IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE CITY OF VANCOUVER

(the "Employer")

AND:

THE VANCOUVER FIRE FIGHTERS' UNION, LOCAL 18

(the "Union")

(Ditchburn Overtime Grievance)

SUPPLEMENTARY A W A R D

Dates and Place of Hearing:	August 24, 2006 Vancouver, B.C.
Board of Arbitration:	Robert Diebolt, Q.C.
Counsel for the Employer:	Charles Harrison
Counsel for the Union:	Allan Black, Q.C.
Date of Award:	September 28, 2006

This matter was remitted to me by the British Columbia Labour Relations Board in the following circumstances. The parties appointed me as a board of arbitration to hear and determine a dispute concerning the interpretation and application of certain overtime provisions in their Collective Agreement.

The hearing convened April 3, 2006. At the outset the parties announced there would be an issue respecting the admissibility of evidence of collective bargaining history which the Employer desired to adduce. Evidence pertaining to the admissibility issue was adduced. The Union also adduced its evidence pertaining to the merits. The hearing was then adjourned on the basis I would endeavor to make a preliminary ruling on the admissibility issue over the ensuing 24 hours. The next day, April 4, I published a preliminary decision, ruling that the bargaining evidence was inadmissible. The hearing then resumed. The Employer called its evidence pertaining to the merits and the parties then made submissions. An Award on the merits was published April 19, 2006.

Before the Award on the merits was published, the Employer applied to the Labour Relations Board under section 99 of the Labour Relations Code, RSBC 1996, c. 244 for a review of the preliminary ruling. The Employer subsequently applied under section 99 for a review of the Award on the merits. The Board consolidated the applications and issued a decision dated July 21, 2006: *City of Vancouver and International Association of Fire Fighters, Local No. 18*, [2006] BCLRB No. B170/2006.

The Board considered that the application respecting the Preliminary Ruling raised three principal issues. It stated at para. 8:

> In my view, this application raises three principal issues. First, if parties agree in bargaining that evidence of their bargaining will be inadmissible in any future arbitration, does an arbitrator commit a reviewable error if he or she excludes such evidence because of such an agreement? Second, what was the basis of the Arbitrator's Preliminary Award? Did he, as the Employer contends,

> find that a general evidentiary privilege had been created by the parties by the use of the words "without prejudice" during bargaining or did he rule the evidence inadmissible because he found that the parties had agreed to exclude it. Finally, if the basis of the Arbitrator's Preliminary Ruling was a finding that the parties had agreed to exclude that evidence, did he make a reviewable error in making that finding? I will consider each issue in turn.

With respect to the first issue, the Board concluded it is open to an arbitrator to find that parties have agreed to exclude evidence of bargaining history when interpreting collective agreement provisions in future arbitrations. But it said that arbitrators should not do so "unless there is clear and unequivocal evidence that is what the parties agreed to do".

Moving to the second issue, quoting extensively from the Preliminary Ruling, the Board decided that I had found the parties had agreed to exclude the disputed evidence. At para. 18 it stated:

> The Employer maintains that the Arbitrator ruled evidence of bargaining history inadmissible because he found that a general evidentiary privilege had been created by the parties' use of the words "without prejudice" during bargaining. I do not agree with this interpretation of the Arbitrator's reasoning. I find that he ruled evidence of bargaining history inadmissible because he found that the parties had *agreed* to exclude such evidence. The Arbitrator's reasoning (which I quote in its entirety) makes this clear. (emphasis in original)

The Board then turned to the issue of whether I had clear and unequivocal evidence that the parties had made such an agreement. In addressing this issue, it stated, in part, at para. 19:

> In addressing whether the Arbitrator had clear and unequivocal evidence that the parties had agreed in bargaining that evidence of bargaining history would be inadmissible at arbitration I note that after he set out the evidence quoted above, the Arbitrator stated:
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> > The foregoing, although not a complete review of the evidence, is sufficient to permit me to begin to address the issue to be determined, namely, should the evidence of bargaining history be ruled admissible or inadmissible? (Preliminary Ruling, p. 3, emphasis added)

The Board also partially quoted a Statutory Declaration made by Mr. Rod MacDonald, the Union's president, for use in the proceedings before the Board. Paragraphs 1, 5 and a portion of paragraph 12 of the Declaration read:

> 1. That I was present throughout the arbitration proceedings herein which are the subject matter of these proceedings and was a witness for the Union during the course of the said arbitration proceedings.
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> 5. That during my testimony before the arbitration board, I advised the board that I had been involved in numerous exchanges, discussions and negotiations with the Employer and matters had been discussed, negotiated and resolved on a "without prejudice" basis. I testified that the clear and consistent mutual understanding when that term was used by representatives of the Employer and/or the Union in dealing with labour relations matters, was that the matters under discussion and/or their resolution could not be used by one side as evidence against the other side in subsequent proceedings. My evidence was not challenged by the Employer at the arbitration.
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> 12. The Employer called no evidence to explain what it meant when it included the words "without prejudice" on its negotiating proposals of December 3, 2003.

