with twenty-four (24) months seniority from the date they are placed" on this seniority list.

Temporary Employee Service Accrual

Temporary Custodians who have accumulated 1,950 paid hours from 1997 July 01 over any twenty-four (24) month period shall be placed on the Custodian seniority list with twenty-four (24) months seniority from the date they are placed on such list.

The Board shall provide the Union with seniority lists for Temporary Custodians and one for Custodians on an annual basis. (Article 11(B)(3)(c))

176 Their placement on the Temporary Custodian or Custodian seniority list does not give Temporary Custodians and Custodians rights and entitlements beyond ranking on list they are and for purposes of vacations, other benefits and applications for training.

177 There is a different approach to placement on the Head Custodian and Building Engineer seniority lists (Article 11(B)(3)(a)(4)). Seniority is not attached to the date of service or accumulation of service. It is attached to the date of employment in a position requiring a level of certification. Again there is a hierarchy.

Seniority on the Building Engineer list shall start when an employee holds a valid boiler operator's or stationary steam engineer's certificate and is employed in a position requiring same (Assistant Building Engineer I or higher)" (Article 11(B)(3)(a)(5)).

Seniority on the Head Custodian list shall start when an employee holds a valid Boiler Operator Program Certificate and is employed in a position requiring same (as Head Custodian or Assistant Head Custodian)" (Article 11(B)(3)(a)(6)).

178 All vacant Engineer Custodial staff positions must be posted.

Notification of all vacancies for all permanent positions shall be sent to the Building Engineer or Head Custodian at each school for posting in a prominent position for eight (8) days for the information of all concerned. Where known, notification of vacancies shall be made at least fifteen (15) days before the position becomes vacant. All vacancies shall be filled as soon as possible but not later than sixty (60) days of becoming vacant. However, in the event that a new vacancy becomes known during July and August, posting of such vacancy shall be withheld until September.

The Head Custodian position for annexes shall be posted and internal applicants shall be given priority for these appointments. (Article 11(B)(3)(b))

179 When an employee is selected for an Assistant Building Engineer I position or higher, the employee is placed on the Building Engineer seniority list with a new seniority date on that list. Similarly, when selected for an Assistant Head Custodian or Head Custodian position, the employee is placed on the Head Custodian seniority list with a new seniority date on that list. These new dates will be later than the date the employee had on the Temporary Custodian or Custodian seniority list.

180 The question is, after achieving placement on either the Building Engineer or Head Custodian seniority list, does an employee give up all seniority for the purposes of competing for a position on the other list? In a competition for a position on the other list is the employee junior to a Custodian who remained on the Custodian seniority list? Is the employee junior even if the employee was previously senior to the Custodian who remained on the Custodian seniority list?

181 The employer says the employee does give up all seniority. It is at this point the logic of the employer's interpretation is stretched. A senior Custodian succeeds in promotion to the Building Engineer seniority list with a new seniority date. The employee later applies for a Head Custodian position for which a junior Head Custodian applies. That formerly senior Custodian, who is now a Building Engineer, will be treated as less senior than the Head Custodian applicant. This approach is based on a "career path" hypothesis that is not consistent with the collective agreement.

182 Seniority is to be considered in making promotions. If movement from a position on one seniority list to a position on another seniority list is a promotion, then the seniority of employees seeking the promotion must be considered even if it is not seniority on the seniority for the position for which they apply.

183 The uniqueness of the Head Custodian position is reflected in two provisions of the collective agreement. First, this is the only position for which "internal applicants shall be given priority for these appointments" (Article 11(B)(3)(b)). This was negotiated into the collective agreement with the creation of the Head Custodian position in the 1982-83 collective agreement.

184 After 1981, when the union made the "major concession" of giving up a steam certificate requirement for 23 positions in the Teachers' Centre, 10 elementary schools, and all annexes except one, the 1982-83 collective agreement provided:

In making transfers, assignments, demotions and promotions, in order of priority, seniority, job qualifications and job record of the employee shall be the primary consideration and where the last two factors are considered to be equal, length of service shall be the determining factor. (Article VI(c)(1)(a))

185 The 1982-83 and 1984 collective agreements defined "promotions":

A promotion is defined as a movement of an employee from one position to another which has a higher maximum on the pay scale. Upon promotion from a position of Engineer-Custodian to another position of Engineer-Custodian, an employee shall be paid on the top step of the scale for the new position at the same step as the step of his existing salary. For any other promotion, an employee shall be paid at the first step which is greater than his existing salary. (Articles VIII(C) and XI(C)(2))

