IN THE MATTER OF AN ARBITRATION

(Under the *Canada Labour Code*)

BETWEEN:

EXPERTECH NETWORK INSTALLATION

("Expertech")

-AND-

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA

(the "Union")

AND IN THE MATTER OF an arbitration of two Union collective agreement interpretation grievances under the "Craft and Services Employees" and "Clerical and Associated Employees" collective agreements between the parties

BEFORE: G. T. SURDYKOWSKI – Sole Arbitrator

APPEARANCES:

For the Company: David M. Chondon, Counsel; Karen G. Hunt, V.P. Human Resources; Erin Chedd, Manager – Industrial Relations.

For the Union: Micheil Russell, Counsel; Janice McClelland, National Representative.

HEARING HELD IN ETOBICOKE, ONTARIO ON OCTOBER 30, 2007.

SUPPLEMENTARY AWARD #3

I. INTRODUCTION

1. I have issued four previous Awards in this matter. I hope and expect that this will be the last one that is required.

2. In first award, styled as "Award – Preliminary Issue" and dated October 30, 2006, I dealt with a dispute about the status of two April 15, 2003 Terms of Settlement documents. I held that paragraphs 4a of the two April 15, 2003 Terms of Settlement attachments to the two April 15 Memoranda of Agreement do not form part of either the "Craft and Services Employees" collective agreement or the Clerical and Associated Employees" collective agreement respectively.

3. In an Award optimistically styled as "Final Award" dated December 6, 2006 I allowed the Craft agreement grievance and dismissed the Clerical agreement grievance. I declared that Expertech violated the Craft agreement between the parties effective May 9, 2003 by refusing to extend the pension plan components of the Bell Canada 2004 VER to its employees under that collective agreement. I ordered Expertech to make the same pension plan components contained in the Bell Canada 2004 VER available to employees covered by the Craft Agreement on the same basis and for the equivalent period of time. I remitted the implementation of the remedy ordered to the parties and remained seized for the purposes of rectification, and to deal with any dispute between the parties concerning the implementation or application of the Final Award, including any issues concerning the scope of the pension plan obligations or any calculations in that respect.

4. In an award styled as "Supplementary Award" dated January 8, 2007, I dealt with two issues put to me by the parties; namely, the VER eligibility timeframe for the remedy ordered for Craft agreement employees, and the effective dates for base pension and enhancement purposes. I held that the relief ordered was intended to put the aggrieved employees in the position that they would have been in if the Bell Canada 2004 VER had

been offered to Craft employees at the time, and that eligibility was to be determined on that same basis. That is, the Craft agreement employees who are eligible for the 2004 VER are those employees who met the eligibility criteria as at December 31, 2004. I also held that eligible employees who elect to take the 2004 VER neither should nor can be penalized for working during the interim period (i.e. while the grievance was being litigated), thereby increasing their basic pension entitlement. The basic pension entitlement for Craft employees who elect to take the 2004 VER in accordance with my Final Award was therefore to be calculated as at their retirement date, but that the effective date for purposes of the enhancements was December 31, 2004 for them as well.

5. "Supplementary Award #2" (dated July 31, 2007) concerned the interplay between the December 6, 2006 and January 8, 2007 Awards and two earlier agreements between the parties: a Workforce Adjustment Agreement and a Severance Agreement, both dated April 17, 2006, and more specifically whether a lump sum payment ($27,000.00) made to employees under paragraph 2(a) of the Workforce Adjustment Agreement had to be returned by the 44 employees (the "group of 44") who had volunteered to retire early under the Workforce Adjustment and Severance Agreements and now wish to accept the VER equivalent ordered in my Final and (first) Supplementary Awards. I held that repayment is not required.

6. A second implementation issue was also flagged by the parties but not dealt with in Supplementary Award #2. It concerns the eligibility for the remedy ordered in my Final and Supplementary Awards of persons who were actively employed in the Craft Agreement bargaining unit during the eligibility period, but who subsequently left employment (other than under the Workforce Adjustment and Severance Agreements) before my Final Award was issued. There are five such employees (the "group of 5"). Four of them retired, and one was discharged. That latter employee has both grieved the discharge and filed an individual VER grievance.

7. In addition to the group of 5 issue, Expertech seeks to dispute the right of the group of 44 to participate in the remedy I have ordered. That is, Expertech asks me to

find that it need not offer an equivalent to the pension plan component in the Bell Canada 2004 VER to the employees in the group of 44. The basis for this request is my reasoning in Supplementary Award #2. Both issues were dealt with at the hearing on October 31, 2007.

