IN THE MATTER OF AN ARBITRATION

PURSUANT TO SECTION 9.1 OF THE
MEMORANDUM OF AGREEMENT OF NOVEMBER 15, 2007

BETWEEN:

**ALBERTA TEACHERS' ASSOCIATION**
(the "Association")

Claimant

- and -

**PROVINCE OF ALBERTA**
(the "Province)

Respondent

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**A W A R D**

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**BEFORE:**

Andrew C.L. Sims, Q.C. ..... Arbitrator

**REPRESENTATIVE OF THE PROVINCE OF ALBERTA**

Graham McLennan, Q.C. ..... Counsel
Stuart Chambers ..... Co-counsel
Randy Clarke ..... Director, Workforce Planning, Dept. of Education

**REPRESENTATIVE FOR THE ATA**

James Casey, Q.C. ..... Counsel
Anne Cote ..... Co-counsel
Gordon Thomas ..... Executive Secretary
Ernie Clintberg ..... Associate Executive Secretary
Sharon Vogrinetz ..... Coordinator, Teacher Welfare

**HEARD in Edmonton, Alberta on January 23, 2010**

**AWARD ISSUED on February 2, 2010**

# AWARD

The question in this arbitration is:

> What percentage increase, as of September 1, 2009, does the contract between the ATA and the Government of Alberta provide for teachers under clause 3.3 of that agreement?

This question requires a legal interpretation of the agreement, based on agreed upon facts. The arbitrator is given no discretion to establish the amount, only to ascertain the parties' intention as expressed in their agreement. That agreement includes the following formula:

> 3.3 For the remaining four years of the five-year terms, commencing 2008 09 01, the percentage increase will be the December 31 year-over-year increase to the Alberta Average Weekly Earnings Index as provided in Appendix B, but in no circumstances less than zero.

Appendix B provides

> Alberta Average Weekly Earnings*
>
> The increase for September 1, 2008, will be calculated by comparing the average of earnings for Alberta from January 1, 2007 to December 31, 2007, to the average of earnings for Alberta from January 1, 2006 to December 31, 2006, and so forth for each subsequent year.
>
> *The average weekly earnings for Alberta (based on the Statistics Canada Survey of Employment, Payrolls and Hours), unadjusted for seasonal variation, by type of employee for selected industries classified using the North American Industry Classification System (NAICS), monthly (Dollars) (281-0026).

The parties agree, and Statistics Canada's Table 281-0026 confirms, that:

> 19. From March 31, 2009 (including on September 1, 2009), the revised Table 281-0026 indicated that the AAWE increase of the average earnings for the year 2008 over 2007 was 5.99%.

Statistics Canada has in the past and continues to publish an index called the Alberta Average Weekly Earnings ("AAWE") Index. That index is calculated from another Statistics Canada Product, the Survey of Employment, Payroll and Hours ("SEPH"). The SEPH, in turn, is compiled using the North American Industry Classification System ("NAICS").

With the release of January 2009 data on March 31, 2009, Statistics Canada altered its estimation methodology for SEPH. This change in methodology resulted in Alberta Average Weekly Earnings figures, from then forward, that were higher, for Alberta at least, than might

have ensued had the old methodology been maintained. This is known because Statistics Canada, by that point, had issued enough preliminary data to show what the 2007-2008 year over year increase would have been under the former methodology.

The Government of Alberta takes the position that the agreement only calls for the increase that would have been yielded under the unrevised method of calculating the AAWE. The Alberta Teachers' Association takes the position that the language the parties used commits them to use the Statistics Canada Alberta Average Weekly Earnings Index and there is no basis for using any other figure. The difference is significant. The year over year figure under the previous estimation method was 4.82% whereas under the new estimation method it was 5.99%. The parties agree that:

> 34. The dollar impact of the difference between an AAWE of 4.82% and 5.99% for teacher salaries for the 2009/2010 school year is approximately $30 million. The Department of Education's budget for the 2009/2010 school year is approximately $5.6 billion.

The parties thus have a significant difference as to the interpretation, application or operation of the agreement. Clause 9 of that agreement provides:

> 9. Arbitration
>
> 9.1 The Parties agree that any disputes with respect to the interpretation, application or operation of this Memorandum of Agreement, shall be referred to arbitration in accordance with the *Arbitration Act*, R.S.A. 2000, c.A-43.

Again, it is worth emphasizing that, in an arbitration of this kind, unlike a labour relations interest arbitration, the task is not to decide what the increase ought to be. Rather the task is to decide what the parties themselves meant when they wrote their contract. Given the impact this decision may have on Provincial finances, the budgets of school boards throughout the Province, and the salaries of teachers employed by the boards, both parties were anxious to have a decision as soon as possible. They presented the case based on a carefully crafted agreed statement of facts without *viva voce* evidence and they asked for an expedited award. Each provided extensive and helpful briefs of law, for which I am grateful.

## Summary of Arguments

The parties' arguments may be grouped in summary fashion as follows:

1. **Clear and Unambiguous**. The ATA says the parties' agreement is clear and unambiguous. No parol evidence is relevant to alter these terms. Both parties agree the arbitrator may look at the whole of the agreement and at the "genesis and aim of the agreement" or, as it is sometimes called, "the factual matrix" in which it was negotiated. The Province urges an interpretation that favours commercial certainty.

2. **Latent Ambiguity**. The Province argues that Statistics Canada's alteration of its SEPH methodology exposes a latent ambiguity. That is, two possible meanings exist for SEPH. The Province says the methodology in use at the time the contract was made prevails, and creates commercial certainty. The ATA says there is no ambiguity; certainty favours continued use of the reported index, and an arbitrator should not add something the parties could have, but did not, include in their agreement.

3. **Implied Term**. The Province says a term is to be implied into the agreement that, in the event of changed methodology in calculating the AAWE, the methodology in use at the date of the agreement would continue to be used. The Province says commercial certainty favours such a term, which the ATA disputes. The ATA asserts there is no need or reason to imply a term and to do so would be to rewrite the parties' bargain.

4. **Trigger Date**. The Province argues that, for this year, the parties used the AAWE preliminary data to prepare for the increases in question. The ATA did not seek to alter last year's increase, which on the basis of Statistics Canada data it might have done. September 1st is not a "trigger date" in the way the ATA asserts.

5. **Subsequent Conduct**. Both parties cite subsequent conduct to show (a) what happened to a similar formula for MLA's; (b) how the parties handled the prior year's increase; and (c) what they did in their pre-arbitration efforts to resolve these matters. The parties disagree as to the extent this information is relevant.

## The Agreed Facts and Parol Evidence

The agreed facts run 34 paragraphs and append twenty documents. Both parties have argued that certain of that evidence is not relevant in interpreting the agreement.

The Province, in its submission at para. 42 suggests that "the Association's submissions under this heading [parol evidence] … are somewhat confusing as the parties have bound themselves by an Agreed Statement of Facts, and the Association has relied on evidence outside the scope of the MOA in its submission."

Both parties acknowledge that the facts in the agreement are properly before me. Both, in making sometimes alternative submissions, speak to the weight or influence particular evidence should carry in this interpretative task. While their submissions sometimes refer to the admissibility of certain evidence, I take those submissions as going to the relevance or weight to be attributed to such agreed facts, not any resiling from the agreement itself. The footnote at paragraph 7 of the *Eco-Zone* decision describes a common conundrum:

> Although stated in terms of admission of parol evidence it is often difficult to determine, absent the evidence, whether it might be admissible as, for example, an exception to the rule. On some occasions the trial judge must hear the evidence and subsequently rule as whether it is to be considered in deciding the issue at trial (See, for example, *Corey Developments Inc. v. Eastbridge Developments (Waterloo) Ltd.* (1997), 34 O.R. (3d) 73 (Ont. Gen. Div.)).
>
> *Eco-Zone Engineering v. Grand Falls – Windsor (Town)* 2000 NFCA 21

The parties' agreement to certain facts does not involve any abandonment of their right to argue their "admissibility" in the sense of their appropriateness as points to be considered in deciding the issues. All the evidence is properly before the arbitrator, by agreement. Its relevance to the issues to be decided, and the weight to be given to certain evidence remains to be decided. Both parties confirmed this understanding at the in-person hearing.

The parties also differed somewhat on a couple of characterizations of the agreed facts which can be disposed of at the outset.

The ATA, in its written submission suggests the parties wished to have the increases, over the last four years of the MOA, "reflect those wage increases earned by the average Albertan." The Province says there is no evidence of any such intent; the only intent was to rely on the AAWE as it was calculated in November 2007. The parties agreed on Article 33 and Appendix B. It does not help to say "those wages earned by the average Albertan." That is what AAWE purports to measure or at least estimate, however, it is the index itself, not the description of the index's objective, that was agreed upon. The Province's addition of the words "as it was calculated on November 2007" is the nub of the difference between the parties. In essence, the question is whether the parties intended to contract for the Statistics Canada <u>result</u> as expressed in the index table, or for the Statistics Canada <u>methodology</u> in use at the time.

The ATA further argues that the parties agreed to make Statistics Canada responsible for arriving at a final and binding determination of their contract. At one point they described this as "delegating the task of making these calculations to Statistics Canada". In my view this is unlike a delegation, or a submission to valuators or arbitrators. The parties, with no agreement or consent on Statistics Canada's part, agreed to adopt a specific Statistics Canada index as the agreed upon reference point upon which their formula for future wage increases would be based.

The nature of the Statistics Canada index is discussed in more detail below. However, it is important to recognize that this is a specific Statistics Canada product, produced and updated regularly for broad public use, in no way designed for, or in any way tied to, the wants or needs of these particular parties. This is not a case of Statistics Canada not doing what the parties asked them to do, or doing it differently than they were asked to do. This argument is in reality just one aspect of the ATA's argument that an index, which may be fluid as to underlying methodology, is not, as a result, ambiguous. That argument is addressed below. The point made here is that the contract adopts something Statistics Canada was independently expected to continue to produce. It did not delegate anything to Statistics Canada in the sense that term is customarily used.

## Principles of Contractual Interpretation

The ATA's position relies on principles of contractual interpretation with which, in large part, the Province agrees, differing only in their application to this case. Nevertheless it is important to set out those principles as a starting point.

