IN THE MATTER OF AN ARBITRATION

BETWEEN:

EARL'S INDUSTRIES

(The "Employer")

AND:

MARINE WORKERS AND BOILERMAKERS
INDUSTRIAL UNION, LOCAL NO. 1

(The "Union")

(National Truth and Reconciliation Day Grievance)

ARBITRATOR:	RICHARD COLEMAN
FOR THE EMPLOYER:	BRUCE CORTA
FOR THE UNION:	SARA HANSON
DATE OF HEARING:	JANUARY 6, 2022
DATE OF AWARD:	JANUARY 13, 2022

This arbitration addresses an interpretation dispute between the parties as to whether the Employer was/is contractually obligated to treat National Truth and Reconciliation Day as a statutory holiday pursuant to art. 6 of the applicable collective agreement. It is my understanding that the Employer is a design/engineer/manufacture/fabricating business located in Port Coquitlam, British Columbia.

The article in dispute reads:

> 6.01 (a) The following twelve (12) Statutory Holidays shall be compensated for in accordance with Clauses 6.03 and 6.04 of this Article.
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> If an employee works on a Statutory Holiday as listed in this Section, they shall receive double time pay for all hours worked on the holiday, in addition to the statutory compensation received pursuant to Clauses 6.03 and 6.04, unless mutually agreed.
>
> If the Federal or Provincial Government declares a special Statutory Holiday in addition to those listed below and if such a day is generally celebrated in the area, the employees will be entitled to that day under the same conditions as outlined in this Article.
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> |---|---|---|
> | NewYear's Day | Victoria Day | Thanksgiving Day |
> | Family Day | Canada Day | Remembrance Day |
> | Good Friday | B.C. Day | Christmas Day |
> | Easter Monday | Labour Day | Boxing Day |
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> 6.03 Affective on the first day of the month following the ratification of the collective agreement, all employees shall receive their statutory holiday pay entitlement equal to eight (8) hours at straight time, at the time of their normal pay period for that day
>
> 6.04 If the Federal or Provincial Government declares an additional statutory holiday to those encompassed in Clause 6.01 of this Agreement, all employees shall receive their statutory holiday pay entitlement equal to eight (8) hours of straight time, at the time of their normal pay period for that day.

On June 3, 2021 the Federal Government passed legislation which amended the *Canada Labour Code* to include "National Day for Truth and Reconciliation Day" to the list of other "general holidays", specifying that the new holiday be observed on September 30.

The Union maintains that notwithstanding that the Employer is a provincial rather than a federal enterprise, and covered by the *B.C. Labour Code* and not the *Canada Labour Code,* the Federal designation of September 30 as a statutory holiday, satisfies both 6.01 and 6.04 in that it represents a declared "additional statutory holiday" as per 6.04, and regardless of being a federal rather that a provincially declared statutory holiday, the new holiday is "generally celebrated in the area" as per 6.01, interpreting "area" as either the entire lower mainland of British Columbia or what is known as the "tri-cities" area, referring to Coquitlam, Port Coquitlam and Port Moody which border each other. The Employer maintains that the new holiday is for employees under federal jurisdiction, and has not been designated as a provincial statutory holiday; and in any case, the concept of "generally celebrated in the area", is ambiguous on its face, and the doctrine of c*ontra proferentem* must apply, such that the Union's interpretation must be rejected. The Employer declined to provide its own interpretation of what "generally celebrated in the area" means.

It is my understanding that Earls' Industries' employees worked September 30, were not provided a holiday, and were not compensated at the rates specified in the collective agreement for work on a statutory holiday and were instead paid straight time rates.

The Union called three witnesses. The first, Denyse Dehler, a Union Staff Representative, who testified as to her communications with the Employer about the matter, and efforts she made to determine which other employers in related industries and/or in the surrounding area recognized the new holiday. She said that seventeen of the local's other eighteen bargaining units had similar contract language and recognized the holiday. The eighteenth employer did not, on the basis that there was no language in their collective with the Union that addressed the issue. Ms. Dehler said that one employer in particular, with identical language to that of article 6.01, recognized the holiday.