The Board noted that the Employer did not dispute any of MacDonald's assertions in its final submission to the Board.

The Board then remitted the matter to me to determine whether there was clear and unequivocal evidence for the finding I had made and, if the evidence was of that character, to provide the reasons for reaching that conclusion. At para. 22 it stated:

> Although the Arbitrator concluded that the parties agreed that evidence of bargaining history would be inadmissible at arbitration, he did not, understandably, articulate any conclusion about whether he found the evidence of such an agreement to be clear and unequivocal. I find that to this limited extent, the decision is inconsistent with principles expressed or implied in the Code. I wish to emphasize that I intend no criticism of the Arbitrator's reasoning; before the articulation of this policy in this decision, he could not reasonably have anticipated the need to decide whether there was clear and unequivocal evidence that the parties had agreed that evidence of bargaining history would be inadmissible at arbitration.

I turn now to the issue of whether there was clear and unequivocal evidence for my finding that the parties agreed that evidence of bargaining history would not be

admissible at arbitration. Some of the evidence pertaining to the agreement was reviewed at pp. 2-3 of the Preliminary Ruling. For ease of reference that review is quoted below:

> I will begin with an abbreviated account of the factual background relevant to the issue. On July 23, 2003 the parties commenced bargaining leading to the current Collective Agreement with an exchange of written proposals. Near the top of the first page of the Union's set of proposals the words "WITHOUT PREJUDICE" appeared in upper case boldface type and with underlining. Those words did not appear in the Employer's initial set of proposals.
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> No reference was made to the term without prejudice on July 23, 2003. However, bargaining notes prepared by the Union record Mr. Rod MacDonald, the Union's chief spokesperson, as making a statement to the effect that the parties had experienced a troubled relationship in the past and that the current round of bargaining presented an opportunity to develop new and better relationships in the future.
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> The without prejudice basis of the Union's proposal was discussed once, at an August 28, 2003 bargaining session. Three sets of bargaining notes refer to that discussion. Two sets were Union documents and the third set was prepared by the Employer. One Union set recorded the Employer's chief spokesperson, Mr. Malcolm Graham, as stating that the Employer wouldn't "necessarily" accept the Union's blanket statement that the Union's proposals were without prejudice. The second Union set recorded Graham as stating they (the Employer) "don't" accept the without prejudice basis expressed in the Union's set of proposals. The Employer set recorded Graham as stating that the Employer did not accept the without prejudice basis in the Union's set of proposals.
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> MacDonald gave evidence about his understanding of the basis on which negotiations proceeded. He testified that he did not understand Graham's comments to constitute an emphatic rejection of without prejudice negotiations. Further, he indicated that it was his understanding negotiations would and did proceed on a without prejudice basis.
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> Moving forward in time, the parties both began to exchange sets of proposals that commenced with an introduction containing the expression "Without Prejudice". The introduction in both the Union and the Employer proposals was the same, subject to one modification to indicate whose document it was. For example, the first page of the Employer's December 18, 2003 document reads:
>
> **FRAMEWORK FOR SETTLEMENT**
>
> **2003 December 18**
>
> *Introduction*
>
> The following package of items is to be considered a Framework for Settlement submitted by the Employer to the Union to conclude the 2003 round of bargaining.
>
> The framework is presented in a package format and on a Without Prejudice basis. Any issue not included in the package from the original set of proposals submitted by both the Employer and the Union are deemed to be withdrawn. Where the package is not accepted as a whole, none of the specific

> provisions of the package remain agreed nor are any of the items left out of the package considered to be withdrawn.
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> The foregoing, although not a complete review of the evidence, is sufficient to permit me to begin to address the issue to be determined, namely, should the evidence of bargaining history be ruled admissible or inadmissible? I will begin with some observations of what I understand the law to be on this issue.