Contract law strives for certainty. The reason contracting parties set out their promises in writing is so that they can each know with precision what they have agreed to. It is so those judges or arbitrators charged with interpreting their contracts, will know, from the words they have used, what their intentions were in making their deal.

Professor Fridman has described the basic principle of contract law this way:

> It is for the parties to use such language or employ such conduct as will make plain that they intended to contract. Once they have done so, they will be bound thereby, even if the result is unreasonable. This was stated emphatically by the Supreme Court of Canada in *Steel Co. of Canada v. Willand Management Ltd.* [1966] S.C.R. 746.
>
> G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto: Carswell, 2006) at 18

The learned author expanded on this at page 440 of that same text:

> (c) The interpretation of express terms
>
> The fact that all or many of the different aspects and obligations of the contract have been expressly stipulated evidences the importance placed by the parties upon the language which they have used. The contents of any express term or terms are basic to a true understanding of the nature, scope and extent of the contractual rights and duties of the parties. What has been spoken or written by them as part of the contract is the prime source of knowledge of their intentions … [O]nce it is established what the respective parties said, and what was the nature and content of their undertakings, effect must be given to their express language.

Former Court of Queen's Bench Chief Justice K. Moore also drew on Professor Fridman's work in stating:

> 20 The basic principles of contractual interpretation are stated by G.H.L. Fridman in the Law of Contract (3d) (Toronto: Carswell, 1994) at 454:
>
> > The golden rule is that the literal meaning must be given to the language of the contract unless this would result in absurdity. Words of ordinary usage must be construed in their ordinary and natural sense. The paramount test of the meaning of words in a contract is the intention of the parties. That is to be determined in the operative sense by reference to the surrounding circumstances at the time of the signing of the contract.
>
> *Alberta (Treasury Branches) v. Leahy* [1999] A.J. No. 1170

A contract is to be interpreted in accordance with its terms even if the result is more onerous, or less advantageous, than the parties may have anticipated at the time they entered into their bargain.

An Ontario case dealt with a forestry company's 75 year old contractual commitment to supply power to the Town of Fort Francis. The town's demands and the cost of producing power rose dramatically over those 75 years. The trial judge described the law in the following passage (quoted at para 27 of the Court of Appeal decision).

> Apart from the frustration cases, the Canadian Courts would not appear to have gone so far as to find an agreement terminable where the circumstances have changed fundamentally since the contract was made and the parties could not have reasonably foreseen such change. No Canadian case in support of such a proposition was cited and the majority of the English Court of Appeal did not support it in the *Staffordshire* case. The Court has no power to absolve a party from his contractual obligations simply because he finds them burdensome due to unforeseen circumstances nor can the Court rewrite the terms of a contract because it considers them no longer reasonable or because no reasonable person would now agree to them. After considering the cases referred to by counsel, I have come to the conclusion that the law of Ontario on this point is as stated by Viscount Simon in *British Movietonews Ltd. v. London & District Cinemas Ltd*. [1952] A.C. 166, when he said at p. 185:
>
> > The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate – a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it

> was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point – not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation.
>
> … It does not seem to me that the law has developed in Ontario to the point that parties to a contract can be relieved of an obligation or deprived of a benefit they could not have reasonably contemplated unless the contract can be construed to provide for such a result.

The Court of Appeal accepted this ruling at para. 29:

> [29] I agree with this conclusion. Furthermore, in my opinion, the learned trial Judge correctly stated the law of this Province with regard to this subject, in particular as it is given in the passage quoted by him from the *British Movietonews* case.
>
> *Fort Frances v. Boise Cascade Canada*, 1981 CanLII 79 (Ont. C.A.), varied on other grounds [1983] 1 S.C.R. 171

In Alberta, Holmes J. adopted a similar statement of the law, taken from the Canadian Encyclopedic Digest (3rd ed) vol. 7 pp 385 and 386:

> 493 The court's duty is to interpret the contract in accordance with the language used by the parties rather than trying to modify the wording of the contract, thereby really making a new contract for the parties, in order to bring it into line with what the court may think the parties might really have intended or ought to have intended. This duty of construction prevails even if the result thereby achieved is more onerous than the parties may have anticipated. If, however, there is a clear contractual intention exhibited in the contract, then effect may be given to this overriding intention that may qualify particular terminology.
>
> *Enchant Resources v. Dynex Petroleum* (1991) 123 A.R. 81 (Q.B.) at para. 11

The British Columbia Court of Appeal has said:

> [10] If the language of a contract is capable of only one meaning, read objectively in the context of the contract as a whole and its surrounding circumstances, the Court is required to give effect to that meaning: *Gilchrist v. Western Start Trucks Inc*. (2000), 73 B.C.L.R. (3d) 102 (C.A.), paras. 17 & 18. This bedrock proposition is the first principle of the interpretation of contracts. The Court will not resort to subsidiary rules of construction or interpretation unless the words used by the parties are reasonably capable of more than one meaning.
>
> *Nutreco Canada Inc. v. Agrimarine Industries Inc.* [2002] BCCA 661.

See also:

> *Chuddy v. Merchant Law Group*, 2008 BCCA 484 at para. 207 (Smith J.A., in dissent on other issues)

The parties here disagree on whether Article 3.3 is clear and unambiguous. The ATA says that it is, the Province says it is open to interpretation, particularly once a latent ambiguity is exposed.

The Province particularly emphasizes the need to interpret agreements in a way that promotes commercial certainty. The Supreme Court of Canada has said:

> … the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation … which promotes a sensible commercial result.
>
> *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co*. [1980] 1 S.C.R. 888 per Estey J.

The text, *Canadian Contractual Interpretation Law*, Geoff R. Hall, Lexis Nexis 2007 expresses this view:

> 3.14 Commercial Certainty
>
> It is widely accepted that business people generally regard uncertainty as undesirable. As a result, certainty is an important policy goal in any aspect of the law which governs commercial relations. A few cases have picked up on this concept to hold that in choosing between competing interpretations of a contract, the interpretation which better promotes commercial certainty ought to be preferred. This approach is justified as furthering the intentions of the parties. Since it is axiomatic that one of the purposes of entering into a written agreement is to achieve certainty of one's contractual obligations and entitlements, the precept that commercial certainty is to be promoted is a sound one that accords well with the law of contractual interpretation as a whole.

See also:

> *Oceanic Exploration Co. v. Denison Mines Ltd*. [1999] O.J. No. 4813, 127 O.A.C. 224 at para. 38 (Ont. C.A.)
>
> *Edbe Consulting Ltd. v. Union Gas Ltd.,* 2001 Carswell Alta., 2001 ACBC 3 at para. 15

These cases speak of "commercial certainty" but the principles are equally applicable to the world of labour relations. This interpretive preference for certainty is distinct from the implication of a term. The one interprets existing words in a certain way, the other adds words the parties must have intended but failed to express (see below for the parties' arguments on implying a term).

These principles of interpretation are closely allied with the parol evidence rule which addresses what evidence is admissible (or for this case, relevant) in interpreting a contract. The parties here agree that the clause in question must be read in the context of the entire agreement. They agree the agreement is to be read objectively and that evidence of either party's subjective intent

is not relevant. They also agree it is permissible to consider "the genesis and aim of the transaction".

These rules are helpfully summarized as follows:

> [16] The core principles for interpreting a commercial contract are well-known. They were recently summarized in this court by Blair J.A. in *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust* (2007), 85 O.R. (3d) 254 at para. 24:
>
> > Broadly stated … a commercial contract is to be interpreted,
> >
> > (a) as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
> >
> > (b) by determining the intention of the parties in accordance with the language they have used in the written document and based upon the "cardinal presumption" that they have intended what they have said;
> >
> > (c) with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties; and (to the extent there is any ambiguity in the contract);
> >
> > (d) in a fashion that accords with sound commercial principles and good business sense, and that avoid a commercial absurdity.
>
> [References Omitted]
>
> *Lauren International Inc. (formerly known as Lauren Manufacturing Company) and Gerhard Reichert et al* [2008] ONCA 382 (Ont. C.A.)

The following passage holds that the context in which a contract is entered into is a part of the interpretive process; something to be considered in deciding on whether a contract is ambiguous.

> [54] A consideration of the context in which the written agreement was made is an integral part of the interpretative process and is not something that is resorted to only where the words viewed in isolation suggest some ambiguity. To find ambiguity, one must come to certain conclusions as to the meaning of the words used. A conclusion as to the meaning of words used in a written contract can only be properly reached if the contract is considered in the context in which it was made: see McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005) at 710-11.
>
> [55] There is some controversy as to how expansively context should be examined for the purposes of contractual interpretation: see Geoff R. Hall, "A Curious Incident in the Law of Contract: The Impact of 22 Words from the House of Lords" (2004) 40 Can. Bus. L.J. 20. Insofar as written agreements are concerned, the context, or as it is sometimes called the "factual matrix", clearly extends to the genesis of the agreement, its purpose, and the commercial context in which the agreement was made: *Kentucky Fried Chicken Canada v. Scott's Food Services Inc*. (1998), 114 O.A.C. 357 at 363 ( C.A. ).
>
> [56] I would adopt the description of the interpretative process provided by Lord Justice Steyn, "The Intracticable Problem of the Interpretation of Legal Texts", supra, at 8:
>
> > In sharp contrast with civil legal systems the common law adopts a largely objective theory to the interpretation of contracts. The purpose of the interpretation of a contract is not to discover how the parties understood the language of the text, which they adopted. The aim is to determine the meaning of the contract against its objective contextual scene. By

> and large the objective approach to the question of construction serves the needs of commerce.[2] [*Emphasis added*]
>
> *Dumbrell v. The Regional Group of Companies Inc*. 2007, Ont. C.A. 59

A slightly different approach is suggested in an earlier Alberta case:

> The Parol Evidence Rule
>
> [20] The parol evidence rule generally bars extrinsic evidence that alters, adds to, subtracts from, or varies the meaning of the written document. The parties intentions are to be found in the document itself: *Paddon-Hughes Development Co. v. Pancontinental Oil Ltd.* (1998) 223 A.R. 180, 183 W.A.C. 180 at para. 27 (C.A.), leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 600, online: QL (S.C.C.). Therefore, unless the evidence falls within an exception to the parol evidence rule, it would be inadmissible at trial.
>
> …
>
> [24] In *Eli Lilly & Co. v. Novopharm Ltd*., 1998 CanLII 791 (S.C.C.) [1998] 2 S.C.R. 129, the Supreme Court of Canada restated the three salient features of the parol evidence rule. First, where the written language of an instrument is clear and unambiguous on its face, it is unnecessary to consider extrinsic evidence. Second, where the words are ambiguous, evidence of surrounding circumstances may be admitted to enable the court to properly construe the language. Third, such evidence must shed light on the surrounding circumstances, not merely on the subjective intention of the parties.
>
> *Guaranty Properties Ltd. v. City of Edmonton* [2000] ABCA 215 (Can LII)