She said she also contacted other unions to see what their experiences had been, and received positive responses, including those in similar industries, but also from CUPE. She also identified a newspaper article from the Tri-City News, which reported that "Tri-City civic and school workers will observe the National Day for Truth and Reconciliation on September 30, shuttering city halls and recreation centres for the day"; and "Coquitlam, Port Coquitlam and

Port Moody city halls and recreation facilities will be closed, with a few exceptions". The article goes on to read:

> …for most non-government employees, Thursday, Sept. 30 will be a regular work day.
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> In a news release, the City of Port Coquitlam stated its participation in the National Day for Truth and Reconciliation is not its only initiative. It also established its Equity, Diversity and Inclusion Roundtable last year.
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> Meanwhile, Coquitlam noted it "has strengthened its focus on promoting diversity, equity and inclusion (DEI) in the city's work and in the community at large."
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> Port Moody city manager Tim Savoie said the city will consider how to mark the day in future years, in line with the provincial government's announcement Aug. 3 to work with Indigenous leaders, organizations and communities for observances going forward.

Ms. Dehler also cited a Provincial Government press release dated August 3, 2021, titled "B.C. to mark Sept. 30 as day of commemoration", which included the following paragraph:

> The national holiday will be observed this Sept. 30 by federal employees and workers in federally regulated workplaces. We have advised provincial public sector employers to honour this day and in recognition of the obligations in the vast majority of collective agreements. Many public services will remain open but may be operating at reduced levels. However, most schools, post secondary institutions, some health sector workplaces, and crown corporations will be closed.

The Union next called Mr. Rob Kappel, Assistant Business Manager with Lodge 359 of the Boilermakers Union, who testified that five of the six employers with whom they have collective agreements, recognized the new holiday, but one did not, the last because their contract did not contain relevant contract language. Three of the five who acknowledged the new holiday were in the lower mainland, one is on Vancouver Island and the fifth in Prince George.

Mark Glazier, Business Agent for Local 170 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry (UA 170), was called to speak to his

union local's experience with employers recognizing the new holiday. Mr. Glazier testified that all ninety-six of those employers recognized the new holiday. He said that that list included major employers such as Seaspan and a number of shipyards.

The final witness called by the Union was George MacPhearson, the Local Union President from 1990 to 2017. Mr. MacPhearson said that he negotiated the initial contract with Earl's Industries. He testified that the agreement was generally boilerplate contract language from other bargaining units, but that negotiations with Earl's had taken place, including discussion of article 6, which MacPhearson recalled, concerned the Employer's concerns about the number of statutory holidays; but that no other discussion took place about the wording of art. 6.01

Submissions:

Union counsel submits that the language is clear, and that the three criteria set out in art. 6.01 have been satisfied. Namely, that the National Truth and Reconciliation Day was declared by the Federal Government to take place on September 30, and that it was "generally celebrated in the area". With respect to how the second criteria should be interpreted and applied, counsel maintains that despite the fact that the precise language was adopted without discussion, the accepted principles of contract interpretation as summarized in *Pacific Press -and- Graphic Communications International Union, Local 25-C* (Pressmen) 1995 CarswellBC 3177, [1995]B.C.C.A.A.A. No. 637, 41, C.L.A.S. 488, (Bird), at para. 27, apply, particularly points 2 and 9. The whole list reads:

> -The object of interpretation is to discover the mutual intention of the parties.
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> -The primary resource for an interpretation is the collective agreement.
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> -Extrinsic evidence (evidence outside the official record of agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention.
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> -Extrinsic evidence may clarify but not contradict a collective agreement.
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> -A very important promise is likely to be clearly and unequivocally expressed.