II. THE SUPPLEMENTARY AWARD #2 ISSUE

8. I think it best to deal with the group of 44 issue first.

9. Expertech notes that the documentation was incomplete when the lump sum repayment issue was argued on June 20, 2007. Further documentation was filed on consent on October 30, 2007.

10. Counsel submits that the rights of the group of 44 crystallized when they voluntarily retired before the Final Award issued and that they only have the rights that they had when they retired. He says that when these employees retired under the April 17, 2006 Workforce Adjustment and a Severance Agreements they released Expertech from all employment claims except those expressly preserved in those Agreements. Counsel submits that the group of 44 is not eligible for the VER I ordered in my Final Award because the rights that were preserved in that respect were conditional upon Expertech being ordered to offer employees a VER similar to the Bell Canada 2004 VER and in Supplementary Award #2 I said that the VER ordered is not similar to the Bell Canada 2004 VER. Counsel submits that Expertech is not seeking to relitigate the issue because it has not previously been an issue. He concedes that when the parties argued the lump sum repayment issue they proceeded on the assumption that the VER that I awarded was similar to the Bell Canada 2004 VER, but submits that Supplementary Award #2 casts doubt on that assumption such that it is entitled to raise the issue and argue that if the VER is not "similar" within the meaning of the Workforce Adjustment and Severance Agreements paragraph 4 of the former and paragraph 3 of the latter do not preserve a right to the VER remedy I have ordered. Counsel submits that I am not *functus* on this point, and that I am in any event entitled to rectify my decision. In support of his

submissions, counsel took me through various parts of Supplementary Award #2 and referred me to the decisions in *Re Toronto (City) and C.U.P.E., Local 79*, (2002) 70 C.L.A.S. 1 (Simmons); *Re Municipality of Metropolitan Toronto and C.U.P.E., Loc. 79*, (1999) 79 L.A.C. (4th) 226 (Starkman, Chair), *Penelakut Indian Band v. Charlie*, [1994] F.C.J. No. 95 (Federal Cour – Trial Division, B.C.); *Chandler v. Alberta Assoc. of Architects*, [1989] 2 S.C.R. 848 (SCC); and, *Canadian Broadcasting Corporation v. Joyce at al.*, (1997) 34 O.R. (3d) 493 (Ont. Div. Ct.), and to the definition of "rectify" in the Canadian Oxford Dictionary (Second Edition, 2004).

11. Although more fulsomely argued by counsel, the essence of the Union's response is that the Company is "cherry picking" from the words in Supplementary Award #2 and attempting to backtrack on the accepted factual basis for the parties' submissions at the hearing on the lump sum repayment issue in order to create an issue where there isn't one. Counsel submits that paragraph 32 sums up the essence of Supplementary Award #2, and refers to the decisions in *Re Elgin Abbey Nursing Home and S.E.I.U., Loc. 210*, (1999) 78 L.A.C. (4th) 385 (Kirkwood); *Re FMC of Canada Ltd. and U.A.W.*, (1980) 25 L.A.C. (2d) 18 (O'Shea, Chair; *Re Manitoba and M.G.E.U.*, (2003) 116 L.A.C. (4th) 351 (Spivak – Manitoba); *Re Toronto (City) and C.U.P.E., Loc. 79*, (2003) 120 L.A.C. (4th) 225 (Supreme Court of Canada); *Re Federated Co-Operatives and I.W.A.-Canada*, (1996) 59 L.A.C. (4th) 30 (McPhillips – B.C.); and *Re Canada Safeway Ltd. and U.F.C.W., Locals 175 and 633*, (2004) 128 L.A.C. 175 (Keller).

12. Section 18 of the *Canada Labour Code* gives the Canada Industrial Relations Board the power to "review, rescind, amend, alter or vary any order or decision made by it". Section 114(1) of the Ontario *Labour Relations Act, 1995* gives the Ontario Labour Relations Board substantially the same power; namely, to reconsider, vary or revoke any decision, ruling etc. Neither piece of legislation gives arbitrators any such power. This raises the issue of *functus officio*. An arbitrator is *functus* once he has determined the merits of the issue(s) referred to him. The general rule is that once he has issued a final decision in a matter with which he is seized an arbitrator cannot revisit that decision because he has changed his mind, made an error within jurisdiction, or he becomes aware

of a change in circumstances, unless he has made a slip in writing the decision or the decision contains an error that misstates or confuses the manifest intention of the decision (see, for example, *Chandler v. Alberta Assoc. of Architects, supra,* and *Canadian Broadcasting Corporation v. Joyce at al., supra*). That is, an arbitrator has only the power to rectify a final decision. To rectify is to "correct, amend or adjust to make right something that is erroneous or doubtful". As Arbitrator Kirkwood put it in *Re Elgin Abbey Nursing Home, supra,* at page 389:

> … the jurisdiction of an arbitrator after the issuance of a final award is very narrow… an arbitrator cannot, after the issuance of an award, decide matters which were not submitted at the hearing, cannot add to or expand the award, but merely complete the award, if necessary, by directing what is lacking to effect the remedy…

13. Within the broad legislated parameters and any lawful restrictions in a collective agreement, arbitrators are the masters of their own procedure. As such they have the power and an obligation to prevent any abuse of process in their proceedings in the interests of finality and to preserve the integrity of the process. This includes prohibiting a party or its privy from relitigating an issue already determined by a tribunal of competent jurisdiction, even where the technical requirements of *res judicata* or issue estoppel are not met (see, *Re Toronto (City) and C.U.P.E., Loc. 79, supra* at pages 246-251), or to prevent "installment litigation" (see, *Re Federated Co-Operatives, supra*, at page 40).

14. The cases cited stand for the proposition that unless the collective agreement specifies otherwise the union party to the agreement "owns" the grievance and arbitration and is entitled to decide whether or not to pursue a grievance in order to protect its own collective agreement interests, regardless of the wishes of the bargaining unit employee(s) affected. However, to the extent a bargaining unit employee has released the employer from claims that could be pursued in a grievance that the union continues to pursue no personal remedy can be obtained for that employee.

15. In Supplementary Award #2 I wrote (in part) as follows:

> 4. Subsequently, issues arose concerning the VER eligibility timeframe for Craft Agreement employees and the effective dates for base pension and enhancement

purposes under the VER which I had ordered be made available to Craft Agreement bargaining unit employees. I held, in paragraphs 4-6 of the Supplementary Award, that:

> 4. The relief ordered was intended to put the aggrieved employees in the position that they would have been in if the Bell Canada 2004 VER had been offered to Craft employees at the time, as I determined it should have been.
>
> 5. The intent of the Final Award was that eligibility therefore be determined on that same basis. That is, the Craft Agreement employees who are eligible for the 2004 VER are those employees who met the eligibility criteria as at December 31, 2004 (see, paragraph 16 of the Final Award).
>
> 6. As for the second question, eligible employees who elect to take the 2004 VER will have worked during the interim period (i.e. until I determined the matter) and their basic pension entitlement may be greater now than it was as at December 31, 2004. They neither should nor can be penalized for this. Accordingly, the basic pension entitlement for Craft employees who elect to take the 2004 VER in accordance with my Final Award must be calculated as at their retirement date. However, for the same reasons as in the case of the eligibility time frame, December 31, 2004 is the effective date for purposes of the enhancements that are part of the 2004 VER.

…

8. Some 44 bargaining unit employees volunteered to retire under the Workforce Adjustment and Severance Agreements before I issued my Final Award. A dispute has arisen concerning the $27,000.00 lump sum payable under paragraph 2(a) of the Workforce Adjustment Agreement, and more specifically whether this sum must be returned by employees who volunteered to retire early under the Workforce Adjustment and Severance Agreements and now wish to avail themselves of the VER equivalent that must be offered to employees in accordance with my Final and Supplementary Awards.

9. Expertech has taken the position that paragraph 4 of the Workforce Adjustment Agreement and paragraph 3 of the Severance Agreement require any employee who voluntarily retired under those agreements to return the $27,000.00 lump sum they received under paragraph 2(a) of the Workforce Adjustment Agreement if they now wish to accept the VER that must be offered in accordance with my Final and Supplementary Awards.

…

11. Expertech submits that the Union's interpretation is absurd and inconsistent with the language of the Workforce Adjustment and Severance Agreements. Counsel says that I got it right when I wrote in my April 25, 2007 letter that the purpose of paragraph 4 of the Workforce Adjustment Agreement and paragraph 3 of the Severance Agreement was to ensure that any employee who voluntarily retired pursuant to the agreements did so without prejudice to the right to claim a greater benefit if one was obtained in litigation. Counsel submits that the intention was that the $27,000.00 lump sum payment would have to be repaid if any greater benefit was obtained in either the CIRB or the arbitration proceedings. Expertech has obtained an actuarial calculation (which the Union has not had an opportunity to verify) of the additional value of the VER being

offered in accordance with my Final and Supplementary Awards compared to that received under the Workforce Adjustment and Severance Agreements. This calculation purports to show an additional VER value that ranges from $569.00 to $115,000.00 (the median being $61,500.00) for the 44 employees in issue. (These figures include an amount for Additional Guaranteed Temporary Pension ("AGTP") payable as a bridge to regular pension at age 65.)