As the Labour Relations Board observed, the final paragraph of the quoted passage notes that the account was not an exhaustive review of the evidence. In addition to the portions of his testimony reviewed in the quoted passage, MacDonald testified about the parties' understanding of "without prejudice" proceedings, the reasons for the Union's desire to proceed on that basis during collective bargaining, and on other matters.

For purposes of determining the present issue, MacDonald's Statutory Declaration is not evidence because it was not in existence at the time of the arbitration. For present purposes the evidence consists of the documents and testimony adduced at the arbitration. However, I do believe it is permissible to indicate whether the contents of the Declaration are consistent with the evidence adduced at the arbitration.

Numbered paragraph 1 is precisely accurate. MacDonald was present at the arbitration and was a witness. Numbered paragraph 12 also accurately states that the Employer called no evidence, documentary or *viva voce*, to explain what it meant when it used the words "without prejudice" on its negotiating proposals of December 3. Indeed, on the admissibility issue, the Employer called no witnesses to refute or contradict MacDonald's testimony. The Employer's case on the admissibility issue was confined to a cross-examination of MacDonald, which included questions pertaining to the bargaining notes and proposals referred to in the above quoted passage from the Preliminary Ruling.

Numbered paragraph 5 of MacDonald's Declaration is not a verbatim repetition of his testimony at the arbitration. It is more in the nature of summary of his evidence than a complete record of his testimony. That said, paragraph 5 is essentially consistent with the evidence MacDonald gave at the hearing. I turn now to a review of his evidence.

In direct examination, MacDonald was asked to articulate his understanding of the meaning and purpose of the term "without prejudice" on the Union's July 23, 2003 bargaining proposal. He said it was a general term indicating that the material could not be used in the future for the advantage of management and would not be admissible "later on down the road". More specifically, he added it could not be introduced in subsequent negotiations or grievances.

MacDonald was asked whether there had been prior occasions on which the term had appeared on documents. He answered in the affirmative. Asked to explain his understanding of "those negotiations" when proposals were exchanged, he said one "just never brings forward the documents" and that the practice was followed on occasion "to encourage fair bargaining".

MacDonald was then shown notes of his opening statement to Employer representatives when the Union's initial proposal was tabled on July 23. Those notes record MacDonald as stating that the Union saw that round of bargaining as an opportunity to improve the relationship between the parties and to inject an element of "good faith" into their bargaining. Asked to relate his opening comments to the term "without prejudice", MacDonald said they were "part and parcel" of an attempt to improve the relationship.

Moving forward in the bargaining chronology, MacDonald testified that the August 28 meeting at which the term "without prejudice" was discussed was the only occasion on which the term was raised and addressed in bargaining. More specifically, he testified that the matter was not raised by the Employer or the Union when the Employer tabled its December 3 proposal containing the term "without prejudice". Use of this term, said MacDonald, led him to believe the Employer was proceeding on a without prejudice basis.

MacDonald was then asked how the Union characterized the Employer's attitude at the arbitration to the expression "without prejudice". He answered in the following way. He stated he was not really sure where the Union was to go in the next bargaining round or issue, adding "although we all had a good understanding respecting without prejudice, something both sides use. It allows making settlements that may or may not be written in a collective agreement but it allows agreement."

MacDonald was then asked whether there were occasions the parties had used "without prejudice" with respect to differences other than past grievances. MacDonald replied "many". He was then asked how the expression was treated in subsequent proceedings such as arbitration. His evidence was that there was an understanding that the material would not be used in a subsequent grievance or arbitration.

Moving to cross-examination, MacDonald agreed that in prior rounds of bargaining the parties proceeded on the basis that if agreement was not reached the consequence would be an interest arbitration rather than a strike. He was then asked to agree that such bargaining was often ineffective, because each side was positioning itself for interest arbitration. MacDonald would not personally agree with this

characterization, saying he always sought agreement and could not recall positioning discussions.

MacDonald was also asked, more than once, to agree that the parties' bargaining practice was to exchange proposals as a complete package, so that it was not possible to sign off on single matters. In short, it was suggested that the proposals had to be accepted as a whole or not at all. MacDonald would not agree with this characterization of the bargaining process. He said there was a "fine line". He said framework proposals were exchanged as a "catalyst" for discussion and that he understood such proposals to be subject to alteration. In essence, he characterized the parties' bargaining as a "dynamic" process in which packages were "constantly tweaked" until final agreement was reached.