Today, this article states:

A promotion is defined as a movement of an employee from one position to another which has a higher maximum on the pay scale. Upon promotion from a position of Building Engineer to another position of Building Engineer, an employee shall be paid on the top step of the scale for the new position. (Article 11(C)(2))

186 In 1983, the settlement for the 1984 collective agreement provided:

Qualifications and Job Posting

The Board and the Union agree that applications may be made by any qualified member for positions which are posted. Those areas previously designated for Head Custodians and Assistant Head Custodians may be used as the first promotional step for Assistant Engineer Custodians provided that the list of such positions is extended by six (6) additional units during the term of this agreement. The Board and the Union further agree that a member who is promoted to a position of Assistant Engineer Custodian II shall be required to obtain experience in that position for not less than one (1) year before qualifying to apply for a more senior promotional position.

187 With only a position title change, the same language as in the 1984 collective agreement continues in the current collective agreement. It states:

Qualifications and Job Posting

The Board and the Union agree that applications may be made by any qualified member for positions which are posted. Areas designated for Head Custodians and Assistant Head Custodians may be used as the first promotional step for Assistant Building Engineer ~~Custodians~~ . An employee who is promoted to a position of Assistant Building Engineer ~~Custodian~~ II shall be required to obtain experience in that position for not less than one (1) year before qualifying to apply for a more senior promotional position. (Article XI(A)(1)(k))

188 Agreeing Assistant Head Custodian or Head Custodian designated areas may be used as "the first promotional step" for Assistant Building Engineers is the second uniqueness of the Head Custodian position. This agreement means and has meant over the years that Building Engineers use their seniority when applying for work in areas designated for Head Custodians and Assistant Head Custodians because it was agreed such a move was a "promotion" (not a transfer, assignment or demotion).

189 There is an obvious explanation why the first sentence speaks of "positions" and the second speaks of "areas." The settlement agreement was amended after the condition was fulfilled:

~~Those~~ a Areas previously designated for Head Custodians and Assistant Head Custodians may be used as the first promotional step for Assistant Engineer Custodians provided that the list of such positions is extended by six (6) additional units during the term of this agreement .

190 The union agreed "the list of such positions is extended by six (6) additional units during the term of this agreement." In exchange for the union agreeing to have the list of positions extended by six additional units/schools the employer agreed that positions in the "areas designated", which was those areas previously designated and the additional ones, were a promotional step for Assistant Engineer Custodians who were on the Engineer-Custodian seniority list. That the union agreed is evident because the finalized 1984 collective agreement language did not include the condition and in 1986 there were 29 employees in Assistant Head Custodian or Head Custodian positions.

191 The basis of the agreement is obvious. The union conceded a steam certificate was not required in additional areas provided Building Engineers could apply with their seniority for position vacancies in areas designated for Assistant Head Custodian and Head Custodian. Agreeing it was a promotional step was the device that required the employer to consider their Building Engineer seniority in making "promotions."

192 The "first promotional step" is for all Assistant Building Engineers. It is not restricted to Assistant Building Engineers I. The only restriction is that: "An employee who is promoted to a position of Assistant Building Engineer II shall be required to obtain experience in that position for not less than one (1) year before qualifying to apply for a more senior promotional position." This is a restriction that would exclude otherwise qualified Building Engineers from applying for Head Custodian positions. It is not a requirement for a job position, such as Assistant Building Engineer III.

193 This restriction was negotiated and included in the collective agreement when the subject was Assistant Building Engineers applying for work in areas designated for Assistant Head Custodians and Head Custodians. The nature of the restriction is that it delays an Assistant Building Engineer II from applying for a Head Custodian position. The restriction might also limit the cohort of eligible Building Engineer applicants for Head Custodian positions and retain some employees in Building Engineer positions.

194 In the context of what the employer was seeking to achieve and the major concession the union was making, it is logical that there was no reciprocal provision for the benefit of Assistant Head Custodians or Head Custodians that Assistant Building Engineer positions are a promotional step. The Building Engineer employee group gave up 29 positions within their exclusive work jurisdiction to allow the employer to create the new lower certificate positions it wanted at cost savings for the employer. In exchange, the employer agreed to a device that would enable Building Engineers, with their higher certificates, to gain access to Head Custodian positions.