12. Expertech observes that these are sophisticated parties and that if they had intended that the paragraph 4 Workforce Adjustment Agreement and paragraph 3 Severance Agreement deduction be made only from a cash payment component they would have said so. Counsel reminds me of my observation in paragraph 30 of my Final Award that "A party cannot be excused from the bargain it has made merely because it turns out to be expensive or difficult to comply with it." He submits that the fact that the result may be complex or administratively difficult is irrelevant in this case, and that if I accept the Union's interpretation the 44 employees will in fact enjoy a windfall of $27,000.00. Counsel also reminds me that any of the 44 employees who accept the VER offered in accordance with my Final Award will also have the benefit of up to an additional 14 months service and salary as a result of my Supplementary Award. Expertech submits that its interpretation of the Workforce Adjustment and Severance Agreements is the only possible one.

13. Expertech also argues that if the VER it has offered is similar to the Bell Canada 2004 VER and benefit under that plan is greater than under the Workforce Adjustment and Severance Agreements, as it submitted the actuarial calculations demonstrate it is, then the $27,000.00 lump sum payment must be deducted, and if it is not similar it does not have to be offered to these 44 employees.

III. DECISION

14. I agree with the Union for the following reasons.

15. I begin by summarily disposing of Expertech's last three points. First, notwithstanding the often pejorative use of the term, the issue is not whether the 44 employees who volunteered to retire early under the Workforce Adjustment Agreement will receive a windfall unless they are required to return the $27,000.00 lump sum payment that they received under that agreement. Windfall or not, the question is whether they are entitled to keep that payment if they accept the equivalent to Bell 2004 VER offer that the Company is required to make to them.

16. Second, the benefit of the additional service and salary that these employees received is irrelevant. The employees have earned that benefit, and it has nothing to do with the lump sum payment in issue.

17. Third, I have ordered Expertech to make the same pension plan components contained in the Bell Canada 2004 VER available to employees covered by the Craft Agreement on the same basis and for the equivalent period of time. Accordingly, Expertech has no choice but to make that offer to eligible employees who have previously accepted the voluntary retirement invitation reflected in the Workforce Adjustment Agreement and Severance Agreements. There is no issue of "similarity" in that respect.

…

22. Although the parties have focused on whether what I have ordered Expertech to offer to employees is "similar" to the Bell Canada 2004 VER such that the lump sum payment received under the Workforce Adjustment Agreement must be returned, there are really two parts to the issue. First, is what I have ordered Expertech to offer to Craft Agreement employees "similar" to the Bell Canada 2004 VER such that paragraph 4 of the Workforce Adjustment Agreement and paragraph 3 of the Severance Agreement are engaged? Second, what do the words "less any payment received" in paragraph 4 of the Workforce Adjustment Agreement and "less any lump sum allowance received" in paragraph 3 of the Severance Agreement mean or require?

23. In the absence of any suggestion to the contrary (and there is none), I must assume that the parties intended the plain and ordinary meaning of the words they chose. Unfortunately, the plain and ordinary meaning of the word "similar" is imprecise. "Similar" means "related in appearance or nature; alike though not identical". It is a virtual synonym for "resembling", and does not mean "the same as", except when "same" is used loosely. Sometimes parties purposely use words loosely in order to achieve an agreement. Is that what these parties did in the Workforce Adjustment and Severance Agreements? I don't know. But I consider it likely that a practical approach more closely mirrors the parties' approach at the time they entered into the Workforce Adjustment and Severance Agreements than a technical approach does.

24. There is undoubtedly some similarity between what I have ordered Expertech to offer to Craft Agreement employees, including the 44 who accepted the offer in the Workforce Adjustment and Severance Agreements as aforesaid, and the Bell Canada 2004 VER. But the similarity is only partial. I did not order Expertech to offer Craft employees "a VER/ERIP similar to that previously provided by Bell Canada to its employees". I ordered only that *pension plan components* the same as those in the Bell Canada 2004 VER package be made available. That is, I only ordered that an equivalent to the pension plan part of the Bell Canada 2004 VER be offered to the Craft employees.

25. Although the pension component was undoubtedly of primary importance in the Bell Canada 2004 VER, the non-pension components were also significant. That is also the case for the Workforce Adjustment and Severance Agreements between these parties. It is not enough to compare part of the Bell Canada 2004 VER to what I awarded in my Final and Supplementary Awards in order to determine whether they are "similar" for purposes of the Workforce Adjustment and Severance Agreements. For "similarity" purposes I consider it appropriate to compare the two voluntary retirement "packages" as a whole, because I consider it more probable than not that that is what the parties would have said they intended if that had been asked that question when they entered into the Workforce Adjustment and Severance Agreements before the hearing in this matter began.