> -In construing two provisions a harmonious interpretation is preferred rather than one which places them in conflict.
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> -All clauses and words in a collective agreement should be given meaning, if possible.
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> -Where an agreement uses different words one presumes that the parties intended different meanings.
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> **-Ordinarily words in a collective agreement should be given their plain meaning.**
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> -Parties are presumed to know about relevant jurisprudence.
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> (emphasis added)

Referring to "ordinarily words in a collective agreement should be given their plain meaning", counsel relies on representative parts of the definitions for "generally", "celebrate" and "area", contained in the *Cambridge English Dictionary* as reflecting the plain meaning of those words.

> Generally: by most people, or to most people.
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> Celebrate: to take part in special enjoyable activities in order to show that a particular occasion is important.
>
> Area: a particular part of a place, piece of land or country.

Applying those definitions, counsel submits that the reasonable appropriate area for the application of art. 6.01 should be the lower mainland, but no smaller than the tri-cities area comprised of Port Moody, Port Coquitlam and Coquitlam. Ms. Hanson maintains that the Employer has customers in both areas, and whether "area" is interpreted as the more narrow tri-cities option or the greater Lower Mainland, in both, the evidence is that the new holiday was generally celebrated. It is also asserted that the fact that so many other union locals in similar industries acknowledged the new holiday, combined with the Provincial Government website communication, show that the new holiday was widely acknowledged, celebrated and honoured, in a wider sense, without necessarily closing down for the day.

By way of remedy, the Union maintains that all the Employer's bargaining unit employees must be paid double time for the day, plus eight hours pay for the holiday itself.

For its part, as above, the Employer declined to make any submission with respect to an alternate interpretation which would, if applied, have allowed the Employer to treat September 30 as a normal work day and pay its workers straight time for a normal working day. Mr. Coatta instead relied on the legal doctrine of c*ontra proferentem* as sufficient grounds for rejecting the grievance, with the inference that the wording was imposed by the Union.

Analysis and Decision:

I begin with the comment that there is no extrinsic evidence to assist in the interpretation of article 6.01 or 6.04. Mr. MacPhearson said that the language has become boilerplate, and as far as he knows, was first drafted decades ago. The original authors are unknown. What is known, however, is that in circa 2006, bargaining for the collective agreement with Earl's Industries included active conversations, including negotiation of the holidays listed in art. 6.01. In my view, it can be inferred from that evidence, that the parties turned their minds to the content of art. 6. For that reason alone, I do not think that the doctrine of *contra proferentem* applies.

The doctrine of *contra proferentem* is defined in *Blacks Law Dictionary* (5th ed.) in the following terms:

> Used in connection with the construction of written documents to the effect that an ambiguous provision is construed most strongly against the person who selected the language.

The arbitrator in *Communication, Energy and Paperworkers Union of Canada, Local 975 v. Accenture Business Service for Utilities Inc.* (Holmeshaw Grievance), [2007] O.L.A.A. No. 739 provides a useful overview of the doctrine (at para 126):

> In Re *Medis Health and Pharmaceutical Services Ltd. and Teamsters Chemical and Allied Workers, Local 424* (2000), 93 L.A.C. (4th) 118, I was required to determine whether the collective agreement language operated to limit the ceiling on compulsory overtime hours agreed to by the parties. At p. 126 of the report, I observed:
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> > Since there is ambiguity in Article 14.06, I have determined that this is a proper case of the application of the *contra preferentem* rule of

> construction. Under that rule, in cases of doubt, and ***as a last resort***, language should be construed against the grantor or promissory under the contract, especially when the clause being construed creates an exemption, exclusion or limitation. In this case, I find that the promissor is the Employer, who, under Article 14.06, is committing itself to a stipulation, by way of exception to the basic proposition that overtime is voluntary, as to the amount of compulsory overtime that may be required of employees, both per day and cumulatively per week.