195 The union protected the exclusivity of the remaining Building Engineer positions. "It is agreed that Head Custodian or Assistant Head Custodian will not relieve Engineer/Custodians or Assistant Engineer/Custodians in other schools/units outside of Custodian/designated listing." The union conceded training for the first group of positions was available for Custodians who were not required to have firing time. Neither the employer nor the union bargained ongoing training for Custodians.

196 The scheme of new custodial coverage with Head Custodians in designated areas that gives priority access for Building Engineers with their qualifications and seniority after 1983 to positions in areas they were giving up in the second set of negotiations has the consequence of making it more difficult for Custodians wanting self-improvement to advance to Head Custodian positions. However, neither the employer nor the union in that round were championing the opportunities for Custodian career development.

197 Flowing from this, it follows that the mutual intention of the union and employer is that in selecting the successful applicant for a promotion to a Head Custodian position "seniority" in Article 11(B)(3)(a)(1) includes a Building Engineer applicant's seniority on the Building Engineer seniority list established in accordance with Article 11(B)(3)(a)(5).

198 The same Head Custodian posted position might be a transfer for a Head Custodian applicant. A Head Custodian applicant's seniority on the Head Custodian seniority list established in accordance with Article 11(B)(3)(a)(6) is also "seniority" in Article 11(B)(3)(a)(1) for purposes of selecting the senior applicant.

199 It is clear on the language of Article 11(B)(3)(a)(4) that "seniority" in Article 11(B)(3)(a)(1) does not include any applicant's length of service or seniority based on date of employment which is to be used to maintain the first seniority list in Article 11(B)(3)(a)(4).

200 The seniority lists for Temporary Custodians and Custodians to be provided to the union under Article 11(B)(3)(c) was negotiated for the purposes of administering the placement of Temporary Custodians on the Custodian seniority list agreed in 1997. And, perhaps, for administering the provisions on filling Assistant Head Custodian, Assistant Building Engineer I and Custodian positions that I was informed are being removed from Article 11(B)(3)(c) of the collective agreement. I find that seniority on these lists is not "seniority" for the purposes of Article 11(B)(3)(a)(1).

201 While not conclusive, but consistent with this mutual intention of the union and employer, within Article 11(B)(3), which has the heading "Assignment of Staff", the union and employer gave the heading "Seniority" to Article 11(B)(3)(a) with its nine sub-clauses. This is also where the requirement for the employer to provide and the union to agree or disagree with seniority lists is included (Article 11(B)(3)(a)(9)). The "Seniority" heading does not extend to or encompass Article 11(B)(3)(c) for which the heading was "Filling Vacancies for Assistant Head Custodians, Assistant Building Engineer I and Custodian." With amendments in the current collective bargaining for the next collective agreement, perhaps the heading is will now "Temporary Employee Service Accrual."

202 This scheme of the collective agreement provides the logic for the employer maintaining and the union agreeing to seniority lists since the 1980's that have Building Engineers in Head Custodian positions remaining on the Building Engineer seniority list and retaining their Building Engineer seniority.

203 Head Custodian positions were filled by employer posting, employee application, as a first promotional step for Building Engineers, by application of seniority and with priority for internal applicants. Because Building Engineers were in a promotional step in an Assistant Head or Head Custodian position they remained on the Building Engineer seniority list with a seniority date from the date of employment in a Building Engineer position, not a date they started in an Assistant Head or Head Custodian position.

204 On the evidence, it is clear this was a deliberate mutual choice from the agreement on the Head Custodian position. For example, the first three Building Engineers placed on the 1986 Head Custodian seniority list were placed back on the Building Engineer seniority list in 1987. This was the action of those who were engaged in negotiating the Head Custodian positions and designated areas.

205 It is a disservice to those employer and union negotiators, to managers charged with administering the collective agreement and making promotion selection decisions and to union representatives responsible to review and agree with seniority lists to simply say they repeatedly and continuously acted in error in the 1980's and that their errors went unnoticed in the 1990's when the number of Head Custodian positions increased.