26. The parties entered into the Workforce Adjustment and Severance Agreements well before the hearing in this proceeding began. There is no indication that the Company was then aware of precisely what remedy the Union was seeking, and more specifically that the Union was not asking that I award any of the non-pension plan components, including any equivalent to the "Special Cash Allowance" non-pension component of the Bell Canada 2004 VER. The remedy that the Union obtained for Craft Agreement employees is limited to what it asked for; namely, an equivalent to the pension component of the Bell Canada 2004 VER. Assuming that Expertech's

calculations are accurate, the VER pension that I have ordered has a greater value to employees than pension component of the Workforce Adjustment and Severance Agreements package. As such it is a "greater benefit" for the 44 employees. However, the greater benefit available to them as a result of my Final and Supplementary Awards is limited to that better pension arrangement or component. But that is not the issue. The issue is whether the VER remedy that I have ordered is similar to the Bell Canada 2004 VER.

27. The pension plan component of the remedy that the Union has obtained in this proceeding is "similar" to the pension plan component of the Workforce Adjustment and Severance Agreements. Indeed, it is the same. But the pension plan component is the entire remedial package in this case. I am satisfied that the VER remedy that the Union has obtained in this case is more dissimilar than it is "similar" to the Bell Canada 2004 VER package because the latter consisted of both pension and non-pension components. By itself, this causes me to me to seriously doubt that the parties intended that this degree of similarity would be sufficient to engage paragraph 4 of the Workforce Adjustment Agreement and paragraph 3 of the Severance Agreement. The answer to the second question confirms that that was not their intention.

…

30. The parties did not agree in either the Workforce Adjustment Agreement or the Severance Agreement that eligible employees would have access to any ordered VER "less the lump sum payment of $27,000.00 received pursuant to paragraph 2 a) above." If they had agreed to those or other words to that effect, Expertech could have a point. But they did not. The parties agreed that employees who voluntarily retired under the Workforce Adjustment and Severance Agreements did so without prejudice to a right to participate in any VER remedy obtained at arbitration or from the CIRB, but that any offer required to be made in that respect would be less any payment/lump sum allowance received "as contemplated in paragraph 2 a)" (emphasis added) in both agreements. What did the parties contemplate?

31. I am satisfied that when they arrived at the April 17, 2006 Workforce Adjustment and Severance Agreements before the hearing in this matter began the Union's litigation strategy was not yet fully formed (indeed there is no indication that Mr. Russell was involved in the process that led to them), and that what the parties contemplated was the possibility that a lump sum payment "similar" to the $27,000.00, and to the "Special Cash Allowance" that was part of the Bell Canada 2004 VER package, might be awarded as part of a remedy ordered by an arbitrator or the CIRB. It is apparent from the structure of the Bell Canada 2004 VER that the non-pension "Special Cash Allowance" was intended as provide an added inducement to employees to apply for that VER. It is apparent from the phrasing of the Severance Agreement that the purpose of the lump sum payable under the Workforce Adjustment Agreement was the same; namely, to provide an additional non-pension inducement to eligible employees to volunteer to retire and make it more likely that a sufficient number of employees would be enticed to volunteer to retire to meet the Expertech's workforce reduction objective. That is what the provisions of the Workforce Adjustment and Severance Agreements clearly indicate, and that is the non-pension payments' only connection to the pension component. The $27,000.00 lump sum payable under the Workforce Adjustment Agreement is "similar" to the "Special Cash Allowance" offered as part of the Bell Canada 2004 VER. There is nothing "similar" to this in the VER remedy that I have awarded.

> 32. In the result, I am satisfied that the parties meant and intended that "less any payment received" in paragraph 4 of the Workforce Adjustment Agreement have the same meaning as "less any lump sum allowance received" in paragraph 3 of the Severance Agreement, and that the parties intended only that any "similar" lump sum payment awarded as part of any VER remedy obtained by the Union from an arbitrator or the CIRB would be deducted form the $27,000.00 already received so as to preclude any duplication of the inducement in that respect.
>
> 33. **I THEREFORE DECLARE THAT** Craft Agreement employees who volunteered to retire in accordance with the Workforce Adjustment and Severance Agreements <u>are not required to return the $27,000.00 lump sum payment</u> that they received in that respect if they accept the equivalent to Bell Canada 2004 VER pension plan offer that I have ordered Expertech to make.
> …
>
> (Italicized emphasis supplied; underlined emphasis added.)

