IN THE MATTER OF AN ARBITRATION
UNDER THE *LABOUR RELATIONS CODE*, RSBC 1996 c. 244

Between

CATALYST PAPER (ELK FALLS MILL)

(the "Employer")

-and-

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 1123

(the "Union")

(Policy Grievance #2010-3 re Denial of Retirees' Benefits and Pop-up Bridge)

ARBITRATOR:	John B. Hall
APPEARANCES:	Robert Sider, for the Employer John Rogers, Q.C., for the Union
DATES OF HEARING:	November 9 & 10, 2011
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF AWARD:	May 3, 2012

AWARD

I. OVERVIEW

The Employer met with the Union to discuss an adjustment agreement after giving notice that its Elk Falls mill would close permanently in September of 2010. One question that arose was whether employees could receive severance pay and also be eligible for certain retirement benefits (collectively referred to in this award as the "Retiree Benefits"). That question, along with the parties' respective positions, was set out in a document prepared by the Union during the course of the adjustment agreement discussions:

> Unresolved
>
> 1. Can employees receive severance and also collect retiree benefits and the Pop-up Bridge?
>
> Company position - Employees who are terminated on September 10, 2010 will not be eligible to receive retiree benefits or the bridge benefit. Employees who retire prior to September 10, 2010 will be eligible for retiree benefits and the bridge benefit but will not receive severance.
>
> Union position - Members are entitled to the benefits if they sever and retire as per past practice and industry standards. The company has a long practice of considering anyone who leaves after the age of 55 to have retired. There is no difference here.
>
> If you retire in the industry normally you have to terminate your employment prior to retiring. This is no different.

The matter remained unresolved, and was later referred to arbitration. This award has been delayed in part because of some uncertainty created by the Employer's subsequent financial challenges.

In brief terms, the Union submits the established practice at the mill had been for the Employer to provide Retiree Benefits to eligible employees in circumstances where

they had also been entitled to severance pay. The Union submits as well that there is nothing in the Standard Labour Agreement (the "Collective Agreement") removing the entitlement to Retiree Benefits where employees are terminated, and it relies on arbitral authorities which hold that severance pay and retirement benefits are not mutually exclusive.

The Employer continues to assert that employees had an option; namely, they could retire before the permanent closure and receive Retiree Benefits (but not severance pay), or they could take severance pay alone when their employment was terminated due to the closure. The Employer submits the Collective Agreement expressly recognizes that retirement and severance are separate concepts, and relies on awards in the industry which hold that employees cannot claim simultaneously under both headings. It also argues that the practice evidence cannot be referred to for purposes of interpretation because none of the prior instances raised by the Union involved Article XXIII, the Permanent Mill Closure provision.

II. THE STANDARD LABOUR AGREEMENT

A number of terms in the Collective Agreement and the Codification of Local Agreements (previously known as "Bull Session Agreements") are relevant to the present discussion. The most recent Collective Agreement tendered at arbitration was for 2003-2008, and contained these provisions:

ARTICLE XX - PENSION PLAN

Section 1: The Plan

The Company agrees to contribute to a Pulp and Paper Industry Pension Plan Trust established pursuant to the Pulp and Paper Pension Plan and the Pulp and Paper Industry Trust Agreement made effective January 1, 1975 and as amended from time to time.

Section 2: Contributions

Contributions are to be made by the Company and the employee to the Pulp and Paper Industry Pension Plan for each hour worked as follows: …

* * *

Section 5: Bridge Benefit

Bridging is paid directly by the Company to employees aged 61 or older who opt to retire early. Present bridging is $20/month/yr of service. The bridging will not be payable beyond age 65.

An employee who chooses to retire at age 60 shall have access to the bridging benefit paid by the Company when they reach age 61. From the date the fund in Article VII is established, the bridge benefit from age 60 until he/she reach age 61 will be paid from the fund.

* * *

ARTICLE XXII - JOB SECURITY

Section 1: Objective

The Company and Union recognize that technological change, while necessary to the industry, may have an impact on employees. It is the purpose of the following provisions to assist employees in adjusting to the effects of such change.

* * *

Section 6: Severance Allowance

(a) An employee with one (1) or more years of continuous service for whom no job is available because of mechanization, technological change or automation will, upon termination, receive a severance allowance calculated by one of the two following methods based on his/her last period of continuous service, …

* * *

ARTICLE XXIII - PERMANENT MILL CLOSURE

Section 1: Notice

An employee terminated as a result of a permanent planned closure of the mill shall be given a minimum of sixty (60) days notice of closure.

Section 2: Severance Allowance

Such employees shall be entitled to a severance allowance of two (2) weeks pay per year of service to a maximum of fifty-two (52) weeks. This calculation is based on his/her years of employment during his/her last period of continuous service and is computed on the basis of forty (40) straight time hours per week at the employee's regular rate.

For employees with a minimum of one (1) years' employment during their last period of continuous service, severance allowance shall not be less than four (4) weeks pay.

No payment will be made under this section in cases where the employee has already qualified under Article XXII, Section 6, Job Security, or under Article XXIV, Section 5, Job Elimination.

ARTICLE XXIV - JOB ELIMINATION

Section 1: Definition

Job elimination means permanent loss of employment as the result of Company decisions to eliminate positions, excluding those in Section 2 below.