206 This is reinforced by the language of Article 11(b)(3)(a)(5). The start date on the Building Engineer seniority list is when an employee "holds a valid boiler operator's or stationary steam engineer's certificate and is employed in a position requiring same (Assistant Building Engineer I or higher)." The combination of certificate and a position requiring that certificate is the start date. That date and placement on the Building Engineer seniority list is not lost by taking a promotional step. Building Engineers retain their seniority date when they successfully compete for a Head Custodian promotional position. This is why

the seniority lists have identified Building Engineers by position code, position title or asterisk as working in a Head Custodian position while remaining on the Building Engineer seniority list.

207 In contrast to "Assistant Building Engineer I or higher", Article 11(B)(3)(a)(6) states the start date on the Head Custodian seniority list is restricted to two positions. It is when an employee "holds a valid Boiler Operator Program Certificate and is employed in a position requiring same (as Head Custodian or Assistant Head Custodian)." While the combination of certificate and a position requiring the certificate is the start date, only two positions, not "or higher", are agreed. This is why the employees on the Head Custodian seniority list do not include Building Engineer who obtained a Head Custodian position at a time when they were on the Building Engineer seniority list.

208 This is not a scheme of reciprocal or super-seniority for Building Engineers on the Head Custodian seniority list. It is maintenance of Building Engineer seniority on the Building Engineer seniority list when a Building Engineer is in a position agreed between the union and employer to be treated as a promotional step at a time when the union relinquished additional Building Engineer positions to be staffed by Head Custodians.

209 By agreeing "Areas designated for Head Custodians and Assistant Head Custodians may be used as the first promotional step for Assistant Building Engineer", the employer agreed work in a position in those "areas" given up by Building Engineers as their exclusive domain is part of a Building Engineer's career path. This might not seem self-evident today, despite there being a salary increase in some situations. However, in light of the historical context, it is completely understandable that this is what the employer agreed in 1984 to achieve additional Head Custodian areas staffed by employees it did not have to support to obtain required certification.

210 At the same time, after the initial groups of Custodians completed the one time training program, the Custodian seniority provision with a date corresponding to the date of a course to qualify for Head Custodian or Assistant Head Custodian was removed from the collective agreement. The consequence is that Custodians do not have a seniority date for competing for a Head Custodian position under the current collective agreement. Their seniority list is from date of employment and is seniority only for "purposes of vacations and other Benefits as well as applications for training" (Article 11(B)(3)(a)(4)).

211 Unfortunately, Ms Horsley-Holwill was too quick to assume her predecessors had acted for decades in what the employer argues was an illogical scheme fostered by the union to act for the benefit of one employee group to the disadvantage of another. She did not ask why the employer and management had been complicit for so long in treating groups of employees disparately. She did not ask if there was a logical or historical reason for doing so or if there was an operational cost saving trade the employer achieved in exchange for agreeing Building Engineers could have access to Head Custodian positions. Or if there was a concession the union made on behalf of Building Engineers for which this promotional access was part of the bargain.

212 It is a divisive disservice to the union for the employer to characterize decades of employer selection and appointment decision-making as preferential treatment of one group to the disadvantage of another group and to attribute responsibility for that decision-making to the union. It is a disservice to the union to attribute to it disparate and disadvantageous treatment of Custodians when the major concession it made in collective bargaining enabled Custodians an opportunity to advance to work as Head Custodians in areas formerly the exclusive work jurisdiction of Building Engineers.

213 For the employer, that advancement opportunity was not a primary concern, but an incidental consequence. The employer's concern was cost savings. The union was balancing competing interests among the employees it represented by making permanent concessions to the disadvantage of one group while gaining opportunities for another group in exchange for short term rate increases that in sum provided the employer with the ongoing long term cost savings it sought.

214 The employer's selection and appointment decision-making in furtherance of the "major breakthrough" it made in having the union agree to rearrange custodial coverage was in accordance with the correct interpretation and application of the collective agreement, which both the union and employer negotiated and bargaining unit employees ratified. No one is to be castigated, belittled or blamed. The union and employer are to be commended for having remained true to their agreement

and having cooperative administration as was reflected in the respectful and mutual help email exchange in May 2013 between Ms Vincent and Ms Yung.

215 Since Ms Horsley-Holwill's insight, the grieved Head Custodian selection and appointment decisions she made and the rationale for them have one common consequence. They preclude Building Engineers, who the employer was having difficulty recruiting and retaining, from promotion from a current Building Engineer position to a Head Custodian position.