In *Eli Lilly* (*supra*), the Supreme Court described the parol evidence rule and its exceptions as follows taking a position between the two:

> (2) Contractual Interpretation and the Intentions of the Parties
>
> 52 In order to ascertain whether the supply agreement conferred or had the effect of conferring a sublicence upon Apotex, it is first necessary to consider the proper approach to the interpretation of such a contract, and, in particular, the evidence which may be considered in this respect. In *Consolidated-Bathurst, supra*, at p. 901, Estey J., writing for himself and Pigeon, Dickson, and Beetz J.J., offered the following analysis:
>
> > Even apart from the doctrine of *contra proferentem* as it may be applied in the construction of contracts, the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation … which promotes a sensible commercial result.
>
> From this passage emerge a number of important principles of contractual interpretation …
>
> 54 The trial judge appeared to take *Consolidated-Bathurst* to stand for the proposition that the ultimate goal of contractual interpretation should be to ascertain the true intent of the parties at the time of entry into the contract, and that, in undertaking this inquiry, it is open to the trier of fact

> to admit extrinsic evidence as to the subjective intentions of the parties at that time. In my view, this approach is not quite accurate. The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination. (*emphasis added*)
>
> 55 Indeed, it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face. In the words of Lord Atkinson in *Lampson v. City of Quebec* (1920), 54 D.L.R. 344 (P.C.) at p. 350:
>
> > … the intention by which the deed is to be construed is that of the parties as revealed by the language they have chosen to use in the deed itself … [I]f the meaning of the deed, reading its words in their ordinary sense, be plain and unambiguous it is not permissible for the parties to it, while it stands unreformed, to come into a Court of justice and say: "Our intention was wholly different from that which the language of our deed expresses …"
>
> When there is no ambiguity in the wording of the document, the notion in *Consolidated-Bathurst* that the interpretation which produces a "fair result" or a "sensible commercial result" should be adopted is not determinative. Admittedly, it would be absurd to adopt an interpretation which is clearly inconsistent with the commercial interests of the parties, if the goal is to ascertain their true contractual intent. However, to interpret a plainly worded document in accordance with the true contractual intent of the parties is not difficult, if it is presumed that the parties intended the legal consequences of their words. This is consistent with the following dictum of this Court, in *Joy Oil Co. v. The King* [1951] S.C.R. 624, at p. 641:
>
> > … in construing a written document, the question is not as to the meaning of the words alone, nor the meaning of the writer alone, but the meaning of the words as used by the writer.

The rule and its exceptions are also set out in a labour relations case that introduces the next significant issue; that of patent or latent ambiguity. It involved a judicial review of a labour arbitration. The Court noted the statutory relaxation of the rules of evidence in that context, but the excerpt below addresses the general law.

> 2. The Admission of Extrinsic Evidence
>
> The general rule prohibiting the use of extrinsic evidence to interpret collective agreements originates from the parol evidence rule in contract law. The rule developed from the desire to have finality and certainty in contractual obligations. It is generally presumed that when parties reduce an agreement to writing they will have included all the necessary terms and circumstances and that the intention of the parties is that the written contract is to be the embodiment of all the terms. Furthermore, the rule is designed to prevent the use of fabricated or unreliable extrinsic negotiations to attack formal written contracts.
>
> One of the exceptions to the parol evidence rule has always been that where there is ambiguity in the written contract itself, extrinsic evidence may be admitted to clarify the meaning of the ambiguous term. (See *Leggatt v. Brown* (1899) 30 O.R. 225 (Div. Ct.)). However, determining when one falls within the scope of this exception is far from easy, as even what can be said to constitute a patent ambiguity is unclear. Some authorities have held that there must be more than the arguability of different constructions of the agreement (*Re Milk & Bread Drivers, Local 647, and Silverwood Dairies Ltd*. (1969) 20 L.A.C. 406), while others suggest that the appropriate test is a lack of clear preponderance of meaning stemming from the words and structure of the agreement (*Re Int'l Ass'n of Machinists, Local 1740 and John Bertram & Sons Co*. (1967) 18 L.A.C. 362). An ambiguity is to be distinguished from an inaccuracy, a novel result or a mere difficulty in construction. There is also the issue of whether an ambiguity need be a patent one to warrant the introduction of extrinsic evidence or whether a latent ambiguity involving the uncertain application of otherwise clear words to the facts of the case is sufficient. If a latent ambiguity is taken to be

> sufficient, the further question arises as to whether extrinsic evidence may be introduced for the purpose of determining the existence of the ambiguity.
>
> *United Brotherhood of Carpenters Local 579 v. Bradco Construction* [1993] 2 S.C.R. 316

## Latent Ambiguity

The Province says, at paragraph 27 of its argument:

> The Province does not submit there is any patent ambiguity in the relevant clauses of the MOA. Indeed, the description of the AAWE, which incorporates the SEPH methodology, is clear on its face and thus does not give rise to an ambiguous term.

It qualifies this somewhat at paragraph 28 when it argues over the trigger date of September 1st, an argument dealt with below. However, its main argument, introduced at paragraphs 20 and 21 of its brief, is as follows:

> While there may not be a patent ambiguity apparent on the face of the MOA itself, Statistics Canada's change in the estimation methodology used to produce the data from the SEPH brought about a latent ambiguity. In other words, the term "SEPH", as incorporated in the description of the AAWE in Schedule B, became capable of more than one meaning at the point Statistics Canada changed its estimation methodology to produce the SEPH data. Where an external event gives rise to a latent ambiguity, the case law is clear that evidence is admissible to show the facts the negotiating parties had in mind in order to clarify the meaning of the term.
>
> 21. Moreover, it is a fundamental principle of law that a contract speaks as of the date of its execution. Based on this principle, the MOA, having been executed by the parties in November 2007, speaks as of that date. Pursuant to this principle, the "SEPH" contained in Appendix B must be taken to mean the SEPH methodology which existed at that date.

Applying these principles to this case, the Province asserts, when this Agreement was signed, the parties had in mind an Alberta Average Weekly Earnings formula, as Appendix B of the agreement says, "based on the Statistics Canada Survey of Employment, Payroll and Hours." Evidence as to the subsequent change in this SEPH methodology, the Province asserts, exposes and helps resolve an ambiguity. As the Province puts the issue, again in its written submission:

> 59 The issue that arises in the within arbitration, therefore, concerns the interpretation to be placed on the words "the SEPH" as they appear in Appendix B. The Association contends that "the SEPH" means whatever SEPH methodology is employed by Statistics Canada from time-to-time and, in this case, the New SEPH Methodology. The Province submits that "the SEPH", as it appears in Appendix B, denotes the Previous SEPH Methodology as it existed at the date the MOA was signed, namely, November 15, 2007.
>
> 60 … this is a case where the change in a term in an agreement brought about by a third party, namely, Statistics Canada's change to "the SEPH" methodology, has brought about a latent ambiguity. In other words, this change has caused the term "the SEPH" to be susceptible of more than one meaning. In these circumstances, evidence is admissible to show the facts which the Association and the Province had in mind at the time the MOA was negotiated in order to clarify he meaning of "the SEPH".

The Province relies on an arbitration decision which, it argues, provides a direct analogy. Those parties agreed upon a phrase, the meaning of which changed during the term of their agreement.

> *United Association of Plumbers and Pipefitters, Local 593 and London Labour Bureau* (1961) 11 L.A.C. 306 at 309 (Reville)

The clause in dispute provided:

> In going to work outside the actual limits of the city and returning daily, the workman shall be on the job at regular starting time and work the full eight hours. The employer shall pay 10¢ per mile travelling expenses, or if transportation is provided by the employer, then 5¢ per mile travelling expenses only will be paid from the city limits to job, and the same rates returning from job to the city limits. … This clause shall include any area surrounding the city within ten miles of the city limits. Any job more than ten miles outside the city limits may be paid for at the out-of-town rate, or travelling time at the option of the employer.

One year later the City of London's limits were considerably extended, leading the employer to reduce its travel expense payments. The Union grieved. Judge Reville, as arbitrator, found, firstly at p. 307:

> There is, of course, no ambiguity in the term itself taken in its ordinary context but certain circumstances have arisen since the term was inserted in the collective agreement effective the 1st of September, 1959, which give to the term "limits" a latent ambiguity.

He then held at p. 309:

> It is a well known principle of the law of evidence that where a term in a contract or agreement contains a latent ambiguity or is susceptible of more than one meaning evidence is admissible to show what were the facts which the negotiating parties had in mind in order to clarify the meaning of the term. In this case, both parties agree that at the time this agreement was executed the term "city limits" was susceptible of only one meaning, namely, the then existing limits of the City of London.

The arbitrator found as a fact that the parties had not considered the possibility of the City's limits expanding. This led the arbitrator to conclude that the term meant, to the then contracting parties, the existing City limits. He said at p. 309:

> There could not have been the slightest doubt in the minds of the parties negotiating and executing this agreement as to the meaning which should be applied at that time to the term "city limits" and it is only since the agreement was signed that the term has acquired a latent ambiguity and has become susceptible of more than one meaning.

The arbitrator then combined this with a second principle: that a contract speaks from the date of its execution unless the operation of the agreement is deferred to a specific date or time set forth in the agreement itself. He concluded at p. 55:

> … This agreement purports to have been signed by the parties on September 1, 1959. … This agreement, therefore, spoke as of the 1st of September, 1959, and the city limits described in art. 7(b) must be taken to mean the city limits which existed on that date.

The Province suggests this case has since been cited with approval in:

> *Siberry Investments Ltd. v. I.W.A. – Canada Local 1-700* (1992) 28 L.A.C. (4th) 129
>
> *Petro-Canada v. C.E.P. Local 593* (2008) 172 L.A.C. (4th) 180

Upon review, I agree with the ATA that the case was only referred to in argument. It was however considered directly in a case cited by the ATA and decided by this arbitrator.