* * *

Section 5: Severance Allowance

Severance allowance will be calculated by one of the two following methods based on the last period of continuous service, it being the choice of the affected employee as to which of such methods of calculations is used. …

Article XX, Section 5 is known as the “Pop-up Bridge” benefit. The version reproduced above was amended by the Memorandum of Agreement which concluded

terms for the 2008-2012 Collective Agreement. The language read as follows at the time of the permanent closure:

> The Company shall provide employees with a pension bridge annuity of twenty dollars ($20.00) per month per year of service at age sixty (60) or older who retire prior to attaining age sixty-five (65). The pension bridge benefit will not be payable beyond age sixty-five (65). The calculation of the pension bridge benefit shall be credited on the same basis as under the terms and conditions of the Pulp & Paper Industry Pension Plan.
>
> An employee who chooses to retire at age fifty-five (55) or later shall have access to the bridging benefit paid by the Company when they reach age sixty (60).

Thus, under the new wording, an employee retiring early could get "into the queue" at age 55 or later, but would not be entitled to the bridging benefit until reaching 60 years of age. The Memorandum of Agreement concluded in late 2008 also contained modifications to Article XXIII:

> **a) AMEND SECTION 2: SEVERANCE ALLOWANCE - PARAGRAPH (A) AS FOLLOWS:**
>
> Such employees shall be entitled to a severance allowance of two (2) weeks per year of service to a maximum of sixty (60) weeks based on the employee's years of employment during the employee's last period of continuous service computed on the basis of forty (40) straight time hours per week at the employee's regular rate.
>
> **b) AMEND SECTION 2: SEVERANCE ALLOWANCE BY INSERTING A NEW THIRD PARAGRAPH AS FOLLOWS:**
>
> Employees will have their welfare coverage continued for the current month plus two (2) additional months from their date of termination.

The Retiree Benefits in issue include two items found in the Codification of Local Agreements:

> **ITEM NO. 34 - Elk Falls Retired Associates - M.S.P**
>
> The current company 50% cost sharing on the premiums for the basic Medical-Surgical (M.S.P) for the Elk Falls hourly retired associates will be increased from 50% to 100% company contribution.
>
> **ITEM NO. 35 - Elk Falls Retired Associates - Extended Health Benefits**
>
> A Basic Extended Health benefit plan without vision care and subject to a $25,000 life time limit will be provided to hourly Elk Falls Mill retirees.
> The parties have agreed to resolve the issue of Extended Health Care Benefits for Retirees based on the attached Letter of Understanding - Retirees Extended Health Benefits.

It was the Union's evidence through its President, Ian Simpson, that an "Elk Falls Retired Associate" is an employee who at age 55 or older has left the Employer and contemporaneously retired from the industry under the rules of the Pension Plan. Mr. Simpson also identified documents which explain the origins of Item Nos. 34 and 35 in the Codification of Local Agreements. A letter to the Union dated July 28, 1988 from one of the Employer's predecessors included what is now Item No. 34:

> **Re: 1988-91 Bull Session Agreements - C.P.U. Local 1123**
>
> As stated during our 1988 Bull Session Negotiations, we agree to renew all ongoing Bull Session Agreements as well as amend and add to those Bull Session Agreements for the term of the 1988-91 B.C. Standard Labour Agreement.
>
> In addition, Management has committed to undertakings concerning certain Mill policies and these commitments will be satisfied as identified below.
>
> * * *
>
> 10. Health Benefits
>
> The current Company 50% cost sharing on the premiums for the basic medical-surgical (M.S.P.) for Elk Falls Hourly Retired Associates will be

> increased to 100% Company contribution in exchange for Local 1123 having agreed to the pushing of Hog Fuel to maintain the Power Boilers on all "Down" Statutory Holidays.

Similarly, a letter dated September 14, 1991 from another predecessor company reveals the genesis of Item No. 35:

> **1991 - BULL SESSION AGREEMENTS, LOCAL 630 AND LOCAL 1123 CANADIAN PAPERWORKERS UNION**
>
> As stated during our 1991 Bull Session negotiations, we agree to renew all on-going Bull Session Agreements, as well as amend and add to those Bull Session Agreements for the term of the 1991-1992 B.C. Standard Labour Agreement and for the term of the following B.C. Standard Labour Agreement.
>
> In addition, Management has committed to undertakings concerning certain mill policies. These commitments, as well as the changes to the Bull Session Agreements, will be implemented as identified below:
>
> * * *
>
> 8. **<u>E.H.B. - Elk Falls Retired Associates</u>**
>
> Basic Extended Health Benefit Plan without vision care and subject to a $25,000 life time limit will be provided to hourly Elk Falls Mill retirees in part in exchange for Local 1123, C.P.U. having agreed to waterwash and/or operate the recovery Boiler(s) as Power Boiler(s) on all down Statutory Holidays.

Finally, the Letter of Understanding regarding extended health care benefits for retirees referred to in Item No. 35 was found at the last page of the Codification of Local Agreements in the 2003-2008 booklet:

> **Letter of Understanding**
> **Retiree Extended Health Care Benefits**
>
> It is agreed that a fund be established to address the issue of ensuring benefit coverage when the retiree or their spouse exceeds the Retiree Extended Health Care Benefit lifetime maximum of $25,000.