16. The fact that the documentation on the group of 44 was incomplete when the lump sum payment issue was argued is irrelevant. No one sought an adjournment. The parties were content to proceed without it, and they were right to do so because the documentation that flowed from the Workforce Adjustment and a Severance Agreements was all subject to the preservation of rights in those agreements (i.e. paragraph 4 of the Workforce Adjustment Agreement and paragraph 3 of the Severance Agreement).

17. It should be apparent from this lengthy excerpt from Supplementary Award #2 that Expertech's primary position at the hearing on June 20, 2007 was that any employee who retired in accordance with the Workforce Adjustment and Severance Agreements had to repay the lump sum payment they received if they wanted to participate in the remedy I ordered in the December 6, 2006 Final Award (see in particular paragraphs 9 and 12). This submission assumed that the VER remedy I have ordered is similar to the Bell Canada 2004 VER. However, in order to emphasize its primary submission Expertech also specifically argued that if the VER ordered is similar to the Bell Canada 2004 VER and the benefit under the ordered VER is <u>greater</u> than under the Workforce Adjustment and Severance Agreements the lump sum payment had to be deducted (or repaid), and if not similar it did not have even have to be offered to the group of 44 (see paragraph 13). Although this point was not developed further, it was made and could

have been pursued further. Further, if the point was to be made, that was the time to make it.

18. For these reasons, I am satisfied that it would be inappropriate and an abuse of process to permit Expertech to raise the issue of the group of 44's right to participate in the remedy ordered at this late stage. Further and in any event, Supplementary Award #2 constitutes a final decision on the lump sum payment issue and I have no jurisdiction to alter that decision even if I think I got it wrong. Expertech's request in that respect is therefore denied.

19. However, I do not think that I got it wrong. The issue arises because Supplementary Award #2 is poorly written. When I write an award I try to say what I mean so that the parties understand what I have determined and my reasons for doing so. Upon re-reading Supplementary Award #2 I am dismayed to find that I failed to do so in this case and that instead of providing a proper explanation for my determination of the lump sum issue, the award created confusion and an additional problem for the parties. The lessons I take from this humbling experience is that simple and concise is often best, and that when writing an award speed should not be the primary objective.

20. I consider it appropriate to rectify the award in that respect.

21. I begin by confirming that at the hearing on June 20, 2007 there was no dispute that the group of 44 is entitled to participate in the VER remedy ordered. The dispute between the parties and their focus at that hearing, and therefore also my focus in Supplementary Award #2, was on the lump sum payment, and more specifically whether it had to be accounted for (i.e. "repaid" in some way) by any of the group of 44 who seek to participate in the remedy.

22. I agree with counsel for Expertech that the Workforce Adjustment and Severance Agreements preserved only the right of employees to participate in any remedy ordered in this proceeding if it included a VER similar to the Bell Canada 2004 VER, less any

payment "contemplated by" the Workforce Adjustment and Severance Agreements. Any release or other document signed by an employee who retired early in accordance with the Workforce Adjustment and Severance Agreements could not have the effect of altering the terms of those agreements unless it specifically said so. There can be no doubt that the parties contemplated that employees who retired early in accordance with the Workforce Adjustment and Severance Agreements did so without prejudice to their right to participate in any remedy ordered in this proceeding that provided a greater benefit than the Workforce Adjustment and Severance Agreements. That is the most sensible interpretation of the operative provisions of the Workforce Adjustment (paragraph 4) and Severance (paragraph 3) Agreements. It is also what I wrote in my April 25, 2006 letter to the parties in that respect, and with which Expertech has never taken issue. Accordingly, my musing in the third sentence of paragraph 20 of Supplementary Award #2 was inappropriate and misleading.

23. But the real problem begins with paragraph 22 of Supplementary Award #2, culminates in paragraph 27, and is exacerbated by paragraph 31.

24. The dispute between the parties at the hearing on June 20, 2007 came down to this. Expertech's position was that as a result of the December 6, 2006 Final Award there are two mutually exclusive early retirement packages available to the group of 44 and that they have to pick one or the other. That is, employees who opted to retire under the Workforce Adjustment and a Severance Agreements could either stick with that package or they could opt to take the VER I have ordered, but they could not take part of the former (i.e. the $27,000.00 lump sum payment) and also the VER ordered. The Union agreed that the parties intended the similarity comparison to be between the two VER packages, including the pension and non-pension components. However, (although counsel did not put it quite this way) the Union's position was that the parties intended a component to component comparison, such that any lump sum allowance awarded in this case would replace the lump sum paid under the Workforce Adjustment and a Severance Agreements to prevent any duplication in that respect, and not count against the pension component awarded.

25. The combined effect of the Final Award (paragraph 40) and the first Supplementary Award (paragraph 5) is that Expertech is required to offer pension benefits equivalent to those in the Bell Canada 2004 VER to all Craft agreement employees who met the eligibility criteria as at December 31, 2004 on the same basis.