> *Finning and International Association of Machinists and Aerospace Workers, Local 99* (1998) 54 C.L.A.S. 357 (Sims)

The case is similar in that the contract's seniority provisions were tied to a branch, defined as "one or more places of business in a geographical locality or municipality." The case is also similar in that the boundaries of the municipality changed, although it is dissimilar in respect of the evidence of negotiating history. The Employer in that case relied upon *London Labour Bureau* (*supra*) which resulted in the following observation and ruling.

> The Employer's argument that a change in municipal boundaries, implemented by the Province, cannot change the parties pre-existing intention depends itself upon what the parties actually and originally intended. Parties are competent to agree on a specific status quo, but they are equally competent to agree to a definition that incorporates by reference a definition capable of changing over time. An example might be a clause adopting "provincial statutory holidays" instead of using a list of named holidays.
>
> Leaving aside for the moment the meaning of the full phrase "geographical location or municipality", the word municipality itself is a word with a clear meaning.
>
> In Article 4.04 it is clear that the parties are referring not to any specific municipality but instead are using the term generically. This distinguishes the situation from the clause in question in the *London Labour Bureau* case, where the reference to "city limits" was clearly to a single municipality – London, Ontario. I accept the Union's argument that "a municipality" is not something static but an institutional or geographical entity inherently subject to change.

The ATA argues that the explicit reference to Table 281-0026 makes it clear the parties contracted for the index, in the sense of the result from time to time, not for any presumed methodology at the time.

Difficulty of interpretation is not, the ATA argues, synonymous with ambiguity.

> It would also be wrong to confuse a difficulty in determining the “sense and meaning” of words used in an agreement, with the existence of an ambiguity. As Cory, J.A. (as he then was) noted in *Transcanada Pipelines Ltd. v. Northern & Central Gas Corp. Ltd*. (1983) 146 D.L.R. (3d) 293 (Ont. C.A.). “The mere fact a contract is difficult to interpret is not fatal to its validity. Nor, the authorities tell us, is the difficulty with the interpretation to be regarded as synonymous with ambiguity. The contract may be effective even though it is open to more than one construction if the court can ascertain the intended meaning …” (at 297)
>
> *Tenneco Canada Inc. v. British Columbia Hydro and Power Authority*, 1999 BCCA 415 at para. 23

As the Supreme Court of Canada said in *Bradco* (*supra*) ambiguity must be distinguished from an inaccuracy, a novel result or a mere difficulty of construction. Further, the ATA argues, failing to address an eventuality does not create an ambiguity. It supports that proposition with two decisions from the Alberta Court of Appeal.

> Schedule "D" to the two servicing agreements requires the City to calculate PACs using a formula which is based on the "assessable area". That schedule contains the following definition:
>
> > Assessable Area or AA - the area of the Developer's subdivision less the municipal, school and environmental reserves, the area of public utility lots, the area of pipeline rights of way and the area of freeways and arterial roads.
>
> It is evident that the language of the definition is clear and unambiguous. What concerns the City is the absence of any reference to the exchange lands, which it says was the result of oversight. However, an omission is not equivalent to an ambiguity in this context. So the first exception to the parol evidence rule does not assist the City.
>
> *Guaranty Properties v. Edmonton (City of),* 2000 ABCA 215 at para. 25

> The resolution of this appeal must be taken in stages, the first of which is to determine whether in the law normally applied by this court the circumstances of the case disclose a latent ambiguity apt to be taken into account in construing the agreement. On this Dea, J., said in part that
>
> > ". . . when one looks at the contract, and even when one looks at the extrinsic evidence, there is no ambiguity. The real complaint is seen. It is not that the contract is ambiguous, but that the contract does not say what one of the parties to it wanted it to say**.** A similar problem arose in *Re United Steelworkers of America, Local 1005 and Steel Co. of Canada Ltd. et al*. 20 O.R. (2d) 205, and there Mr. Justice Grange said at p. 206 and 207:
> >
> > > 'An ambiguity whether patent or latent implies at least two meanings of one word or phrase. A patent ambiguity is an ambiguity on its face; a latent ambiguity does not become one until evidence shows it to be so. The evidence here sought to be adduced is not intended to point out a latent ambiguity or to clear up an ambiguity either patent or latent; it is tendered to show that words unambiguous in meaning were not intended to apply to a particular factual situation. Contracting parties must live with the words they have used if those words are clear and no mistake or other vitiating element is involved.'"
>
> I agree.
>
> *Inland Cement Industries v. C.L.G.W., Local 359* (1981), 27 A.R. 135 (C.A.) at para. 15

## Implication of a term to deal with an unexpected external event

The Province asserts that:

> (a) It was an implied term of the MOA that the SEPH estimation methodology would remain the same regardless of subsequent, unilateral amendments by the Statistics Canada; and
>
> (b) An interpretation of the MOA which maintains the use of the Previous SEPH Methodology better promotes commercial certainty.

The Alberta Court of Appeal adopted two leading descriptions of when a term may be implied into a contract:

> Implied Terms
>
> 51 The most critical part of the judgment appealed from relates to the test of when terms of a contract may be implied. Many Canadian courts have cited *Luxor (Eastbourne) v. Cooper* [1941] A.C. 108, [1941] 1 All E.R. 33 (H.L.), as laying down the principles to be considered on this point. Lord Wright, at p. 52-53, stated:
>
> > "The general presumption is that the parties have expressed every material term which they intended should govern their agreement, whether oral or in writing. It is well recognised, however, that there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some term of which it can be predicted that 'it goes without saying', some term not expressed, but necessary to give to the transaction such business efficacy as the parties must have intended. This does not mean that the court can embark on a reconstruction of the agreement on equitable principles, or on a view of what the parties should, in the opinion of the court, reasonably have contemplated. The implication must arise inevitably to give effect to the intention of the parties. These general observations do little more than warn judges that they have no right to make contracts for the parties. Their province is to interpret contracts."
>
> 52 The law is set out in *Halsbury's Laws of England* (9 Hals. 4th para. 351) as:
>
> > As a general rule, the courts will enforce not only the terms expressly agreed between the parties, but also those which are to be logically implied from the express terms. The question of whether a term is to be logically implied from the express terms of the agreement is a matter of construing the intention of the parties, and is considered elsewhere.
> >
> > Even where a term may not be logically implied from the words used, the law admits of certain other terms to be implied as follows: (1) terms which the parties probably had in mind but did not express; (2) terms which the parties, whether or not they actually had them in mind, would probably have expressed if the question had been brought to their attention; and (3) terms that, whether or not the parties had them in mind or would have expressed them if they had forseen the difficulty, are implied by the court because of the court's view of fairness or policy or in consequence of rules of law."
>
> *Catre Industries Ltd. v. Alberta* (1989) 63 D.L.R. (4th) 74; 99 A.R. 321 (C.A.)

See also:

> *Canadian Pacific Hotels Ltd. v. Bank of Montreal [1987] S.C.J. No. 29*, [1987] 1 S.C.R. 711 at paras. 53-55

> *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd*., [1999] S.C.J. No. 17, [1999] 1 S.C.R. 619 at para. 27

In the *Catre Industries* (*supra*) case the Alberta Court of Appeal accepted the following extract from *G. Ford Homes*.

> When may a term be implied in a contract? A court faced with that question must first take cognizance of some important time-honoured cautions. For example, the courts will be cautious in their approach to implying terms to contracts. Certainly a court will not rewrite a contract for the parties. As well, no term will be implied that is inconsistent with the contract. Implied terms are as a rule based upon the presumed intention of the parties and should be founded upon reason. The circumstances and background of the contract, together with its precise terms, should all be carefully regarded before a term is implied. As a result, it is clear that every case must be determined on its own particular facts.
>
> *G. Ford Homes Ltd. v. Draft Masonry Co. Ltd*. (1983), 43 O.R. (2d) 401 [p. 403] per Cory J. quoted in *Catre Industries*, *supra*, at para. 61

At para. 75 of *Catre Industries* (*supra*) Stratton J. accepts, in the implication of terms context, the following statement:

> The fact that a contract turns out to be more difficult in execution than anticipated is not sufficient to serve as a release from its express terms.

In *M.J.B. Enterprises* (*supra*) the Supreme Court of Canada held at para. 29:

> 29 As mentioned, LeDain J. stated in *Canadian Pacific Hotels Ltd*., supra, that a contractual term may be implied on the basis of presumed intentions of the parties where necessary to give business efficacy to the contract or where it meets the "officious bystander" test. It is unclear whether these are to be understood as two separate tests but I need not determine that here. What is important in both formulations is a focus on the intentions of the actual parties. A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis. As G. H. L. Fridman states in *The Law of Contract in Canada* (3rd ed. 1994), at p. 476:
>
> > In determining the intention of the parties, attention must be paid to the express terms of the contract in order to see whether the suggested implication is necessary and fits in with what has clearly been agreed upon, and the precise nature of what, if anything, should be implied.

The Province cited several further cases as examples of when one might imply a term. In an Alberta case, Rawlins J. addressed when a Court can imply a term based on business efficacy.

> 38 Under the doctrine of business efficacy, the court may imply a term when it is necessary, as opposed to merely reasonable, to do so. "[T]he alleged implied term must be one that is reasonable, necessary, capable of exact formulation, and clearly justified having regard to the intention of the parties when they contracted": G.H.L. Fridman, *The Law of Contract in Canada*, 3rd ed. (Toronto: Carswell, 1995) at 477. The implication of a term based on business efficacy is justified on the basis that it reflects the presumed intention of the parties, and as such it must meet

> "the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed": *C.P. Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711 at 775-776.
>
> 39 The question as to what the parties must have intended as a matter of necessity depends on the particular facts of the case, and the party seeking to have the term implied bears the onus of persuading the court of that necessity: *Olympic Industries v. McNeil* (1993), 86 B.C.L.R. (2d) 273 at 280 (BCCA). It is not the court's role to add terms to the contract which the parties would not have expressed, but to interpret the contract which the parties themselves have made and would have necessarily agreed to had they turned their minds to the issue: *Super S Drugs Ltd. v. Richfield Properties Ltd.* (1979), 24 A.R. 449 at 458 (S.C. (T.D.)). Further, terms will not be implied if to do so would require deciding a large number of complex matters clearly not contemplated by the parties: *Super S Drugs*, *supra* at 459-460.
>
> *529198 Alberta Ltd. v. Thibeault Masonry Ltd*. (2001) 6 Alta. L.R. (4th) 323 (Alta. Q.B.)