> [The Employer] will provide a lump sum payment of $100,000.00 into the common fund, for all CEP Locals of [the Employer], on May 1 of each contract year. The Union will provide an audited financial report to the Company every year.
>
> For the purpose of union administration of this fund, a committee comprised of one (1) representative from each Local Union and a representative from the CEP Western Region office shall meet following ratification of the Memorandum of Agreement to:
>
> 1. Select a fund administrator
> 2. Develop guidelines for Governance and Investment Issues
>
> The guidelines for Governance and Investment Issues shall be completed within six (6) months following ratification.
>
> The Union shall be solely responsible for the governance and administration of this fund.
>
> Dated this 5th day of September 2002.

This Letter of Understanding was revised in the 2008 Memorandum of Agreement as follows:

> The Company agrees to contribute a yearly top up to the Retirees Extended Health Care Fund (to a maximum of $100,000) to reach and maintain a minimum balance of $400,000. The top ups will occur on May 1st of each year for the term of the collective agreement.

Thus, the present dispute concerns four Retiree Benefits: the bridge benefit in the amended Article XX, Section 5; the MSP premium payment in Item No. 34; the extended health benefit plan in Item No. 35; and the extended health care benefits provided by the revised Letter of Understanding. Any differences between these provisions are not material to the grievance in terms of the entitlement of employees affected by the permanent closure. That is to say, the case was argued on the grounds that employees receiving severance pay could claim all of the Retiree Benefits if otherwise eligible (the Union's position), or they were not entitled to any of the Retiree Benefits (the Employer's position).

III. PRACTICE EVIDENCE

Much of the Union's evidence was directed to prior instances where employees had received severance pay and were also eligible for retirement benefits. The Employer submits that none of this evidence constitutes past practice regarding the parties' intended interpretation of Article XXIII because the permanent closure was the first time the provision was engaged.

It seems axiomatic that Article XXIII can only apply on a single occasion given its subject matter; i.e. Permanent Mill Closure. However, Articles XXII and XXIV also provide for severance pay upon termination of employment, and the practices under those provisions may well shed light on the parties' mutual expectations regarding the severance benefit under the permanent closure language. Nonetheless, there is considerable force to the Employer's further submission that the prior instances were distinguishable from the 2010 closure. For example, the Union makes much of the crew reductions in 1998 and 2004. However, those were both early retirement offers by the Employer which included a lump sum severance payment. That is, they were the reverse of the present situation; moreover, they were enhanced early retirement offers that went beyond the terms of the Collective Agreement as an incentive for employees to retire. What Mr. Simpson referred to as the Employer's "yard distribution strategy" and its later closure of the kraft mill in 2008 were arguably closer to the present circumstances. However, both arrangements again included incentives by the Employer, and did not involve a straightforward application of the Collective Agreement.

At the same time, the Employer does not dispute that there have been "some instances" where employees have had their employment severed, and have received Retiree Benefits. Indeed, the Employer did not lead any evidence to establish contrary circumstances. The Union also relies on a letter the Employer sent to a former employee who had been terminated and began receiving Retiree Benefits. The letter is dated April

4, 2011 (i.e. after the permanent closure):

> **Re: Retiree Health Benefits and Pension Bridge**
>
> Catalyst Paper recently received notice from the Pulp & Paper Industry Pension Plan that you had retired effective April 1, 2011.
>
> In February 2010, you elected severance under the 900-Hour Indefinite Curtailment letter of agreement. At the time of your severance the mill entered you as a retiree of the operation and you were placed into the Retiree Benefit Plan. This was an administrative error that we discovered when we received your notice of retirement from the Plan.
>
> Retiree Benefits and the Pop-Up Bridge are a contractual benefit to retirees of Catalyst Paper, Elk Falls Division. In your case you terminated employment with the company and began your pension benefits some 13 months later. As such, you did not retire from Catalyst and are not entitled to retiree health benefits and the Pop-Up Bridge.
>
> While Catalyst Paper has decided not to ask you to repay these benefits, as you have been receiving the benefits in error you do not qualify for the benefits. Catalyst Paper will terminate both the Pop-Up Bridge and the retiree benefit plan. The Pop-Up Bridge which did not trigger will terminate effective immediately. However, on a completely *ex gratia* basis, we are willing to provide benefit plan coverage to May 31, 2011 in order to allow you a period of time to obtain alternate coverage.

The point made by the Union is that the Employer did not terminate the former employee's Retiree Benefits because he had received severance pay under the 900-Hour agreement; rather, the benefits were discontinued because the individual "did not retire from Catalyst" when he "elected severance". The Employer sent a similar letter to at least two other former employees in July of 2011.

I have canvassed the Union's practice evidence in admittedly brief terms. The evidence is perhaps helpful in providing a broader context for the grievance, and certainly explains why the Union saw the Employer's position upon permanent closure as a change in practice (a view the Union expressed during a July 27, 2010 meeting to discuss the adjustment agreement). However, with the possible exceptions of the log yard and kraft mill closure, I am unable to find that events prior to 2010 meet the long-established

limitations laid down in the *John Bertram* case. And even if those two circumstances are not excluded, I note the observation in *Re Eurocan Pulp and Paper Ltd. and CEP* (2005), 143 L.A.C. (4th) 353 (Germaine), that "two incidents will seldom establish a practice" (para. 50). Moreover, the kraft mill closure arrangements are complicated by the fact that they resulted from Section 54 discussions where the *Labour Relations Code* encourages alternatives that may involve amending a collective agreement.