MacDonald was taken through the three sets of notes pertaining to the August 28 bargaining session. The content of those notes were reviewed in the Preliminary Award and need not be repeated here. With respect to the word "necessarily" used in one of the three sets, MacDonald said it would be for the arbitrator to decide which set of notes was the correct record of the language that had been used. However, he said "at no time" did he perceive Graham, the Employer spokesperson, to be making an "emphatic" statement.

Turning to other aspects of the cross-examination, it was suggested to MacDonald that Graham had first introduced the words "without prejudice" in the Employer's preamble in the 1998 round of bargaining. MacDonald said he could not categorically state whether that were so, but had no evidence to dispute the suggestion. It was also suggested that Graham had stated at that time that the use of "without prejudice" was intended to have the effect of allowing parties to revert to their previous

positions. MacDonald replied that he did not know what Graham had said, "if he said anything at all". Graham was not called as witness and no documentary evidence about this matter was proffered by the Employer.

In redirect examination, the MacDonald was asked to explain what he understood by the words "without prejudice" in the Employer's 2003 proposals. MacDonald said he was "very clear on that". He said it had the "appearances of the regular relation between the Employer and the Union". He added there was "nothing startling" and that he had come to expect "without prejudice".

Asked again his understanding of "without prejudice", MacDonald said that when things were submitted on that basis they could not be "re-raised as evidence". He described it as a "cutting off at the knees effect" with respect to grievances and labour relations issues, saying the present proposals were made on that basis.

Finally, with a view to rebutting the Employer's suggestion that proposals were exchanged on an all or nothing basis, MacDonald was asked about the topic of parking in the last round of negotiations. His recollection was that it was raised by the Employer separately from the proposals it tabled. Asked its fate, MacDonald said it disappeared.

I now move to an analysis of the matter remitted by the Labour Relations Board. In the Preliminary Ruling I found the parties had agreed that bargaining history would be inadmissible at arbitration. Was the evidence of such an agreement clear and unequivocal? Taken as whole, I have concluded that the evidence was clear and unequivocal and my reasons follow.

Had the evidence consisted only of the parties' proposals and the use of the term "without prejudice" in them, the matter would have been less clear than it is when

considered in the context of other evidence. That said, even if the evidence had been so limited, I would have been unable to agree with the Employer's submission, advanced at the arbitration, that the words signified an intention that a proposal could not be partially accepted. That submission was addressed in the Preliminary Award.

Turning to evidence beyond the proposal documents, MacDonald's testimony was both clear and unequivocal. His clear understanding was that "without prejudice" exchanges and negotiations signified a mutual intention that the bargaining evidence would be inadmissible in a subsequent arbitration. Not only was that his understanding. He unequivocally testified that was the mutual understanding of the parties respecting the use of the term and that they had proceeded on that basis in past negotiations, which were not limited to past grievances. Whatever might be the meaning attributable to "without prejudice" in the abstract, MacDonald's evidence, if accepted, proves that in this case the parties had a mutually known and agreed meaning.

Two observations about MacDonald's evidence are very important. First, the Employer never directly sought to impeach MacDonald's credibility as a witness. It strove valiantly and skillfully, albeit unsuccessfully, to elicit agreement from him respecting the Employer's position. But it did not put to him that he was being untruthful. Second, the Employer did not call a witness to refute MacDonald's testimony. Nor was there any documentary evidence contradicting his testimony. His evidence, therefore, itself clear and unambiguous, stood uncontradicted. For clarity, I should add that I accept his evidence.

In summary to this point, when the evidence reviewed in the Preliminary Award is coupled with MacDonald's evidence recounted in this Supplementary Award, I am satisfied that there was clear and unequivocal evidence for my finding in the Preliminary

Ruling that the parties had agreed that evidence of bargaining history would be admissible at arbitration.

There remains to be clarified the scope of the agreement. Did it cloak all of the 2003 collective bargaining? Or, as contended by the Employer at the August 24, 2006 hearing, could it only cloak those negations commencing as of the date the Employer began to use the words "without prejudice" in its proposals? Essentially, the question is whether the agreement had retroactive effect.