Concerning the operation of the *contra proferentem* rule, see *Chitty, supra* at [para]12-081, p. 619 ff:

> Another rule of construction is that a deed or other instrument shall be construed more strongly against the grantor or maker thereof (*verba cartarum fortius accipiuntur contra proferentem*). This rule is often misinterpreted. ***It is only to be applied in cases of ambiguity and where other rules of construction fail.*** Nevertheless, despite certain doubts which have been the case upon it from time to time, the rule has been constantly cited as a rule of construction from Cokes's time to the present day. For instance Coke says: "It is a maxim in law that every man's grant shall be taken by construction of law most forcibly against himself; and in 1949 Evershed M.R. said:
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> > *"**We are presented with two alternative readings of this document*** and the reading which one should adopt is to be determined, among other things, by a consideration of the fact that the defendants put forward the document. They have put forward a clause which is by no means free from obscurity and have contended...that it has a remarkably, if not an extravagantly, wide scope, and I think that the rule of *contra preferentem* should be applied..."
>
> The justification rule has been said that "a person who puts forward the wording of a proposed agreement may be assumed to have looked after his own interests so that if the words leave room for doubt about whether he is intended to have a particular benefit there is reason to suppose that he is not.

To the same effect is Fridman's *Law of Contract in Canada,* 4th ed., 1999, Carswell at p.495:

> In cases of doubt, as a last resort, language should always be construed against the grantor or promissory under the contract... In the words of Sir Montague Smith, in *McConnel v. Murphy* (1873), L.R. 5 P.C. 203 at 218-219:

> "Where a stipulation is capable of two meanings equally consistent with the language employed, that shall be taken which is most against the stipulator and in favour of the other party."
>
> (emphasis added)

Three important pieces of the above comments are central to the application of the doctrine to a collective agreement once ambiguity is acknowledged. First, it is only applied as a last resort where other rules of interpretion fail to yield a result. Second, the person or party "putting forward the wording" must be identified—which is quite different from the party proposing a particular interpretation. And third, there must be opposing interpretations.

In addition, and particularly relevant to collective agreements: as per *Ironside v. Smith* (1998) 70 Alta. L.R. (3d) 393 (C.A.) (at para. 67), cited in *Bristol Aerospace Ltd. v. International Assn. of Machinists and Aerospace Workers, Spit Fire Lodge 741,* [2005] M.G.A.D. No. 63 at para 55:

> *Contra proferentem* should not be used to construe an agreement against its drafter ***unless it is clear that the non-drafting party had no meaningful opportunity to participate in the negotiation of the instrument.*** In most commercial situations each party will bargain, insisting on certain concessions and giving up others. ***Although one party may take charge of drafting, the agreement is a product of negotiations. The use of contra proferentem is contingent on an absence of meaningful negotiating ability. So long as a party is permitted to participate in real negotiations, even if he chooses not to do so, it is inappropriate to invoke the rule.***
>
> (emphasis added)

The doctrine is to be a last resort, and requires both ambiguity and evidence as to which party put forward the language; but also that the other party had no meaningful opportunity to particulate in negotiating the clause.

The evidence before me is that bargaining took place, and that article 6 was discussed. That the Employer ultimately accepted the Union's proposed boilerplate language does not remove the fact that they had an opportunity to negotiate, but did not object to the wording even after a specific discussion of the holidays listed. Applying the *Black's Law Dictionary* definition, the language was in fact, ultimately "selected" by both parties.

Another missing piece necessary for an application of the doctrine, is that there be opposing interpretations. That is not the case here, where the Employer has not proposed an alternative interpretation. It is their position that they have no contractual obligation to include National Truth and Conciliation Day, period, without asserting an interpretation for the words in art. 6.01 which could be assessed against the Union's interpretation.

A third reason for rejecting the applicability of *contra proferentem* in the current mater, is that application of the doctrine should be a last resort where other rules of interpretation fail to provide an answer. I find that application of those other rules do in fact produce an answer.