In short, the past instances where employees were terminated and received severance pay and were also allowed to claim Retiree Benefits cannot be relied upon to discern the mutual intent of the parties regarding the Collective Agreement provisions now in dispute. The letters sent by the Employer during 2011 to former employees fall into a different category. I will revisit that subject should it become necessary, as it also requires a closer examination of the 900-Hour agreement.

IV. ANALYSIS

Paragraph 20 of the Employer's written argument provides a suitable framework for considering the parties' submissions regarding the interpretive issues presented by the grievance:

> …[I]t is clear on the face of the Collective Agreement that retirement and severance are mutually exclusive concepts. This is evident from the following:
>
> (a) The entitlement to severance in Article 23 is triggered where an employee "is terminated" whereas the entitlement to the Bridge Benefit in Article 20, section 5 is triggered when an employee "chooses" to retire. The concept of an employee being terminated is inconsistent with an employee choosing to retire, which is a voluntary act.
>
> (b) In Article 16, section 3, of the Collective Agreement retirement and severance are referred to as the distinct concepts of "retirement or termination."

(c) The severance benefits in Article 23, Section 2 provide for two additional months health and welfare coverage from the date of termination whereas the Retiree Benefit LOU provides for immediate benefit coverage. If employees were entitled to both severance pursuant to Article 23 and Retirement benefits, there would be no need to include benefit coverage for all employees in Article 23.

The Employer's third point can be put to rest in relatively short order. As the Union notes, Item Nos. 34 and 35 and the related Letter of Understanding only apply to retired associates, and the extended health benefits provided by Item No. 35 do not include vision care. The amended Article XXIII, Section 2 applies to all employees who receive the severance allowance, and it extends full welfare coverage for the current month plus two additional months from their date of termination. Thus, the amendment was not redundant to the Union's interpretation of the Collective Agreement as it represented an improvement to the exisiting Retiree Benefits.

Turning to the Employer's primary point, one cannot dispute that retirement and severance (or termination) are generally regarded as separate concepts. However, as will be seen, this distinction is not necessarily a complete answer to the Union's claim. One should consider the context in which a particular dispute arises and the language in the applicable collective agreement. Further, the nature and purpose of the benefits in question form a relevant avenue of inquiry when determining whether receipt of one benefit precludes entitlement to the other.

The strongest support for the Employer's position is perhaps derived from *Tembec Industries Ltd. -and- PPWC, Local 15* (2010), 104 CLAS 148 (Brown). The question in that proceeding was whether an employee whose position had been eliminated was entitled to both severance and pension bridging. The arbitrator held the

employee could not claim both benefits based on the language of the collective agreement:

> I must interpret the Collective Agreement provisions without any extrinsic evidence. With respect to interpreting collective agreement provisions that involve a monetary benefit, in *British Columbia Nurses' Union, supra*, the arbitrator stated:
>
> > The Employer submits that when a party asserts the existence of a monetary benefit bestowed in clear language of the collective agreement, the onus is on that party, i.e., the Union, to prove that such a benefit exists. Here the Employer relies on *Government of the Province of British Columbia and British Columbia Government & Service Employees' Union* [1997] B.C.C.A.A.A. No. 550, Award No. A-294/97 (Ready) and asks that I draw an adverse influence [sic] from the fact that the evidence that was not called at the hearing is supportive of its position that the Union did not prove its onus. Arbitrator Ready stated:
> >
> > > However, I must also consider the line of cases, starting with the *Noranda Mines* case, *supra*, [1 W.L.A.C. 246 (Hope)] that suggest a financial benefit must be clearly provided for.
> > >
> > > * * *
> > >
> > > A slightly different view was set out by the same arbitrator as in the *Noranda Mines* case, Arbitrator Hope, in *School District No. 39 (Vancouver) and Vancouver Teachers Federation* (1996), 53 L.A.C. (5th) 33 (Hope). In the decision, he quotes from the key passage in *Noranda Mines* on p. 262:
> > >
> > > > Of course the fact that the employer did not intend the result alleged by the union does not defeat the union interpretation if the language agreed upon dictates that result. I simply observe that, in my preliminary consideration of the language, I find it inherently unlikely that the employer would express an intention to confer substantial monetary benefits on employees in language from which that intention emerges obliquely or by inference.
> > >
> > > * * *