In another Alberta case, Grandeur Prov. Ct. J. implied a term to fill a void in a circumstance the parties failed to put their minds to in making their original agreement.

> 53 This is clearly a matter that the parties did not address their minds to at the time of entering the contract. In such a circumstance, the Court may imply an unexpressed term in a contract where necessary to implement the parties presumed intention and give business efficacy to the contract. (See: *Allan v. Bushnell T.V. Co.* (1968) 1 D.L.R. (3d) 534 (Ont. H.C.) at 539). It has also been held that regardless of the parties presumed underlying intentions, the Court may imply a term for purposes of making the contract have real meaning and effect. (*Knowlton Realty Ltd. v. Mace* (1979) 106 D.L.R. (3d) 667 (Alta. Q.B.) at 670). In this case such an implication is necessary because the contract does not directly or indirectly deal with the issue of how profits are shared if the employee does not remain employed for the full fiscal year over the course of which the profits are earned.
>
> *Slozka v. Commodity Carriers Inc*., 2003 Carswell Alta. 110 (Prov. Ct.)

In another case, a term was implied that a timetable for logging work was subject to circumstances beyond the parties' control, such as weather.

> *Morin v. Nuni (Ye) Forest Products Ltd*. (1999) 49 B.L.R. 179 (de Weerdt J. NWT S.C.)

The ATA raises several arguments about when it is inappropriate to imply a term, and why such an implication is, in their view, inappropriate in this case. First, parties are presumed to have expressed every material term they want to govern their agreement. See: *Catre Industries* (*supra*) at para. 51, quoted above. The ATA provided examples of where parties have expressly anticipated the possibility of adjustments being made to a Statistics Canada index upon which they rely for future rates. See:

> *Aird v. Country Park Village Properties (Mainland) Ltd.*, 2004 F.C. 551 (TD aff'd 2005 FCA 352)
>
> *CAW-Canada v. Bristol Aerospace Ltd*., MBQB 51 at para. 2

Nothing in the terms of this contract, the ATA argues, suggest these parties intended such a term, which it was open to them to include. The agreement, in so far as is possible, should be interpreted on the basis of what the parties chose to include and not rewritten for them.

> 42 Courts should not be quick to rewrite contracts between parties -- especially parties who have equal sophistication, experience, bargaining strength and legal representation. People enter into contracts to define the relationship between them. They choose to include various provisions and not others; they choose to express themselves by selecting particular words and not others. They retain lawyers to help them negotiate, then draft a contract that reflects their deal. They believe the terms they include mean what they think they mean and not what a judge, eight years later and with the full benefit of hindsight, thinks they should have meant.
>
> 43 In the absence of the narrow circumstances set out in the case law, our struggle should be to apply a contract as written, not to give in to the temptation to redraft it. Business people are accustomed to weighing risks and benefits. They make bad deals all the time. A breach does not give courts license to sweeten them. By implying terms in situations in which they are not imperative, we encourage litigation and suspend certainty of contract until a final determination in a court of law. That is not how the world of commerce goes round.
>
> *Prenor Trust Co. of Canada v. Nunn* (1998) 214 A.R. 1 (Fruman, J. Alta. Q.B.)

"Slavish effect", the ATA argues, should generally be given to the parties' written agreements.

> *Wilde v. Archeau Energy* Ltd. [2007] ABCA 385 at para. 43

The ATA argues that the onus is upon the party arguing for an implied term (i.e. the Province) to establish that it is permissible and necessary to imply such a term. Further, the term argued for must "be capable of exact formulation." The ATA cites Prof. Fridman's discussion of implied terms at p. 468 of his text *The Law of Contract in Canada* (*supra*).

A term should not be implied where an agreement is sophisticated and detailed, and there is no evidence that the parties did not have every opportunity to negotiate and include in the agreement the term one that of the parties seeks to imply.

> *CSRC Ltd. v. Embley*, 2008 BCCA 533 at para. 23

The Province urged an examination of the reasons of the trial judge as well as of the Court of Appeal decision in C*SRC* (*supra*). The trial judge's analysis, at paragraphs 46-51, is particularly helpful:

> **Principles of Construction**
>
> [46] Provisions of an agreement are not to be construed in isolation. Rather, in construing a provision of an agreement a court is to look to the contract as a whole in order to determine the true intent of the parties at the time of entry into the contract: see *Hillis Oil & Sales Ltd. v. Wynn's*

*Canada Ltd.*, 1986 CanLII 44 (S.C.C.), [1986] 1 S.C.R. 57 at para. 15. A court's task is to construe the contract the parties have made, and not to make or improve the contract for the parties.

[47] Two tests have been adopted with respect to the circumstances in which a court will imply a term to a contract. The first is the "business efficacy test" under which a term may be implied if it is necessary to give the business efficacy to the agreement that the parties must have intended at the time of contracting. The second is known as the "officious bystander test" pursuant to which a term will be implied where it is something so obvious that it goes without saying, a term which represents the obvious, but unexpressed, intention of the parties.

[48] These tests for implied terms have been recognized by the Supreme Court of Canada: see *CP Hotel v. Bank of Montreal*, 1987 CanLII 55 (S.C.C.), [1987] 1 S.C.R. 711: and *Martel Building Ltd. v. Canada*, 2000 SCC 60 (CanLII), [2000] 2 S.C.R. 860, 2000 SCC 60.

[49] In *London Drugs Ltd. v. Kuehne & Nagel International Ltd*. 1990 CanLII 3811 (BC C.A.), (1990), 45 B.C.L.R. (2d) 1 at 64 (C.A.), aff'd 1992 CanLII 41 (S.C.C.), [1992] 3 S.C.R. 299, Mr. Justice Lambert quoted the following general principals governing the implication of contractual terms:

> There is a useful restatement of the relevant principles in the reasons of Lord Simon of Glaisdale, for the Privy Council, in *B.P. Refinery (Westernport) Pty Ltd. v. Shire of Hastings* (1977), 16 A.L.R. 363 (P.C.), at p. 376:
>
> > Their Lordships do not think it necessary to review exhaustively the authorities on the implication of a term in a contract which the parties have not thought fit to express. In their view, for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

[50] While it is a necessary precondition for implication of a term that the term be reasonable, the test is one of necessity and not of reasonableness. The reasonableness of a term is not a sufficient basis to justify its implication. In *Olympic Industries Inc. v. McNeill* 1993 CanLII 318 (BC C.A.), (1993), 86 B.C.L.R. (2d) 273 at para. 31 [*Olympic Industries*], Finch J.A., as he then was, stated:

> The party who seeks to have a term implied into the contract bears the onus of persuading the court of that necessity. It is not sufficient to show that it would be reasonable or logical to imply such a term, or that the parties would probably have agreed upon such a term if they had put their minds to it, or, that having put their minds to it, chose not to express it. A higher burden of proof must be met, upon the authorities referred to above.

[51] Courts will be cautious in implying a term into a detailed written contract, and in particular where the proposed implied term has been expressly dealt with in the contract. In *Codelfa Construction Pty Ltd. v. State Rail Authority of N.S.W.* (1982), 149 C.L.R. 337 at 346 (H.C.A.) [*Codelfa*], Mason J. discussed the basis for the caution as follows:

> For obvious reasons the courts are slow to imply a term. In many cases, what the parties have actually agreed upon represents the totality of their willingness to agree; each may be prepared to take his chance in relation to an eventuality for which no provision is made. The more detailed and comprehensive the contract the less ground there is for supposing that the parties have failed to address their minds to the question at issue. And then there is the difficulty of identifying with any degree of certainty the term which the parties would have settled upon had they considered the question.

*CSRS Ltd. et al v. Embey et al*, 2006 BCSC 700 (Ross J.)

The Court of Appeal upheld the reasons on this point, at para. 23:

> [23] In my opinion, the trial judge correctly rejected the Purchasers' argument that the Agreement did not reflect the parties' true intentions. The Agreement is sophisticated and detailed, and there is no evidence that the parties did not have every opportunity to negotiate and include in the Agreement the term the Purchasers seek to imply. For whatever reasons, they did not do so.

At this point, to interpret the agreement, it is appropriate to examine the "entire agreement", and the "factual matrix the underlying the negotiation of the contract" or "the genesis and aim of the transaction."

## The ATA – Province of Alberta Agreement

This dispute concerns one clause of a multi-faceted settlement arrived at by the ATA and the Province of Alberta. Teachers in Alberta are, for the most part, represented in collective bargaining by the ATA. They are mostly employed in one of the 62 School Boards established under the *School Act*. Funding for School Boards, and thus for teachers' salaries, comes primarily from provincial revenue or from revenue sources controlled by Provincial legislation.

Teachers' pensions are provided for under the *Teachers Pension Plan Act*. The outstanding liabilities for pre-1992 teachers' pensions greatly exceed the monies in the fund to pay those pension liabilities. In 1992, the Province and the ATA entered into an earlier agreement over this unfunded liability, but problems persisted. From the terms of the 2007 agreement it is obvious that a solution was needed for several reasons. The agreement says directly, in the preamble:

> a. The Government and the Association entered into an agreement in 1992 regarding the pre-1992 unfunded pension liability;
>
> b. The Government and the Association wish to reach a permanent resolution to the pre-1992 unfunded pension liability; and
>
> c. The Government and the Association wish to create a stable learning environment for Alberta students.

The agreement signed on November 13, 2007, by the Premier and the President of the ATA, arrived at the following broad compromise.

> 1. The Province agreed to assume a significant portion of the unfunded pension liability and to make certain administrative changes to the pension arrangements.
>
> 2. The ATA agreed not to press for pension benefit improvements.

3. Teachers were each to receive a $1,500 lump sum payment (prorated, in some cases).

4. The Province's agreement was conditional on all 62 School Boards and the ATA agreeing on 5 year no-strike no-lockout collective agreements. They all did so and that condition was met.

5. It was to be a term of all these collective agreements that there would be a 3% salary increase for 2007/09/01 to 2008/08/31 (the first school year), and increases, if any, thereafter as provided in Article 3.3.