The Employer's position that the agreement can have no retroactive effect was grounded on my finding in the Preliminary Award that the Employer did not agree to without prejudice negotiations until it began to use that expression in its December 2003 proposals. For convenience, I set out the relevant portion of the Preliminary Ruling, appearing at p. 5:

> I therefore pose this question. Did the parties agree to conduct their negotiations on a without prejudice basis in the sense that the negotiation evidence would be inadmissible for use against a party in a future arbitration? I have concluded that they did. My reasons follow.
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> I am unable to conclude that the parties reached such an agreement on July 23, 2003, the day the parties commenced negotiations by exchanging written proposals. On that day the Union unilaterally expressed its proposals to be advanced on a without prejudice basis, but the Employer did not then agree to such a basis. As noted, the Employer proposal was silent on that issue and no discussion about it occurred that day. I reach this factual conclusion despite MacDonald's subjectively held belief that bargaining would proceed on a without prejudice basis.
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> Moving forward in time, I am also unable to conclude that the August 28, 2003 bargaining session yielded an agreement to proceed on a without prejudice basis. Indeed, to the contrary, the previously mentioned bargaining notes, on any view, cannot be interpreted to mean that both parties subjectively intended to reach such an agreement or, objectively, should be taken to have done so. At a minimum, the Employer was expressing reservation. At a maximum, it was declining to proceed on a without prejudice basis.
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> In my view, however, the Employer's stance changed when both it and the Union began to make and receive written proposals expressed to be made "on a without prejudice basis" Given that development, and assessing the issue according to an objective standard, use of those introductions leads me to conclude that the parties must be taken to have agreed to bargain on a without

> prejudice basis in the sense that evidence of bargaining would not be used in a proceeding such as this.

The Union vigorously opposed the suggestion that the agreement could only operate as and from the date the Employer began to use "without prejudice" in its proposals. In its written argument it stated:

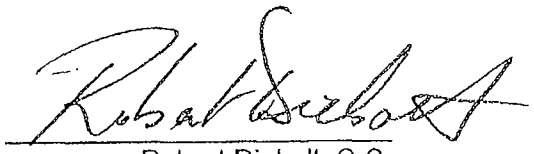
> It would be patently unfair in the extreme to suggest that the concept of "without prejudice" only took effect on December 3rd forward, when the Employer advanced its first negotiation proposals. What this would mean would be that the Union's initial proposal of July 23, 2003 could be used in subsequent proceedings and used against the Union but only after the Employer had changed its position and it used the phrase without prejudice, then neither the Union nor Employer proposals could be used in subsequent proceedings. At the very least, what this would constitute would be bad faith bargaining and an attempt to trick the Union to advance proposals which could then be used against it, but precluding the use of Employer proposals in subsequent proceedings against it. We say that is clearly not what was intended by the parties. Rather, what was intended by the mutual use of the phrase without prejudice on each of the Employer and the Union's proposals since the very beginning, was to the effect that neither side could use their bargaining proposals in subsequent proceedings. (emphasis in original)

Before turning to the analysis of this issue, I begin with two observations. First, the Preliminary Award does not address the issue in express terms. Second, when the hearing resumed on April 4, 2006 the Employer did not raise any issue respecting retroactivity. When the Preliminary Ruling was distributed April 4 the parties were given time to review it before the hearing resumed. At the point when the hearing resumed, the Union had closed its case with respect to the both admissibility issue and the merits. The Employer did not begin by raising any issue about the scope of the agreement and did not attempt to adduce evidence of bargaining history prior to December 2003. It proceeded directly to call evidence pertaining to the merits.

Returning to the issue, in my view the parties must be taken to have intended their agreement to cloak the whole of their negotiations. I contemplated this issue when conducting my deliberations with respect to the Preliminary Ruling and, while I did not

address the matter expressly in the document, it was not then my intention to deny retroactivity to the agreement. I also agree with the Union's submission on the issue. In particular, I have no wish to attribute to the Employer's bargaining representatives the hypothetical mindset described in the Union's submission and, in my view, the evidence does not warrant such an attribution. In conclusion on this issue, therefore, even if it is now jurisdictionally open to me to deny retroactive effect to the agreement I reject that characterization of the agreement.

In closing, I wish to make clear the scope of the conclusion reached in this Award. I have concluded there was clear and unequivocal evidence that the parties agreed the whole of the 2003 bargaining history would be inadmissible at arbitration. I emphasize, however, that this conclusion applies only to the 2003 round of collective bargaining in issue here. I make no finding and have no opinion about the admissibility of bargaining history pertaining to prior or future rounds of collective bargaining or other negotiations. Should the admissibility of bargaining history become an issue in relation to any of those matters, it will have to be adjudicated by another Board of Arbitration in accordance with the evidence then adduced. IT IS SO AWARDED.



Robert Diebolt, Q.C.