> Whether I take a plain and ordinary meaning approach or a purposive approach to the interpretation of the Collective Agreement, I am not persuaded by the Union's argument.
>
> The structure of the Collective Agreement results in termination and retirement as being two different concepts. The terms do not mean the same thing.
>
> Employer actions due to mechanization, technological change or automation may result in job loss. Employees may opt to exercise recall and seniority rights and maintain employment with the Employer; or, the employee may elect to receive severance allowance and terminate employment. These individuals may subsequently receive pension benefits.
>
> Employees who maintain employment may opt to retire early and receive pension bridging benefits.
>
> I agree with the Employer that based on the structure of the Collective Agreement, termination and receipt of severance allowance; and early retirement receiving pension bridging are two distinct methods of exiting employment.
>
> In the case at hand Flanders [the grievor] was advised that his job was being eliminated. He was advised that he could collect severance allowance or retire early but could not collect both. Not surprisingly Flanders took some time to weigh the pros and cons of the options. He chose to accept severance. His last day of work was June 30, 2008. On that date he was terminated and received severance. He could not then decide to retire early and receive pension bridging as he had already severed his employment. However, that did not preclude him from applying to the Pension Plan to receive pension benefits.
>
> I conclude that there is nothing in the Collective Agreement that leads me to conclude that there was an intention of the parties, when the Collective Agreement was negotiated, to confer the monetary benefit asserted by the Union.
>
> The Collective Agreement uses different terms; termination and retirement. Certain benefits flow to individuals depending on how they exit the workforce. However, an employee cannot assert a claim to both based on the language of the Collective Agreement. (paras. 31 and 37-44)

The interpretative approach followed in *Tembec* is similar to that found in another award cited by the Employer: *Cowichan School District No. 65 -and- Canadian Union of*

Public Employees, Local 606, [1992] BCCAAA No. 176 (McPhillips). The Employer relies on the following passage in particular:

> There are a number of well established legal principles which are applicable to the case at hand. First, it is clear that the onus is on the Union to show clear and unequivocal terms, either by the language itself or in conjunction with extrinsic evidence such as past practice and/or bargaining history, that a benefit was mutually agreed to by the parties: *Highmont Operating Corporation*, October 31, 1985 (Kelleher); *British Columbia Hydro and Power Authority* January 5, 1987 (Hope); *Noranda Mines Limited*, May 19, 1981 (Hope); *Board of School Trustees of School District No. 39 (Vancouver)*, B.C.L.R.B. No. 333/86; *Vancouver General Hospital*, June 15, 1983 (Vickers); *Sealy (Western)*, 5 L.A.C. (3d) 360 (Hope); *Wire Rope Industries Ltd.*, 4 L.A.C. (3d) 323 (Chertkow). … (para. 20)

The notion that a party has a special onus or burden to establish its interpretation of a collective agreement has been overtaken by subsequent authorities in this Province. Most (and perhaps all) of the leading arbitrators who once espoused that approach have expressly charted a different course. See, for instance, *Pope and Talbot -and- CEP, Local 1092*, [2006] BCCAAA No. 224 (Hope), at paragraph 92. The current state of the law is exemplified by *The Board of Education of School District No. 36 (Surrey)/BCPSEA -and- BCTF/Surrey Teachers' Association* (March 6, 2009), unreported (Korbin):

> With respect to the Employer's reliance on the *Wire Rope* and *Noranda* line of cases, arbitrators have not, in recent history, strictly adhered to the notion that the Union bears any additional onus or burden in cases such as this. It is my view that as this is a matter of interpretation, my role is to find the mutual intention of the parties within the competing interpretations put forward by the parties. In such an analysis, neither party bears any special onus of proof. (p. 13)

Thus, I do not accept the Employer's submission that the *Tembec* and *Cowichan* awards provide the proper interpretive framework. Moreover, it appears the arbitrator in *Tembec* was not directed to other awards which have allowed employees to claim both severance pay and retirement benefits in analogous circumstances. One such award is

AGS Automobile Systems -and- National Automobile, Aerospace, Transportation and General Workers of Canada (CAW-Canada), Local 124 (Retiree Benefits Grievance), [2011] OLAA No. 208 (P. Picher), and it forms a cornerstone of the Union's position.

The employer in *AGS* contended that seven grievors were ineligible to claim retiree benefits under the collective agreement because they had severed their employment by operation of the Ontario *Employment Standards Act* when they elected to be paid severance pay. There are indeed passages in *AGS* which lend support to the Union's claim under the present grievance. But the arbitrator made at least two determinations which do not apply here: first, she found that the grievors' seniority and employment had not terminated because of their election to receive severance pay under the statute (para. 106); and second, she found the grievors had voluntarily terminated their employment when they resigned (paras. 114-115 and 126). These findings were seemingly crucial to her reasoning:

> Entitlement to life insurance and health benefits in addition to severance pay under the *ESA* for employees who both have been on extended layoff for 35 weeks or more and who have 20 or more years credited service does not create a contradictory result. In the circumstances of this matter, both are payments that fall upon a voluntary cessation of the employment relationship and both are earned benefits.
>
> *Entitlement to retiree benefits under the collective agreement is triggered by the employee's voluntary decision to retire. Similarly, the timing of the election to be paid severance pay, with its related loss of recall rights, was a voluntary decision for the grievors*. While the initial severance by way of layoff was the result of action taken by the Employer, the timing of the receipt of severance pay was triggered by the grievors' voluntary election under section 67(3) of the *ESA* to be paid severance pay instead of retaining their recall rights. The payment of severance pay was not set in motion by the Employer's layoff of the employee for 35 weeks or more, although that was a precondition to entitlement. *For the grievors, the employment relationship would continue following the layoff of 35 weeks and the deemed severance by the Employer essentially until the grievors elected to be paid severance pay. Accordingly, the two benefits of severance pay and retiree benefits, timed as they were, resulted from voluntary steps taken by the grievors to leave employment*. (paras. 116-117; emphasis added)