> 3.3 For the remaining four years of the five year terms, commencing 2008 09 01, the percentage increase will be the December 31 year-over-year increase to the Alberta Average Weekly Earnings Index as provided in Appendix B, but in no circumstances less than zero.

6. No new "hours of work/minutes of instruction" provisions would be bargained.

7. There would be no strikes or lockouts during the term of these five year agreements.

8. The government agreed with the ATA that it would provide School Boards with the operating funds needed to pay for the collective agreements thus negotiated.

9. The parties agreed to a consultation committee to further their relationship and provide for a stable learning environment, and also to a practice review process.

This is only a bare bones summary to put the disputed term in its broader context.

## The genesis and aim of the agreement

The major aim of the agreement is obviously to have the Province take over, from the Province's current teachers, the responsibility for a large and underfunded pre-1992 pension liability. This unfunded liability meant current teachers would otherwise have been required to fund the pension benefits of teachers (many already retired) out of current income. A significant part of the *quid quo pro* for the Province's doing so involved an agreement by the ATA and the School Boards to forego five years of collective bargaining. That means foregoing the periodic opportunities they would otherwise have had to adjust wages and other terms and conditions of employment based on their own view of circumstances from time to time.

The School Board's support for this was no doubt linked to the Province's agreement to fund the cost, to the ATA's agreement to forego negotiating hours of work/minutes of instruction provisions and its right to strike.

Teachers have the statutory right to collectively bargain with each school board. In the absence of this agreement, increasing each teacher's contribution to the pension plan, to cover the unfunded liability, would no doubt have created bargaining pressures on School Boards to pay increases higher than might otherwise be expected to cover any such increased contributions or to retain teachers who might be attracted by higher net (i.e. after pension contribution) pay elsewhere. This in turn might well have led school boards to seek savings in ways that themselves might create labour relations issues, such as increasing class size. These collective bargaining pressures would take place at the School Board level. Work stoppages over these issues - whether strikes or lockouts – would have a direct effect on the students enrolled in the school system. The reference to a stable learning environment must be viewed in light of these obvious bargaining realities.

Associations like the ATA see the right to collectively bargain as the principle means they have to ensure that teacher's wages keep pace with economic changes like inflation, the cost of living and so on. School Boards equally see the right to bargain over terms and conditions of employment as one of their principle methods of carrying out their mandate, given their heavy reliance on provincially controlled revenue.

Economic change (including changes in teacher supply) and consequently changes in wage rates are difficult to predict in the longer term. The choice of Article 3.3 is obviously designed to provide a means of tying wage adjustments to an acceptable metaphor for what might otherwise result from free collective bargaining over the last 4 years of the agreed upon 5 years of labour peace.

The ATA argues that it is common place for parties to agree, in their contracts, that future increases or adjustments be based on some external index. An agreement is not ambiguous nor does it lack the necessary certainty, where the parties have put machinery in place for a method to calculate the specifics.

> *Attorney General for Alberta v. Haggard Assets* [1951] S.C.R. 427 at 448
>
> *Klemke Mining Corporation v. Shell Canada*, [2008] ABCA 257 at para. 20

The ATA referred to several examples of cases where the parties have chosen to use CPI (The Consumer Price Index) in domestic relations, royalty, fee, rent and similar situations. It refers to the similar use of the AAWE in setting the salaries of Provincial Court Judges as described in:

> *Alberta Provincial Court Judges' Association v. Alberta*, 1999 ABQB 57 at para. 6, affirmed 1999 ABCA 229.

It refers to the almost identical use of the AAWE in setting MLA salaries. The parties agree that the Province and the Association were aware that AAWE was used for calculating increases in MLA remuneration (fact 7). These examples are just that, examples of other parties linking future pay increases to some independently produced index as part of their longer term contracts.

When faced with a need to fix wage rates over the longer term and their inability to agree on the appropriate numbers, parties often adopt one of two mechanisms; (a) they incorporate a formula often using, as one of its constituent elements, an index prepared by a third party, or sometimes an average of what other named parties later agree to, or (b) they agree to a wage reopener usually with a form of interest arbitration with an arbitrator charged (with more or less direction) to set the rate at the time. These parties obviously opted for the first option. The question is not is it a normal practice, which it clearly is, but what exactly they meant by the words they used. But the challenge they faced, at the genesis of the contract, was to choose a credible and reliable base for future increases for teachers in an uncertain future economy. The option would clearly have to be one politically acceptable to both sides in terms of perceived objectivity and neutrality. Its use for MLA's may well have helped create that level of acceptability. The choice of a fixed formula instead of interest arbitration suggests a desire for predictability and certainty of result, and perhaps for timeliness.

The parties agree that:

> 12. During negotiations in the fall of 2007, which culminated in the MOA, the representatives of the Association and the Province did not discuss whether or not Statistics Canada might make a change in the estimation method for AAWE.
>
> and
>
> 16. Neither the Department of Education nor the Association was aware that the new estimation method would be implemented.

The Statistics Canada Alberta Average Weekly Earnings Index, and its elements, need to be examined both as they were when the contract was entered into and, in order to address the latent ambiguity question, as they changed.

## The Alberta Average Weekly Earnings Index

As noted at the outset, the Alberta Average Weekly Earnings Index is but one of a multitude of Statistics Canada indices routinely produced. The Alberta Index is just one subset of the national index.

Statistics Canada is a federal body established under the *Statistics Act*, R.S.C. 1985 c. S-19 (as amended). It is headed by Canada's Chief Statistician and has a mandate which includes:

> (a) to collect, compile, analyse, abstract and publish statistical information relating to the commercial, industrial, financial, social, economic and general activities and condition of the people;
>
> (e) generally, to promote and develop integrated social and economic statistics pertaining to the whole of Canada and to each of the provinces thereof and to coordinate plans for the integration of those statistics.

Statistics Canada (for such purposes) has an ability to survey Canadian employers and obtain from them information, for example, about when they employ people, in what industries and categories, at what pay rates and for how many hours. They also have access to other information provided to government, for example information on income tax remittance forms and so on, compiled by employers in the ordinary course of business throughout the year.

Statisticians analyze such data for many purposes and publish a multitude of tables or series of data, or conclusions from data, for public, government, and industry use. The description of the improvements to the Survey of Employment Payrolls and Hours shows that, behind these "end products", exist a variety of surveys, data models and quality and accuracy checking techniques which are used, on an ongoing basis, to make the "end products" more precise predictors of what they purport to show.

The parties agree on the following:

> **Alberta Weekly Earnings Index ("AAWE")**
>
> 8. AAWE is calculated by Statistics Canada using data from Statistics Canada's "Survey of Employment, Payrolls and Hours" ("SEPH") classified using the North American Industry Classification System ("NAICS"). The Statistics Canada publication, "SEPH estimates are now based on North American Industrial Classification System (NAICS)" from March 29, 2001, provides background information on SEPH and describes some of the changes that have taken place in the estimation methods [Tab 2]. The NAICS Classification System is used for organizing economic data by industry, and is used by Canada, Mexico and the United States. NAICS 2007 supersedes NAICS 2002. NAICS is revised on a 5-year cycle in order to ensure that the Classification continues to reflect the rapidly changing structure of the economy. NAICS 2007 groups economic activity into 20 sectors and 928 Canadian industries.

9. AAWE data is published shortly before the end of each month in Statistics Canada's publication "The Daily" and provides data for the period ending two months previously. For example, September's preliminary data is available just before the end of November, with the finalized data for September being available at the end of December.

10. As indicated in Appendix B of the MOA, AAWE is sourced from Statistics Canada's CANSIM Table 281-0026. At approximately the end of February of each year, Statistics Canada provides data on average weekly earnings in Table 281-0026 from the preceding year, although this data is described by Statistics Canada as "preliminary" in nature. During the time period that the data is "preliminary" in nature, an individual accessing the online Table 281-0026 cannot directly access a part of the table showing a year-over-year percentage change in average weekly earnings. However, a user of the table can calculate the percentage increase in a 12-month period by using the data on average weekly earnings that was published throughout the year. Copies of Statistics Canada's monthly publication "The Daily" for 2007 and 2008 are provided in the enclosed binder marked "2007/2008 Dailys".

11. The preliminary average earnings data in Table 281-0026 released on February 28, 2009, allowed one to calculate the AAWE increase of the average earnings for the year 2008 over 2007 as being 4.82%.

The parties also agreed on the following facts about how, when, and why Statistics Canada revised its methods for estimating the component parts of its Alberta Average Weekly Earnings Index. At least some of this evidence is significant to the nature of the AAWE agreed to at the time the contract was entered into.

**New Estimation Method**

12. During negotiations in the fall of 2007, which culminated in the MOA, the representatives of the Association and the Province did not discuss whether or not Statistics Canada might make a change in the estimation method for AAWE.

13. During 2008, the published AAWE estimates indicated year-over-year changes between each month in 2007 in comparison to the corresponding month in 2008 as follows:

| Month in 2008 | AAWE |
|---|---|
| January | 3.16% |
| February | 5.27% |
| March | 6.36% |
| April | 5.65% |
| May | 5.11% |
| June | 4.40% |
| July | 3.31% |
| August | 5.25% |
| September | 5.82% |
| October | 3.93% |
| November | 5.60% |
| December | 4.02% (preliminary) |

14. As of September 1, 2008, the increase in AAWE comparing the average of earnings for Alberta from January 1, 2007, to December 31, 2007, to the average of earnings for Alberta from January 1, 2006, to December 31, 2006 (AAWE increase of the average earnings for the year 2007

over 2006), was 4.53%. As a result, salaries, allowances and other rates of pay in the Association/School Board Collective Agreements were increased by 4.53% effective September 1, 2008.

15. In December 2008, the Statistics Canada publication "The Daily" [Tab 3] stated:

> With the release of the January 2009 data on March 31, 2009, data from the Survey of Employment, Payrolls and Hours will be produced using a new estimation method. Many series will be affected by this change, most notably average weekly earnings, average hourly earnings, and average weekly hours.

16. Neither the Department of Education nor the Association was aware that the new estimation method would be implemented. As late as March 2009, the Association and the Province believed that the teachers' salary increase for 2009/10 would be very close to 4.8% based on the February 2009 publication of preliminary data from SEPH for the 2008 calendar year.