26. In retrospect it was inappropriate and misleading to divide the single question that the parties had put to me into two questions in the way I did in paragraph 22 of Supplementary Award #2. The only question was: Do employees who took early retirement under the Workforce Adjustment and a Severance Agreements, and who meet the eligibility criteria for and wish to participate in the VER remedy ordered, have to repay (or otherwise account for) the lump sum allowance they received as part of the Workforce Adjustment and a Severance Agreements package?

27. I became lost in my own words in paragraphs 24-26 of Supplementary Award #2. Instead of paragraphs 24-26 a single paragraph would have been a sufficient and more accurate reflection of my reasoning and intent. What I intended and should have said is what flows from paragraph 23 of Supplementary Award #2, as follows.

28. "The Bell Canada 2004 VER consisted of pension plan and non-pension plan components. The Union claimed and I ordered that an equivalent to the pension plan component be offered to eligible Craft agreement employees. Although the non-pension plan component was undoubtedly significant, the pension plan component was undoubtedly of primary importance in the Bell Canada 2004 VER. Accordingly, although what I ordered was not the 'same as' the Bell Canada 2004 VER, its primary component is identical and therefore satisfies the similarity requirement in the Workforce Adjustment and a Severance Agreements."

29. As for paragraph 27 of Supplementary Award #2, there is an obvious error in the first sentence. The question of similarity concerned the remedy I ordered and the Bell Canada 2004 VER, not the Workforce Adjustment and a Severance Agreements.

Accordingly, the reference in the first sentence should clearly be to the Bell Canada 2004 VER, not to the Workforce Adjustment and a Severance Agreements. Further, I misspoke in the rest of that paragraph. What I wrote is inconsistent with and does not flow from paragraphs 23-26 as written in Supplementary Award #2, or with paragraph 23 and the single paragraph that I intended as aforesaid. That is, the dissimilarity (i.e. the absence of any non-pension plan component) does not detract from the similarity between the VER remedy I have ordered and the Bell Canada 2004 VER within the plain and ordinary meaning of the concept as described in paragraph 23 of Supplementary Award #2. In other words, I lost my focus and failed to express my real intent. That that is so is demonstrated by the analysis in paragraphs 28-30 and the conclusion in paragraph 32 of Supplementary Award #2.

30. However, paragraph 31 could also be improved in order to reflect my true intent. More specifically, significant parts of it are superfluous and misleading. It would have been sufficient and much clearer if I had simply written that paragraph as follows:

> 31. I am satisfied that when they arrived at the April 17, 2006 Workforce Adjustment and Severance Agreements before the hearing in this matter began the parties contemplated the possibility that a lump sum payment "similar" to the $27,000.00, and to the "Special Cash Allowance" that was part of the Bell Canada 2004 VER package, might be awarded as part of a remedy ordered by an arbitrator or the CIRB. It is apparent from the structure of the Bell Canada 2004 VER that the non-pension "Special Cash Allowance" was intended as provide an added inducement to employees to apply for that VER. It is apparent from the phrasing of the Severance Agreement that the purpose of the lump sum payable under the Workforce Adjustment Agreement was the same; namely, to provide an additional non-pension inducement to eligible employees to volunteer to retire and make it more likely that a sufficient number of employees would be enticed to volunteer to retire to meet the Expertech's workforce reduction objective.

III. REGARDING PERSONS WHOSE EMPLOYMENT CEASEDBEFORE THE FINAL AWARD ISSUED

31. I now turn to the issue of the group of 5.

32. Andrew Ames, Daniel Stuart, Jean Pierre Arbour and Rejean Lague retired from Expertech effective July 31, 2005, Sept 30, 2006, August 31, 2005 and November 30, 2006 respectively. Rick Wilkins was fired on November 13, 2006. None of them have signed any release of claims against Expertech. All of them were Craft agreement bargaining unit employee as at December 31, 2004, the eligibility date for purposes of the remedy ordered in this proceeding.