Nonetheless, a further reason in *AGS* for allowing both benefits does support the Union's claim here:

> Moreover, both are earned benefits. Under article 65(1) of the *ESA,* severance pay is calculated on the basis of the length of employment. The retiree benefits contained in articles 18 and 19 of the collective agreement are based on 20 or more years of credited service. Such earned retiree benefits should not be voided or forfeited except on the basis of clear language expressing such an intention. It is the conclusion of the Arbitrator that no such language exists in the collective agreement. (para. 118)

As observed in *United Steelworkers, Local 1-500 -and- Syncreon/TDS Automotive Canada Inc. (Retiree Severance Pay Grievance)*, [2008] O.L.A.A. 601 (Hunter), the Ontario case law is, to some extent, "conflicting" (para. 23). The question there was whether an employee who resigned under a plant closure agreement and received severance pay could also claim benefits that flowed under the collective agreement to those who had retired. Not unlike the situation before me, the company argued the categories of "resigned" and "retired" are distinct and mutually exclusive. The arbitrator found there was nothing in the plant closure agreement that restricted former employees from any collective agreement benefits that accrued to "retirees". In the absence of such disqualifying language, the arbitrator concluded he would be exceeding his authority by "reading in" the interpretation proposed by the company, and rejected its position:

> [The Company] submitted that in labour law "resignation" and "retirement" are two separate and distinct concepts. Even if this were true (and the case law does not persuade me that it is true), both are artificial concepts where, as here, the catalyst is a plant closure. The "resignations" generated under the Plant Closure Agreement (Exhibit 4) amount to nothing more or less than a severing of employment coupled with an intent to immediately access one's post-employment entitlements.
>
> * * *
>
> The case that is factually closest to the instant case is *C.U.P.E., Local 2187 v. Regional Municipality of Ottawa- Carleton,* [2001] O.L.A.A. No. 588. I find the reasoning of Arbitrator Burkett, and the [result] reached in that case, persuasive, and with respect adopt it.

Specifically, I agree with this analysis of Arbitrator Burkett:

> "... were the grievors entitled to both the separation payments under article 23.03 and the termination allowances payable on retirement? In order to answer this question, we must turn to the language of the collective agreement read in the context of the economic realities. We comment, firstly, that the idea that an individual in deciding whether or not to terminate his/her employment would consider the totality of his/her economic circumstances is a commonsense one that reflects what people do. We comment, secondly, that it is not unusual for employers seeking to downsize through attrition to offer both severance payments and enhanced early retirement packages. ... It seems to us that against this backdrop, it could reasonably have been expected that if the intention had been to disqualify individuals from other termination allowances based on retirement who were at one and the same time retiring and receiving a separation payment, there would have been an express disqualification. There is none here. ..."

To the extent that Arbitrators Etherington (*C.A.W., Local 35 v. Siemens VDO Automotive Inc.* (2007), 162 L.A.C. (4th) 43) and Brandt (*C.A.W., Local 252 v. Cryovac*, [2007] O.L.A.A. No. 557) have reached different conclusions, I note that those cases are factually distinguishable from my case; to the extent that some arbitrators have treated retirement and resignation as two "mutually exclusive forms of termination of the employment relationship" (Arbitrator Etherington's words) then I respectfully disagree.

The arbitral jurisprudence is, to some extent conflicting, but I prefer and follow the Burkett line of cases. (paras. 20 and 24-27)

Not surprisingly, the Union relies as well on the *Ottawa-Carlton* award, while the Employer's brief of authorities contains the *Siemens* and *Cryovac* decisions. In *Ottawa-Carlton*, the arbitrator looked to see whether there was language that expressly disqualified an employee from the two benefits in question (para. 13). Further, it was held that the article providing the retirement benefits "does not require a finding as to the reason for termination but simply a finding as to whether or not an employee has retired" (para. 15).

In the *Siemens* case, it was found that employees who elected severance pay were not entitled to a lump sum retiring allowance. The arbitrator accepted the view that severance pay and voluntary resignation are two mutually exclusive ways of terminating the employment relationship, and "… voluntary resignation will exclude an employee from entitlement to severance payments unless the union can prove the employee fits within an express exemption …" (p. 57). The arbitrator was also influenced by the fact that the employees were treated as retirees for purposes of certain other pension and health insurance benefits. These express provisions supported the employer's interpretation that the employees were not entitled to the lump sum retiring allowance because there was no comparable language making it applicable to the employees (pages 58-59).

The arbitrator in *Cryovac* denied a claim for early retirement benefits where employees had accepted severance pay under a closure agreement, and reasoned:

> At its most fundamental level, the obstacle faced by the union is that someone whose employment is severed and who accepts enhanced severance payments under the Closure Agreement, is no longer an "employee" for the purposes of D.01.11 and cannot claim the benefits provided for therein. An employee who qualifies for the benefits under D.01.11 and who has not been severed, has the option of retiring early and taking those benefits. However, he cannot at the same time enjoy the severance pay that is payable to employees whose employment is terminated by the company. In short, he cannot have his cake and eat it too. (QL p. 7)

It is perhaps noteworthy that the union in *Cryovac* had sought through its severance pay proposals to include "those who retire during the closure". In the arbitrator's opinion, the provision would not have been necessary if severance pay was payable to employees who retired, and it demonstrated the union accepted the "fundamental principles relating to the termination of the relationship of employment" (*ibid*).