17. Accordingly, both the Association and the Province used both the final data (from January to November 2008) and the preliminary data (from December 2008) to calculate an AAWE of 4.82% in late February 2009, which figure was communicated by the Association to its members in March 2009 [Tab 4]. Further, the Province relied on this figure in calculations provided to and approved by the Treasury Board as part of the provincial budget process.

18. The March 31, 2009, edition of the Statistics Canada publication "The Daily" [Tab 5] stated at page 9:

> With this release, data from the Survey of Employment, Payrolls and Hours are being produced with a new estimation method. Many series are affected by this change, most notably average weekly earnings, average hourly earnings, and average weekly hours. Previously released estimates back to 2001 have been revised to ensure continuity of data series.

19. From March 31, 2009 (including on September 1, 2009), the revised Table 281-0026 indicated that the AAWE increase of the average earnings for the year 2008 over 2007 was 5.99% [see Tab 6].

20. The following is a table showing a comparison of the AAWE calculated under the previous estimation method versus the new estimation method from 2002 to 2008:

| | **2002** | **2003** | **2004** | **2005** | **2006** | **2007** | **2008** |
|---|---|---|---|---|---|---|---|
| Previous Estimation Method | 2.31% | 1.43% | 2.97% | 5.20% | 4.86% | 4.53% | 4.82% |
| New Estimation Method | 2.56% | 3.45% | 3.32% | 5.78% | 5.03% | 5.79% | 5.99% |

21. Information on the changes to the estimation method for SEPH is provided in the Statistics Canada publications "Improvements in 2009 to the Survey of Employment, Payrolls and Hours" (March 2009) [Tab 7] and "Redesign of the Survey of Employment, Payrolls and Hours: Change of Estimator and Sampling Plan" (March 2009) [Tab 8].

22. As a result of Statistic Canada's revisions on March 31, 2009, to previously released calculations, the AAWE increase of the average earnings for the year 2007 over 2006 was revised from 4.53% to 5.79%. The Association did not seek any further adjustment to teachers' salaries and benefits for the school year September 1, 2008, to August 31, 2009.

> 23 The Department of Finance and Enterprise of the Government of Alberta publishes a "Weekly Economic Review". The September 4, 2009, edition Weekly in the table of current economic indicators provides that the average weekly earnings change for 2008 was 6% [Tab 9].
> 24. The Province's Office of Statistics and Information publishes a Fact Sheet on Average Weekly Earnings. The Fact Sheet updated in April 2009 provides that the weekly earnings of all payroll employees in Alberta was up 6% in 2008 [Tab 10].

The Statistics Canada documents, particularly Tabs 2, 7 and 8 in the agreed facts, are very helpful in explaining what the Alberta Average Weekly Earnings Index is, and was when this contract was entered into. Tab 2 is headed "Survey of Employment, Earnings and Hours are now based on the North American Industrial Classification System (NAICS)" and is dated March 29, 2001. It presents a history of the design of the SEPH survey tool. It notes that

> Over the last decade, SEPH has gone through extensive changes designed to reduce respondent burden and improve its methodology. From a monthly sample survey of 70,000 establishments, SEPH gradually migrated to an administrative based survey supplemented with a 10,000 monthly sample survey of establishments (Business Payrolls Survey (BPS)).

The paper, in particular, describes how the SEPH survey and data was adopted to use, and comply with, the industry classification system "NAICS" used throughout the North American Free Trade Area. It describes the way in which Revenue Canada records are used to verify and adjust estimates using regression analysis. It notes at one point (speaking in 2001):

> As usual, the Labour Statistics Division of Statistics Canada will continue to monitor the situation and inform SEPH users on the quality of the estimates while at the same time, trying to minimize as much as possible the potential impact that this sample redraw could have on the data series.

The paper provides advice to parties using SEPH data for contract escalation clauses, addressing specifically the stability of different elements of the survey. It speaks directly to "SEPH future":

> Over the past decade, the SEPH program has changed its methodology dramatically. With the objective of reducing response burden and processing costs while at the same time improving the quality of its main estimates, administrative data from the Canada Customs and Revenue Agency were gradually incorporated in the SEPH sample in replacement of survey data.
>
> This redesign was so extensive and complex that it had to be staged in three phases. Each phase corresponded to an increased reliance on administrative data and, consequently, a significant reduction of the direct survey component. Since the introduction of the third phase, in May 98, SEPH relies almost completely on administrative records for the estimation of employment and monthly payrolls. Because of its extensiveness, this multi-phased redesign has had impacts on the continuity and quality of the data produced, especially on some of the more detailed variables. This was especially true in the last phase where larger businesses were included in the administrative sample. The historical revision reduced many of the adverse impacts of the multi-staged redesign but could not remove all of them.
>
> However, now that the redesign and the move to the new NAICS classification are completed, SEPH program will now enter into a consolidation period as it will be in a position to take full

> advantage of the more timely and complete administrative data source. As usual, the Labour Statistics Division will continue to strive to improve the quality of the SEPH estimates.

Tab 7 addresses "Improvements in 2009 to the Survey of Employment, Payrolls and Hours" and Tab 8 addresses, in greater technical detail, just how and why these improvements were made. These documents are relevant in that they too give a clear indication of what parties adopting a Statistics Canada index might expect. To that extent, they are of some weight in assessing what AAWE, and its SEPH and NAICS components, were at the time the parties contracted.

These two documents are also of assistance in describing the extent and nature of the changes to SEPH and their impact on the AAWE table results. Further, they are of assistance in assessing whether an interpretation of the parties' agreement, as involving a contract to adopt a methodology rather than a result, holds the potential of commercial certainty, or could yield a sufficiently precise term that might be implied.

What is clear from Tab 7 is that the changes to SEPH methodology were not designed to change what was reported, but to improve the quality of the data produced, still estimating the same phenomenon. The document states:

> A major modification to the estimation methodology used by the SEPH is being implemented. The new estimation method better reflects the particular characteristics of individual provinces and territories.
>
> …
>
> During the 1990's, SEPH went through an extensive redesign to reduce respondent burden and improve its methodology. The purpose of the redesign was to improve paid employment and payrolls estimates and to reduce reporting burden on businesses by substituting administrative records for survey questionnaires. From a monthly sample survey of 70,000 establishments, SEPH gradually migrated to an administrative based survey supplemented with a monthly sample survey of 11,000 establishments (Business Payrolls Survey (BPS)).
>
> This estimation method has now been improved so that it takes into account the particular characteristics of individual provinces and territories by making a new adjustment to the regression coefficients based on the provincial/territorial data from the BPS. To move to this new estimation method, more BPS sample was required in some provinces, and less in others. The BPS sample has thus been both redistributed and increased to 15,000 establishments per month so that each province and territory is adequately represented to allow for the adjustment of the survey estimates at the provincial/territorial level.

They say, at one point "… the estimates of change over time, and the levels of hours and earnings, are considered more accurate under the new method." The more technical document, Tab 8, elaborates on the various influences that went into the redesign. Of particular significance is the description of the way Statistics Canada uses regression analysis to identify and correct for potential biases in its formulas or inadequacies in its survey techniques. By using concrete data from smaller samples it is able to check the assumptions in its methodologies and correct or at

least improve its predictions for the broader population. It can isolate, and more recently report on, areas where its predictions are more or less reliable, depending on such factors as sample size. It can also alter the size of the samples it takes or alter the target groups it surveys to get results that provide an increasingly reliable base for its projections. All Statistics Canada indexes are just that; statistical predictions of what certain numbers or trends in numbers are, for the whole population (or an identified segment of the population), based on data from less than that entire population.

What is significant is that a Statistics Canada index, and the Average Weekly Earnings Index in particular is, by its very nature, a statistical prediction (a) based on changing raw data (b) based on changing sampling and reporting requirements (c) analyzed using complex statistical analysis tools and (d) checked and periodically altered either as to the survey methodology, the weighing of that survey data, or the analytical tools, as a result of regression analysis used for quality checking purposes.

What is also clear from this technical information is that a significant portion of Statistics Canada's source of either raw data or the data used to check its predictions come from sources only available to Statistics Canada through their statutory ability to obtain protected information.

I find from this that, even aside from the changes in 2009, it is not feasible, and would not have been feasible then, to speak of adopting a particular Statistics Canada methodology for producing the data alluded to in Article 3.3 and Appendix B. I agree with the ATA's submission that the Table alluded to is and was inherently a result, produced by a fluid set of ongoing calculations, constantly being worked upon to improve their accuracy. This involves some major changes such as the adoption of the NAICS or the changes to the SEPH Estimator and Sampling Plan, but it also involves adjustments to who is surveyed, and in what detail, how survey data is adjusted by area or job category, the use of external data and regression analysis and so on. The description of the data sets and the results tables available at the time this contract was entered into, and some of the later descriptions as to how Statistics Canada adjusts data to maximize accuracy leads to the following conclusion. It could not reasonably be thought that one could simply adopt a Statistics Canada methodology at a given time and expect to reproduce that data for the future, should Statistics Canada fail to do so. While I do not need to weigh the information in Tab 15 to come to that conclusion, its contents confirm, rather than lead me to question, that conclusion. That communication provides, in part:

> The Chief Statistician shares the view that Statistics Canada should not produce the estimates using the old methodology. The new AWE methodology which uses more provincial level data in calculating average weekly earnings provides a technically more accurate method for deriving provincial estimates. On principle, Statistics Canada feels

> that because the new method more accurately reflects changes in Alberta's weekly earnings, the new SEPH estimates should be the only estimate of AWE available.
>
> The Statistics unit of Alberta Finance and Enterprise would not be able to produce an AWE using SEPH, under the old methodology. To produce AWE under the original methodology would require access to raw national data from respondents to the Business Payroll Survey, and over one million administrative records from CRA, which are only available to Statistics Canada. Also, even if access to the raw data were available, the method for determining AWE using these two data sources is extremely complex, and would require lengthy research and many resources before it could be attempted by the Statistics unit of Alberta Finance. The SEPH unit at Statistics Canada which produces AWE and other estimates includes a staff of over 40 people using large computer systems. As a result, it would be well beyond the capacity of your unit.