216 Reordering custodial coverage by expanding opportunities for Custodians with certificates and restricting opportunities for Building Engineers to move to Head Custodian positions might be a partial solution to the employer's problems in recruiting and retaining Building Engineers. But it is not one permitted by the collective agreement.

217 The seniority that is to be considered in a competitive posting and selection for the position of Head Custodian is seniority that is unlimited in its purposes under the collective agreement. This is seniority on either the Building Engineer or Head Custodian seniority list. It is not length of service or seniority on the Temporary Custodian or Custodian seniority lists.

218 Applying this to the grievances:

- In September 2009, the employer selected Mr. Cartagena for the position of Head Custodian at Laurier Annex based on his Custodian seniority or length of service. He had no seniority for the purpose of this selection. The employer did not give priority to the seniority of other applicants. The position should have been offered to Mr. Han and if he declined to Mr. Mesa. The grievance is allowed.
- In May 2011, the employer selected Mr. Villanueva for the position of Head Custodian at Collingwood Elementary based on his Head Custodian seniority. The employer did not give priority to the greater seniority of Building Engineer applicants. The position should have been offered in order of seniority to Mr. Han and others. The grievance is allowed.
- In May 2011, the employer selected Mr. Lemaire for the position of Head Custodian at McBride Annex based on his Head Custodian seniority. The employer did not give priority to the greater seniority of Building Engineer applicants. The position should have been offered in order of seniority to Mr. Azul and others before Mr. Lemaire. The grievance is allowed.
- In September 2011, the employer selected Mr. Shen for the position of Head Custodian at False Creek Elementary based on his Head Custodian seniority. The employer did not give priority to the greater seniority of Building Engineer applicants. The position should have been offered to Mr. Perada before Mr. Shen. The grievance is allowed.
- In February 2012, the employer selected Mr. Carlos for the position of Head Custodian at Douglas Annex based on his Head Custodian seniority. The employer did not give priority to the greater seniority of Building Engineer applicants. The position should have been offered to Mr. Perada and others before Messrs Lemaire, Torok and Carlos. The grievance is allowed.
- In April 2012, the employer selected Mr. Dharni for the position of Head Custodian at Henderson Annex based on his length of service. He had no seniority. The employer did not give priority to the seniority of Building Engineer applicants. The position should have been offered to Mr. Revelle and then Mr. Khan before Mr. Dharni. The grievance is allowed.

219 The employer is ordered to compensate and make whole the employees adversely affected by its selection contraventions of the collective agreement. Making whole includes offering grievors Head Custodian positions they should have been offered. For some or all, there might be claims for appointment to subsequent posted Head Custodian positions. I leave it to the union and employer to attempt to achieve a resolution on which Building Engineers should be Head Custodians at what locations and who, if anyone, should be displaced to remedy the employer's selections and appointments in contravention of the collective agreement.

220 Because the dispute over the December 2011 seniority lists has been separately grieved and referred to arbitration, I make no order with respect to the December 2011 seniority lists.

221 To assist in making the grievors whole, I order the employer to prepare seniority lists for all bargaining unit employees as of December 31, 2012 and May 31, 2013 in the manner it prepared the December 31, 2010 seniority lists, with which the union agreed. Further, I reserve and retain jurisdiction to decide any difference between the union and employer over the placement, ranking or absence of any employee on the Building Engineer and Head Custodian seniority lists as of December 31, 2012 and May 31, 2013 prepared by the employer.

222 Further, I order the employer not to appoint any person, without the union's agreement, to any Head Custodian position currently posted or any Head Custodian position posted before the employer has delivered to the union seniority lists for all employees as of December 31, 2012 and May 31, 2013.

223 If the union disagrees with the absence of any employee from or the placement and ranking of any employee on the Building Engineer and Head Custodian seniority lists as of December 31, 2012 and May 31, 2013 prepared by the employer and that disagreement results in disagreement with an employer selection and appointment for a Head Custodian position currently posted or a Head Custodian position posted after this date and before the employer delivered these seniority lists to the union, I retain jurisdiction to finally decide that difference.

224 I reserve and retain jurisdiction over the interpretation, application and implementation of this decision and the final resolution of compensation and any other remedy to redress the employer's selections and appointments in contravention of the collective agreement.