Another award from this jurisdiction is *British Columbia Public School Employers' Assn. -and- British Columbia Teachers' Federation (Loewen Grievance)*, [2002] BCCAAA No. 237 (Jackson). The circumstances were reversed, in that a teacher who applied under an early retirement incentive plan later requested severance pay; however, similar arguments were were directed to the same issue. The union said the grievor could elect severance pay and retire, and there was nothing in the collective agreement to prevent both. The employer submitted this was not possible, as retirement and termination are mutually exclusive concepts. The arbitrator rejected the employer's argument, taking into account the nature of the two benefits:

> … I have found nothing in this collective agreement that disentitles a teacher to severance pay because she chose to participate in the ERIP under the provincial program. Further, it is my view that severance pay and pension do not provide payments for the same purpose. Severance pay is recompense for the loss of continuing employment and recognition of the employee's years of service. Pension is a benefit earned by an employee over a number of years to provide an income on retirement.
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> * * *
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> I have reviewed the decision of *Mainland Engine Rebuilders, Ltd.*, *supra*, relied on by the Employer. In that case Arbitrator MacIntyre considered whether an employee who had voluntarily retired at age 65 was entitled to severance pay. He decided that the employee was not entitled. In my view, however, that case is distinguishable from the instant case. In the *Mainland* case there was a provision in that collective agreement that removed any possible entitlement to severance pay when an employee resigned. The arbitrator noted that there was no mention in that agreement of retirement or any provision requiring retirement at any age. So he treated the employee's "retirement" as simply a resignation. Since there was an express provision in the agreement disentitling employees who resigned from receiving severance pay, the grievance failed. As well, the employee in *Mainland* had not already been terminated/laid off as had Ms. Loewen at the time she applied for her severance.
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> * * *
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> In sum I do not agree that the general law precludes the receipt of both a pension or a pension incentive and severance pay. Entitlement in any particular case will depend on the language of the collective agreement and the timing and circumstances surrounding the end of the

> employment relationship. In this case the agreement does not preclude the receipt of both benefits. The grievor was terminated by her Employer and entitled to severance. She applied for severance pay before her links with the Employer were extinguished by her resignation on July 1st. For all the above reasons I have concluded that Ms. Loewen's participation in the provincial ERIP did not disentitle her from electing severance pay at the time she did. (paras. 49, 51 and 59)

The last award to review is put forward by both parties: *MacMillan Bloedel Ltd. -and- Communication, Energy & Paperworkers Union, Local 76*, [1997] BCCAAA No. 744 (Lanyon). One of the issues before the arbitrator was "[t]he ability of an employee to take both enhanced early retirement and severance". This question was answered in the negative:

> *I have concluded that an employee is not entitled to both enhanced early retirement and severance benefits.* This clearly, in my view, amounts to pyramiding a benefit or double dipping as the Company states.
>
> An employee receives enhanced severance and normal retirement benefits because the enhanced severance will provide some partial benefit to make up for the early retirement at the standard benefit rate. However, if enhanced early retirement is granted, this benefit covers the entire period prior to the period when full retirement benefits would have been triggered. Thus, to receive severance, would be to cover at least some of the same period twice. *This would not be the case under the scenario of normal severance and normal retirement benefits* (with the exception of course of someone whose job has been eliminated some months prior to the normal retirement age under the Collective Agreement).
>
> This flows from the same principle as to why an individual is not entitled to both enhanced severance and enhanced early retirement. Any such double benefit would require the strongest possible language. Any such language is absent from this agreement. Indeed, the evidence points to the opposite conclusion for three reasons: no past agreement has granted such a benefit; during the negotiations of the package there were no specific discussions on this issue; and finally, at an initial meeting held to discuss the effect of the early retirement package, a Glen Nimark, who conducted the meeting, with the Union present, was specifically asked about the issue of an employee taking both enhanced early retirement and severance, and he stated that no employee was entitled to both benefits. (paras. 20-22; emphasis added)

Unfortunately, the *MacMillan Bloedel* award does not describe what the "enhanced early retirement benefits" entailed, but it seems evident that the benefits flowed from a memorandum of agreement outside of the collective agreement. It also appears that the arbitrator did not adopt the view expressed in many awards that severance pay is an earned benefit in return for service, and also compensates employees for the loss of their seniority status: see the discussion found at pages 87-88 of *Re Atco Lumber Ltd. and I.W.A. Canada, Local 1-405* (2004), 130 LAC (4th) 76 (Hall). But those uncertainties aside, as the Union emphasizes, there was no doubt that employees in *MacMillan Bloedel* were "entitled to both standard severance and retirement benefits under the Collective Agreement" (para. 18).