## Trigger Date

The parties raise arguments based on two issues. Firstly, Statistics Canada has issued revised calculations for the previous year's year-over-year AAWE figures. However, the ATA has not sought to challenge the increase paid for that second year of the agreement. The Province argues that consistency requires similar treatment for both the second and third years with the implication that the third year should use the unrevised or preliminary figures in the same way as year two.

Further, the Province argues that the Province and the ATA prepared for the third year increase using the preliminary and unrevised AAWE figures drawn from the preliminary data published in "The Daily" by Statistics Canada. That is agreed to be so. The Province urges that, given the planning, budget work and so on that goes into school board funding, it must have been the parties' intention that figures released well before September should apply.

I find neither argument persuasive on the language of this agreement. First, the agreed facts stipulate that Statistics Canada issues its preliminary data for the year-over-year increase on February 28. The final data is released somewhat later, but well before the September 1st salary adjustment date.

The Statistics Canada reported final year-over-year figures were used to calculate the second year's increase. These were the Table 281-0026 results, at least until December 2008 and really until this March 31, 2009 revisions. I see no merit to the proposition that the ATA could, for the second year, resile from the Statistics Canada final results reported at the time of the September 1 increase. Nor however, do I see any support for the practice of using preliminary rather than final figures, either in practice (for year two) or in law (for year three).

It is not necessary to speak of a trigger date. What the parties have contracted for is increases, as of September 1st, calculated on the basis of the previous calendar year's year-over-year increase. Final figures for that calculation are released by Statistics Canada well before the September 1st implementation date. I see no basis to interpret the agreement to allow preliminary figures to override the final figures.

## The relationship to MLA remuneration

The parties agree that:

> 7. The Alberta Average Weekly Earnings index ("AAWE") was chosen by the Province and the Association as a means of calculating salary increases for teachers. The Province and the Association were aware that AAWE was used for calculating increases in MLA remuneration.
>
> …
>
> 25. In accordance with a decision of the Special Standing Committee on Members' Services, components of Alberta MLA remuneration are adjusted on April 1 of each year by the same percentage increase or decrease as in the AAWE for the immediately preceding calendar year. During the period from approximately mid-April 2009 to approximately September 10, 2009, the website from the Legislative Assembly of Alberta on MLA Remuneration and prepared under the authority of the Speaker of the Legislative Assembly of Alberta indicated that a decision had been made to forego remuneration adjustment for the fiscal year April 1, 2009, to March 31, 2010, but if MLA remuneration had been adjusted pursuant to the approved formula, the percentage increase based on the AAWE would have been 5.99%.

I have accepted that the use of AAWE for MLA salaries may have played a part in the choice of AAWE as the reference formula for setting wages. It would no doubt have added to its political acceptability and credibility on both sides. However, beyond that I do not find what happened to MLA's salaries of any assistance in interpreting or applying this agreement.

The Speaker of the Legislature is not the Government. Given that a decision had already been made to forego the previously contemplated MLA salary increases, the identification of a "what if we hadn't" figure is not of great import except from a public relations point of view. It is a given that AAWE (using the revised calculations) would indeed yield 5.99%. I do not find this Legislative Assembly publication of any assistance to the interpretation of this agreement. The same can be said for other Alberta Government references to the AAWE data.

## Post-Agreement Conduct

The parties agreed on a series of facts about their response to the new estimation method.

26. On April 7, 2009, the Minister, the President of the Alberta Teachers' Association (the "ATA President"), and the President of the Alberta School Boards Association released a tripartite Letter of Understanding in which they stated the following:

> Over the past several weeks, the government, school boards and the ATA have all acknowledged that the increase in teacher salaries is likely to be in the range of 4.8% and have planned accordingly. To this end, Budget 2009 has incorporated a 4.8% increase to school board instructional allocations.
>
> Statistics Canada announced on March 31, 2009, that methodological changes to the calculation of AAWE had been adopted and that the newly calculated AAWE change from the previous year was 5.99%. This news and the magnitude of the changes were unanticipated.

27. On the same date, the Minister sent a similarly worded email to all School Board Chairs.

28. During the period of April 2009 to August 2009, the Province and the Association agreed to work together to find a resolution that respected the MOA and the Collective Agreements in place through August 2012.

29. After discussions with the Association, the Province approached Statistics Canada in April 2009 for the purpose of determining whether Statistics Canada would produce a Table 281-0026 using the previous estimation method and a table with a new number using the new estimation method. Statistics Canada advised the Province in April 2009 that it would not do so. The Minister then determined that the Department of Education would approach Treasury to apprise Treasury Board of the Statistics Canada decision and the implications of the new Statistics Canada estimation method and seek further direction from Treasury Board with respect to whether Treasury Board would fund the 5.99%. When Treasury Board was approached, in light of the new Statistics Canada number, it declined to provide funding for a 5.99% increase, and confirmed its decision to fund at 4.83% (sic) consistent with the original Statistics Canada methodology. A June 25, 2009, memo from Treasury Board to the Minister reflects this decision. In an email of August 24, 2009, Statistics Canada confirmed that it would not make the AAWE estimates available using the previous estimation method.

30. On July 20, 2009, the Minister sent a letter to the ATA President, noting the following:

> The change in methodology implemented by Statistics Canada and the resulting change in the Alberta Weekly Earnings Index (AWEI) announced this past March was unanticipated when the Ministry established its spending targets. …
>
> As we agreed in our earlier discussions, Education continues to work across government and with the federal government to find the means to replicate the AWEI calculation methodology in place at the time the parties to the collective agreement reached their agreements.

31. In a letter dated September 14, 2009, the Minister asked the Association to consider arbitration under the MOA as a way to resolve the difference with respect to the AAWE figure to be used for the September 1, 2009, increase. After further discussion and correspondence, the Minister wrote the Association on October 29, 2009. The Association responded in a letter dated November 9, 2009, agreeing to proceed to arbitration under MOA under the agreed conditions.

32. On September 21, 2009, the Deputy Minister sent a letter to the Alberta School Boards Association.

**Effects of the New Estimation Method**

33. All of the 62 publicly-elected school boards adjusted teachers' salaries, allowances, and other rates of pay by 4.82% effective September 1, 2009. The Association filed grievances with all 62 publicly-elected school boards on the grounds that AAWE as of September 1, 2009, was 5.99%

> and, as a result, salaries, allowances and other rates of pay were to be adjusted by this amount as of September 1, 2009.

I do not find these agreed facts and the appended correspondence relevant to the interpretation of this contract. The anticipation both parties had in early 2009 was a result of Statistics Canada's publication of preliminary results as much as any particular understanding of the methodology in use. Their reaction to the change demonstrates a common desire to find a solution, but ultimately an inability to do so, and a resort to their legal rights and this arbitration. I find nothing significant in the parties seeking a resolution or exploring options. The Province and the ATA have a wide range of common interests and the search for a solution is simply an indication of that fact. There is nothing in these events that is of assistance, within the interpretative rules set out above, in determining the meaning of the agreement.

## Conclusion

The words used by the parties in Article 3.3, along with Schedule B to which it alludes, are clear and unambiguous. They refer to a particular Statistics Canada Table, publicly available and regularly produced. The Table in question is reproduced at Tab 6 of the agreed facts. The description of the Statistics Canada Table 281-0026 in its title matches entirely the description the parties have set out in Schedule B. On the face of the agreement, it appears to me that the parties have contracted to use this published data as their point of reference for calculating the annual percentage increases.

Table 281-0026 was and remains Statistics Canada's estimate of the percentage change in Alberta's Average Weekly Earnings. This is not a situation where the agreed upon index has ceased to exist, or has changed in a way where it purports to report on something different.

The nub of this dispute is really whether the words the parties have used connote a reference to a result, as published by Statistics Canada, or a calculation based on a particular methodology. I find they refer clearly and unambiguously to the result. The parties have identified with precision just what table it is to be used. It is the year-over-year change that has been adopted. This year-over-year calculation is not distorted by the change in methodology so that a January 1st apple is being compared to a December 31st orange. The question of the change for this year may have proved to be a surprise given the earlier estimates, but that alone is not a basis, on the authorities set out above, for rewriting the contract.

The Province urges that the changes to SEPH methodology in 2009 disclose an ambiguity. I find that not to be the case, since in my view even when considering the changes that occurred, the

clear meaning of the contract is still that the parties contracted for a Statistics Canada result, not some underlying formula or methodology. Even if I were to accept this as a true ambiguity, I would in any event resolve it by adopting the interpretation I arrived at looking at the language alone.

The argument that contracting for a result rather than the methodology in place at the time of execution gives commercial certainty is not persuasive. The same chart, estimating the same Alberta Average Weekly Earnings change year-over-year continues to be available. It provides a clear and concrete result. The interpretation the Province seeks would leave the parties in a very uncertain position. While preliminary data could be used for this year, it would leave an insoluble uncertainty for the balance of the contract's term.

This is not a situation where a term should be implied. I agree with the ATA that to do so would be to rewrite the parties' contract to include a term to cover a contingency they could have but did not address. A term should not be implied where it is impossible to say, with some precision what that term should involve. There is no obvious replacement for Statistic's Canada's reporting data nor any practical method of replicating their methodology.

Applying the officious bystander test, I find it difficult to accept that the parties would have said "of course" if they were asked at the time whether, if Statistics Canada revised its methodology for producing the results they were incorporating, they intended to keep using that methodology rather than using the Statistics Canada result. It pressed for what would happen if the methodology changed, they might have replied, "it is already subject to ongoing change." They might have replied, "yes it might change but we have no way of knowing if that would increase, decrease or leave similar results." What I find highly improbable is that they would have said "of course, what we intend, if Statistics Canada changes their methodology and stops producing results in the way they do now, is that we will replicate the work ourselves using their old methodology. The ATA is persuasive when it argues:

> Is it plausible for the Province to argue that the Parties' intention was to abandon Table 281-0026 if changes were made so that the Table more accurately measured the actual increase in average earnings?

That, I find, is what Statistics Canada has purported to do; by statistical analysis and refined methodology, it has produced what it believes to be a better quality Table 281-0026. It has produced what it maintains are more accurate estimates of the Average Alberta Weekly Earnings.

I find the parties have contracted that the annual increase for this year is to be based on the Table 281-0026 result and that result is 5.99%. Given these findings I have no discretion to alter what the parties, by contract, have agreed upon.

DATED at Edmonton, Alberta this 2nd day of February, 2010.

ANDREW C.L. SIMS, Q.C.