Appendix — Employees in Assistant and Head Custodian Positions (1986 — 2010)

Employee	BE Sen. Date	HC Sen. Date	1986	1987	1988	1991	1992	1993	1995	1996	1997	1998	2000	2004	2008	2009	2010
1 Gallagher, V.	13-Jun-66																
2 Helmich, P.*	17-May-76																
3 Wanless, G.	01-Dec-77																
4 Narain, R.	10-Mar-79																
5 Mallard, S.J.	12-Mar-79																
6 Reid, D.R.*	12-Mar-79																
7 Keng, C.S.	01-Sep-79																
8 Kwan, K.	01-Jul-80																
9 McCulligh, J.D.	04-Jan-82																
10 Wong, E.	01-Aug-80																
11 Curtis, K.	09-Mar-81																
12 Jasper, W.	09-Mar-81																
13 Lowe, H.*	09-Mar-81																
14 Little, D.J.	09-Mar-81																
15 Kuo, K.	01-Apr-81																
16 Chan, K.	11-Jan-82																
17 David, A.	16-Mar-82																
18 Bernaldez, A.	26-Mar-82																
19 Delatorre, M.	29-Mar-82																
20 Hougham, D.	20-Apr-82																
21 Stewart, M.	30-Apr-82		0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
22 Tang, E.	30-Apr-82		0														
23 Mravunac, T.	30-Apr-82		0	0	0												
24 Bennett, A.*	25-May-82																
25 Samuels, B.	05-Jun-82		0	0	0	0	0	0									
26 Chand, P.	10-Jun-82		0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
27 Vanhouten, W.	10-Jun-82		0	0	0	0	0	0									
28 Datuin, J.	14-Jun-82																

Graphic 2

Employee	BE Sen. Date	HC Sen. Date	1986	1987	1988	1991	1992	1993	1995	1996	1997	1998	2000	2004	2008	2009	2010
29 Nickel, U.		14-Jun-82	0	0	0	0											
30 Tseung, V.		30-Jul-82	0	0	0	0	0	0	0								
31 Kelch, S.		15-Sep-82	0	0	0	0	0	0									
32 McMuldroch, R.	13-Sep-82							■									
33 Chan, H.M.		26-Oct-82	0	0	0	0	0	0	0								
34 Correia, N.	01-Nov-82										■	■	■				
35 Clark, E.		30-Nov-82	0														
36 Clarke, D.		13-Jan-83	0	0	0	0	0	0									
37 Marshall, D.	11-Apr-83							■									
38 Connelly, M.		12-Apr-83	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
39 Lising, A.		12-Apr-83	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
40 Lucas, R.D.		12-Apr-83	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
41 Abela, P.		12-Apr-83	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
42 Gibson, W.		12-Apr-83	0	0	0												
43 Tansley, J.		12-Apr-83	0	0													
44 Rengert, C.		12-Apr-83	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
45 Granger, G.		12-Apr-83	0	0													
46 Soong, L.		12-Apr-83	0	0													
47 Allason, R.		12-Apr-83	0	0	0												
48 Bujold, J.L.		08-Jul-83	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
49 Aguilar, P.		11-Oct-83	0	0	0	0											
50 Paul, R.D.		29-Nov-83	0	0	0	0	0	0	0								
51 Edward, M.		10-Apr-84	0	0	0	0	0	0	0	0							
52 Prestley, M.		12-Sep-84												0	0	0	0
53 Koren, J.	24-Sep-84							■									
54 Stiles, J.	26-Jun-85									■	■						
55 Prasad, P.		07-Nov-85		0	0	0	0	0	0	0	0	0	0	0	0	0	0
56 Rocha, L.		07-Nov-85		0	0				0	0					0	0	0
57 Disanjh, J.	03-Jan-86											■					
58 MacDougall, D.*	24-Apr-86														■	■	■