33. The Union submits that everyone in the group of 5 is entitled to participate in the VER remedy ordered in accordance with the general remedial theory that employees should be put as closely as possible in the position they would have been in if the collective agreement had not been violated. The Union submits that the eligibility date in that respect for all employees is December 31, 2004, and that the fact that an employee retired, quit, died, or was discharged, laid off or had his employment terminated in any way is irrelevant. Counsel posited the example of what he asserts is an analogous earned benefit situation; namely, that in the event of a collective agreement dispute concerning the proper rate of pay in a particular overtime situation employees who were paid at what was determined by an arbitrator to be an improper lower rate for overtime they worked but who were permanently laid off before the arbitrator issued the decision would be entitled to participate in any compensation remedy awarded. The Union relies on the decisions in *Re Penticton and District Retirement Service and Hospital Employees' Union, Local 180*, (1977) 16 L.A.C. (2d) 97 (B.C.L.R.B. - P.C. Weiler, Chairman); *Re Leamington Bd. Of Police Com'rs and Police Assoc.*, (1982) 9 L.A.C. (3d) 67 (Saltman); and, *Re Durham Memorial Hospital and L.D.S.W.U., Loc. 220*, (1991) 19 L.A.C. (4th) 320 (Kaufman, Chair).

34. Expertech submits that the four employees in the group of 5 chose to voluntarily retire before the Final Award issued notwithstanding that they knew or ought to have known about this proceeding, and that their rights under the collective agreement crystallized when their employment terminated effective the date that they retired. Counsel observes that there is nothing in these individuals' retirement documents that purported to preserve any right to participate in any remedy ordered in this proceeding.

Expertech says that the fired fifth employee in the group of 5 stands in no different position subject to the determination of his discharge grievance.

35. The cases cited by the Union (and the Ontario Court of Appeal decision in *Mackey et al. v. City of London et al.*, [1953] O.W.N. 987) are all collective agreement retroactivity cases. They stand for the proposition that unless the parties specifically agree otherwise, or the result would be absurd, unfair, impractical or clearly unintended, all terms of a collective agreement apply retroactively to all employees during the period covered by the collective agreement in issue, including employees whose employment ceased during the retroactivity period. This has primarily applied to applied wages and benefits that accrue on the basis of time worked. Although the analysis in this jurisprudence is helpful it does not directly address the issue before me.

36. I was not referred to any decisions that deal directly with the issue before me. Perhaps that is because the answer is obvious. As I held in the (first) Supplementary Award, the purpose of the remedy ordered is to put Craft agreement employees in the position that they would have been in if the Bell Canada 2004 VER had been offered to Craft employees at the time, as it ought to have been under the provisions of the Craft agreement, and that eligibility is therefore determined on that same basis. To illustrate the remedial theory, take the example of an employee who grieves that he has been paid at a wage rate lower than he was entitled to under a collective agreement and who quits or is fired before the grievance can be brought to arbitration and has not signed any release documents. Is there any doubt that the union is such a case is entitled to continue to pursue the grievance and that the employee is entitled to an individual remedy if the grievance succeeds? Or what if an employee quits or is fired (and signs no release) before the crew he was part of is awarded a productivity bonus for work performed while he was part of the crew. Is there any doubt that he would be entitled to his share of that bonus? I can discern no material difference in this situation, where the issue concerns entitlement to an earned pension benefit based on age and service eligibility criteria.

37. In the normal course collective agreement rights crystallize upon the termination of the employment relationship. But this crystallization is subject to the collective agreement retroactivity principles as aforesaid, and to a retroactive crystallization of rights pursuant to a rights arbitration award. In this case, the rights of all Craft agreement employees crystallized on December 31, 2004 pursuant to my determination of the merits of the grievance under that agreement. Except to the extent that employees agreed otherwise (by release of claims, for example), anything that happened after that date is irrelevant. Any employee who would have met the eligibility requirements of the Bell Canada 2004 VER on December 31, 2004 is eligible to participate in the VER ordered to remedy the violation of the collective agreement in this case.

38. I am therefore constrained to find for the Union on the group of 5 issue. Accordingly,

> **I DECLARE THAT** Andrew Ames, Daniel Stuart, Jean Pierre Arbour, Rejean Lague and Rick Wilkins are entitled to participate in the remedy ordered in this proceeding if they met the VER eligibility requirements as at December 31, 2004.
>
> **I THEREFORE ORDER EXPERTECH** to make the same equivalent to Bell Canada 2004 VER offer to Andrew Ames, Daniel Stuart, Jean Pierre Arbour, Rejean Lague and Rick Wilkins in the same manner as to other Craft agreement employees pursuant to my previous orders in this proceeding.

39. I note that the Union undertook to withdraw the Wilkins discharge grievance if this result was obtained. **I THEREFORE ORDER THE UNION TO DO SO.**

DATED AT TORONTO THIS 3RD DAY OF DECEMBER 2007.

George Surdykowski

Digitally signed by George Surdykowski
DN: cn=George Surdykowski, c=CA, o=George T. Surdykowski Arbitration / Mediation Inc., email=surdyfaub@sympatico.ca
Date: 2007.12.03 09:28:35 -05'00'

George T. Surdykowski – Sole Arbitrator