What guidance should be taken from this review of past awards? The observation in *Syncreon* that "[t]he case law is, to some extent, conflicting" is an obvious understatement. The Ontario cases can perhaps be explained on their facts, as Arbitrator Picher did at paragraphs 119 through 123 of *AGS*. That award also represents the most thorough examination of the subject. However, it is impossible to reconcile some of the underlying "principles" articulated by the authors of the various awards. I prefer the approach which suggests that the manner in which the employment relationship has come to an end should not be determinative. This is consistent with the fact that employees who have received severance pay are nonetheless entitled to the main retirement benefit contemplated by the Collective Agreement; namely, the pension provided by the Plan referenced in Article XX. The question should be whether the language of the collective agreement indicates the parties mutually intended employees to be eligible for the benefit(s) in dispute. This involves the usual canons of construction (see *Pacific Press -and- Graphic Communications International Union, Local 25-C*, [1995] BCCAAA No. 637 (Bird), at QL para. 27), bearing in mind the nature and purpose of the benefit(s).

I have already canvassed the purpose of severance pay. A pension has been described differently as a contractual benefit whereby "[e]mployees forego their current earnings (whether from their own direct contribution or from an employer contribution which otherwise could be paid in wages or other benefits) in order to provide for their

income after they have retired": *PPIRB -and- CPU*, [1978] 1 Can LRBR 60, at p. 72. That is certainly the situation here having regard to Section 2 of Article XX. It is apparent as well that improvements to the Pop-up Bridge were negotiated under the 2008 Memorandum of Agreement. It should additionally be recalled that Item Nos. 34 and 35 in the Codification of Local Agreements were expressly secured in exchange for employees performing certain work of benefit to the Employer on "down" statutory holidays. The earned nature of the benefits in dispute here invites the approach that employees should be eligible unless there is an express disqualification: see *AGS*, at para. 118; *BCPSEA*, at paras. 49 and 59; and *Syncreon*, at para. 25 citing *Ottawa-Carlton*. On that front, I note Article XXIII, Section 2 contains exclusionary language regarding other severance payments, but does not preclude payment where an employee is otherwise entitled to any of the Retiree Benefits.

The operative language of the current Pop-up Bridge is repeated for proximate reference:

> The Company shall provide employees with a pension bridge annuity of twenty dollars ($20.00) per month per year of service at age sixty (60) or older who retire prior to attaining age sixty-five (65). The pension bridge benefit will not be payable beyond age sixty-five (65). The calculation of the pension bridge benefit shall be credited on the same basis as under the terms and conditions of the Pulp & Paper Industry Pension Plan.
>
> An employee who chooses to retire at age fifty-five (55) or later shall have access to the bridging benefit paid by the Company when they reach age sixty (60).

I note the mandatory language of this provision: "The Company *shall* provide …" and an employee "… *shall* have access …" (emphasis added). Further, and more critically, the bridge is provided to an employee "who chooses to retire at age fifty-five (55) or later …". Eligibility is not dependant on employees "ending their employment by retiring from the Company". Yet those words must effectively be read into Article XX, Section 5 under the Employer's interpretation of the clause. Presumably, employees age 55 and older had at least two options when faced with the permanent closure at Elk Falls:

they could seek employment at another mill, or they could choose to retire and apply for benefits under the Pension Plan. Under one scenario put forward by the Union, employees could have provided written notice of retirement effective October 1, 2010 and would still have been "employees" when the mill closed. Absent an exclusion arising from contrary language, or by necessary implication, I agree with the proposition that there is nothing to prevent "the door to both severance pay and retiree benefits [opening] virtually simultaneously …": *AGS*, at para. 114. Indeed, that is a plain interpretation of Article XX, Section 5 which aligns with the mandatory wording.

Much the same can be said about Item Nos. 34 and 35 and the related Letter of Understanding. The phrase "Elk Falls Retired Associates" can be readily interpreted as referring to persons who have retired under the Pension Plan coincident with their employment at the mill being terminated by the permanent closure. That is because the phrase speaks to the status of the individual, and not the manner by which their employment came to an end (see again *Ottawa-Carlton*, at para. 15).

I have not yet dealt expressly with the Employer's argument based on Article XVI, Section 3 of the Collective Agreement which it says refers to the distinct concepts of "retirement" and "termination":

Section 3: Partial Entitlement

> At *retirement or termination* from the Company an employee who has completed five (5) or more years of service shall be entitled to that portion of Supplementary Vacation Pay proportionate to the number of years of service completed subsequent to his/her last five (5) year entitlement period. (emphasis added)

To reiterate, I have no quarrel with the authorities which treat retirement and severance (or termination) of employment as separate concepts. However, as noted in *AGS* in relation to *Bell Canada*, [1974] SCR 334, instead of focusing on whether one concept includes or excludes the other, the current difference is whether receipt of one benefit precludes entitlement to another. Article XVI, Section 3 describes the two

instances where an employee will be entitled a portion of the Supplementary Vacation Pay; however, for reasons given already, it does not automatically follow that receipt of severance pay upon termination due to permanent mill closure precludes entitlement to the Retiree Benefits.

V. CONCLUSION

The question raised by the grievance is answered in favour of the Union: Employees terminated due to the permanent closure of the Elk Falls mill were entitled to receive severance pay under Article XXIII and, if otherwise eligible, they were also entitled to the various Retiree Benefits provided by the Collective Agreement and the Codification of Local Agreements. I so declare, and reserve jurisdiction in the event of any difficulty implementing the terms of this award.

DATED and effective at Vancouver, British Columbia on May 3, 2012.

JOHN B. HALL
Arbitrator