Graphic 3

Employee	BE Sen. Date	HC Sen. Date	1986	1987	1988	1991	1992	1993	1995	1996	1997	1998	2000	2004	2008	2009	2010
59 Lovell, D.	18-Sep-86									■	■	■	■				
60 Shaughnessy, P.*	18-Sep-86					■	■	■	■	■	■	■	■	■	■	■	■
61 Johnson, R.	14-Nov-86							■	■								
62 Ta, C.	15-Nov-86												■				
63 Matus, G.	16-Feb-87								■	■	■	■	■	■			
64 Anderson, S.	11-May-87								■	■	■	■	■				
65 Dela Cruz, L.	01-Sep-87								■	■	■	■	■				
66 Ginn, T.*	08-Sep-87								■	■	■	■	■	■			
67 Clarkson, B.	07-Oct-87										■	■	■				
68 Chorzepa, E.	15-Jan-88									■	■	■	■	■			
69 Craven, S.	01-Nov-87									■							
70 Wong, P.K.		07-Dec-87			0	0	0	0	0								
71 Cheng, K.S.	01-Feb-88									■							
72 Marasigan, A		12-Sep-88				0	0	0	0	0	0	0	0	0	0	0	0
73 Corey, R.	28-Dec-88									■	■	■	■	■			
74 Carr, G.		13-Feb-89				0	0	0	0	0	0	0	0	0			
75 Bain, B.		24-Apr-89				0											
76 Lee, T.	18-Sep-89										■	■					
77 Hall, W.*	18-Dec-89										■	■	■	■	■	■	■
78 Ewanchook, D.		08-Feb-90				0											
79 Arcales, G.	09-May-90												■				
80 Sararakas, C.	19-Jun-90												■	■	■	■	■
81 Stiles, R.*	01-Oct-90											■	■	■	■	■	■
82 Kumar, B.*	26-Nov-90											■	■	■	■	■	■
83 Cannell, R.		08-May-91				0	0	0	0	0	0	0	0	0	0	0	0
84 May, D.		03-Sep-91							0	0	0	0	0	0	0	0	0
85 Tyson, G.	03-Sep-91												■				
86 Nguyen, D.*	01-Oct-91												■	■	■	■	■
87 Hall, P.*	15-Oct-91													■	■	■	■
88 Chu, F.		03-Jan-92				0	0	0									

Graphic 4

Employee	BE Sen. Date	HC Sen. Date	1986	1987	1988	1991	1992	1993	1995	1996	1997	1998	2000	2004	2008	2009	2010
89 Townsend, S.		10-Feb-92					0	0		0	0	0	0	0	0	0	0
90 Ferma, J.		08-Sep-92					0	0									
91 Evans, A.*	21-Sep-92												■	■	■	■	■
92 Hammel, G.		08-Jan-93					0										
93 Ferris, H.	21-Apr-93												0				
94 Hedman, G.		19-Sep-94							0								
95 Cote, M.*	19-Dec-94														■	■	■
96 Addison, S.*	20-Mar-95														■	■	■
97 Bacani, W.		03-Apr-95							0	0	0	0	0	0	0	0	0
98 Moulton, S.	05-Jun-95														■	■	■
99 Cote, R.*	12-Jun-95														■	■	■
100 Kwong, J.		04-Jul-95							0								
101 Tieu, C.		26-Oct-95								0	0	0	0	0	0	0	0
102 Kemp, H.		01-Nov-96									0	0	0				
103 De Vera, F.		10-Nov-97									0	0	0	0	0	0	0
104 Moran, M.		06-Jul-98										0	0	0			
105 Barroso, M.		07-Sep-99											0	0	0	0	0
106 Khan, M.	27-Sep-99														■	■	
107 Khan, K.		10-Nov-99													■	■	■
108 Plett, R.*	31-Jan-00														■	■	■
109 Teiueira, S.		18-Dec-00													■	■	■
110 Scott, C.*	15-May-00															■	■
111 Tasaka, J.		04-Sep-01													0		
112 Prasad, V.		13-Nov-01													0	0	0
113 Cheung, H.*	02-Jan-02															■	■
114 Samra, B.*	08-Jul-02															■	■
115 Perry, T.		05-May-03													0	0	0
116 Zdravkovic, M.	08-Dec-03															■	
117 Yoo, J.*	19-Jan-04															■	■
118 Turcotte, K.	05-Jun-06															■	■

Graphic 5

Employee	BE Sen. Date	HC Sen. Date	1986	1987	1988	1991	1992	1993	1995	1996	1997	1998	2000	2004	2008	2009	2010
119 Zhou, Y.	25-Sep-06														■		
120 Shen, W.J.*	26-Feb-07															0	0
121 Hayat, K.		29-Sep-07													0	0	0
122 Ip, Y.K.		05-Nov-07													0	0	0
123 Cartagena, R.		11-Nov-09														0	0
124 Lemaire, M.		14-Dec-09														0	0
125 Villanueva, A.		28-Jun-10															0
Totals			68	57	29	30	34	35	35	43	43	45	42	42	46	45	45

Graphic 6