The role of an arbitrator role is to determine what the parties would have intended with the language chosen and agreed to, even if they did not expressly turn their minds to discussing a precise meaning. It is not necessary that the parties actually discussed the interpretation or application of a given clause or a given sentence. A lack of evidence of discussion on a particular point is not fatal to a particular interpretation. As per, *Andres Wines (B.C.) Ltd. (Employer), and Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 300* (Union), [1977] B.C.L.R.B.D. No. 73:

> …one may readily appreciate why the parties will have neither the foresight, the time, nor the inclination to canvass every such possibility and attempt to reach explicit agreement about it.
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> But the fact of the matter is that such events do occur during the term of the agreement. The parties may not then reach an accommodation during the grievance procedure. ***When they take the issue to arbitration, their arbitrator does not have the luxury of deciding not to decide. He must make up his mind about the implications of their general contract language for this peripheral problem. In the absence of any clear indication of the mutual intent of the parties -- gathered from either their language or their behaviour -- the arbitrator must, in effect, reconstruct some kind of hypothetical intent.*** What is it reasonable to assume that typical labour negotiators, having analyzed the nature and purpose of the contract benefit in question, would agree to as a sensible judgment about who should enjoy the benefit in this unusual situation?
>
> (emphasis added)

As there is no extrinsic evidence, the words must be interpreted according to accepted principles of contract interpretation and construction. Particularly relevant to the facts of the current dispute: all words in a collective agreement must be given meaning, and ordinary words should be given their plain meaning. The operative phrase here, "generally celebrated in the area", is ambiguous to the extent that what that means is not precisely defined, but it is not thereby rendered meaningless.

The use of dictionaries is well accepted by arbitrators as a useful tool to determine meaning. In this case, the first word needing interpreting is "area". What did the parties intend with that language? In my view, if the parties had meant that the same definition of "area" would be the same in each instance, they would be expected to have said so. Which is to say, if they intended that "area" was to mean something definitive such as the province or city in which, or out of which, the employer operates, or some other definitive geographic area applicable to every instance, the language would reflect that intent. More likely and the most reasonable reading of the language, in my view, is that "area" is intended to mean an area such that the Employer is not out of sync with what is going on around them, which may vary depending on the nature of the holiday.

In the case at hand, given the national and provincial importance and attention given the holiday in contention—National Truth and Reconciliation Day—the evidence is that it was widely honoured and celebrated throughout the province, as per the Provincial Government news release and application to Provincial Government operations; and in the tri-cities area in which the Employer operates, as per the reporting in the Tri-City News. It was also "enjoyed" by all ninety-six of the UA170 bargaining units and most of the Union's other certifications. That many of those workers enjoyed the day as a result of their collective agreements does not erase the fact that they had the day off and thereby enjoyed a celebration of the day.

Mr. Coatta objected to the use of the Tri-City News reporting as inappropriate evidence. I respectfully disagree. A critical read of the article indicates that it represents factual reporting that was not disputed.

By way of summery, consideration must be given to the nature of the issue: a new Federal statutory holiday, acknowledged by the Provincial government even if not provincially legislated; the nature and focus of the day itself in the Province; and the implied purpose behind the words "generally celebrated". I agree with the Union that "celebrated" does not necessarily mean not worked, but rather something closer to its plain meaning: "to take part in special enjoyable activities in order to show that a particular occasion is important".

Put together, I interpret the proper meaning to be given to art. 6.01 is that new statutory holidays which enjoy wide acceptance and celebration within a geographical area relevant to the Employer, must be included in the art. 6.01 list. I find that that is the situation here with National Truth and Reconciliation Day, and that the evidence presented is sufficient to meet the requirements of art. 6.01, that the new Federal statutory holiday on September 30 was generally celebrated in a relevant area. In my view, in this instance, whether that area is the the province or the lower mainland or the tri-cities area, art. 6.01 is satisfied.

The grievance is sustained. Employees of Earl's Industries are entitled to September 30 "under the same conditions as" they are for the statutory holidays listed in art. 6.01, including eight hours at straight time plus double time for work on that day.

I retain jurisdiction over the implementation of remedy should the parties disagree as to what is owed to employees pursuant to this award.

It is so ordered.

Dated in Vancouver, B.C., this 13th day of January 2022.

Richard Coleman, Arbitrator