IN THE MATTER OF AN ARBITRATION

BETWEEN:

CARRIER LUMBER LTD.
(VALEMOUNT FOREST PRODUCTS LTD.)

(The "Employer")

AND:

USW, LOCAL 1-417

(The "Union")

Re: Severance Pay Grievance

ARBITRATION AWARD

Counsel for the Employer:	Donald J. Jordan, Q.C.
Counsel for the Union:	Sandra Banister
Date of Decision:	January 7, 2010
Arbitrator:	John L. McConchie

AWARD

I INTRODUCTION

This case involves a grievance brought by the Union on behalf of its members who, it alleges, are owed severance pay as a result of having been terminated from their employment due to the permanent closure of their place of employment.

On May 24, 2006, Northwest Lumber Manufacturers Ltd. ("Northwest") discontinued operations at its sawmill and laid off all employees, with a few exceptions. On June 6, 2006, Carrier Lumber Ltd. ("Carrier") bought the mill with the intention of re-opening it. The operation was later renamed Valemount Forest Products Ltd. ("VFP"). Working pursuant to a multi-faceted plan, VFP worked towards a re-opening over what proved to be a lengthy period of time. As time went on, employees lost their seniority retention rights under the Collective Agreement. The Employer continued to work towards its goal of re-opening but, in the fall of 2008, housing markets in the United States collapsed. On March 2, 2009, VFP announced that the mill was being permanently closed. The Union then grieved, seeking severance pay for its members.

The Union's severance pay claim is based on Article XXVIII of the Collective Agreement which provides as follows:

> XXVIII: SEVERANCE PAY FOR PERMANENT PLANT CLOSURE
>
> 1. Employees terminated by the Employer because of permanent closure of a Manufacturing Plant shall be entitled to severance pay equal to ten days' pay (a day is defined as 8 hours straight time pay) for each year of continuous service and thereafter for partial years in increments of completed months of service with the Company.
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> 2. Where a Plant is relocated and the Employees involved are not required to relocate their place of residence and are not terminated by the Employer as a result of the Plant relocation, they shall not be entitled to severance pay under this Article.

The Union has asserted that employees have lost their seniority retention rights as a result of the permanent plant closure. The relevant provision in the Collective Agreement is Article X, Section 10: Retention During Layoff, which provides:

> Seniority during lay-off shall be retained on the following basis:
>
> (a) Employees with less than one (1) year's service shall retain their seniority for a period of eight (8) months.
>
> (b) Employees with one (1) or more year's service shall retain their seniority for one (1) year, plus one (1) additional month for each year's service, up to an additional twelve (12) months.

(c) A laid-off Employee's seniority retention is reinstated on the completion of one day's work.

The Employer disputes the claim. It says that the employees' entitlement to severance pay under Article XXVIII arises only when the employee is terminated because of a permanent plant closure. While the Employer admits, as it must, that the mill did permanently close as of March 2, 2009, it says that it was not permanently closed at the time that the employees lost their seniority. Accordingly, says the Employer, there was no causal relationship between the ultimate closure and the employees' terminations.

II PRIMARY ISSUES IN THIS CASE

There are two primary issues in this case which must be resolved.

The first issue is whether the bulk of the employees who were "terminated" in the course of the lengthy closure were terminated because of a "permanent plant closure" within the meaning of Article XXVIII. The resolution of this issue will depend on a review of the facts in light of the applicable legal authorities which have considered the precise issues.

Depending on the resolution of the issue addressing the bulk of the employees, there are several separate categories of employees whose circumstances may require separate examination, including those who retired during the period of the closure, those on long term disability, and so forth. The evidence and argument in this case was largely taken up with resolving the first issue, and so, if it becomes necessary, I will refer these separate category cases back to the parties with the guidance provided by the resolution of the first issue. If it should be necessary to adjudicate, I then will invite the parties to refer the matters back that cannot be resolved.

The second issue arises from the course of discussions between Employer and Union representatives towards resolving the collective agreement issues that represented the first "piece of the puzzle" in the company's plan to re-open the mill (see later discussion). The issue is whether the Union is estopped from claiming severance pay on behalf of its members because of representations it made to the Employer during those discussions, which representations were relied on by the Employer to its detriment.

In addressing these issues, I will first set out a somewhat expanded version of the facts of this case. Putting the estoppel issue aside, the facts are largely undisputed. It is the application of the jurisprudence to the facts which is at issue. I will then deal with and resolve the first above-mentioned issue. If, having done that, the further issues remain, I will address them in their turn.

III FACTS

The facts which follow are drawn from a comprehensive Statement of Agreed Facts put before me by the parties and from the testimony of the witnesses who testified in the proceedings. As I do not intend to reproduce it here in its entirety, and because it forms a useful record of the full facts before this board, I will attach the Statement as an

Appendix to this Award, with redactions to protect the privacy of individuals..

Apart from the Statement of Agreed Facts, the Employer also produced voluminous documentary evidence in support of the matters reviewed in it. In view of this, the witnesses were few and the hearing was conducted with efficiency. Warren Oja, the financial secretary of Local 1-417, testified for the Union. Martin Meyer and Bill Kordyban testified for the Employer. Mr. Meyer is Carrier's Manager of Administration. Mr. Kordyban is the President of Carrier Lumber and VFP.

As already mentioned, when Carrier purchased Northwest on June 6, 2006, the mill was not operating. With the exception of 12 employees who were being paid, the mill's workforce had been laid off.

It was Carrier's purpose in purchasing the sawmill to resume operations and it almost immediately made this known to the Union and the employees.

On June 20, 2006, representatives from Carrier met with representatives from the Union and members of the VFP Plant Committee. At the meeting, Carrier's President outlined a plan for resumption of operations which consisted of several "pieces of the puzzle" which would have to be in place before the mill would open. These included:

a. Reaching acceptable amendments to the collective agreement with the union (Collective Agreement Issue).
b. Obtaining an adequate log supply for the mill (Log Supply Issue).
c. Coordinating a viable plan to dispose of mill residues given the pending Tier 1 beehive burner operations within the province (Burner Issue).
d. Coordinating capital improvements to the mill (Mill Reconfiguration Issue).
e. Market conditions making operations economically viable (Market Issue).

Other matters addressed at the meeting included vacation pay, ROCE pay under the Collective Agreement, contracting out, plant seniority, working foreman, technological change, letters of understanding and outstanding grievances.

From paragraph 6 of the Statement: The parties addressed the issue of whether there were any outstanding grievances on a number of occasions by telephone, email transmissions and direct meeting. Those discussions took place on June 20, August 14, September 18 and October 17, 2006. On November 8, 2006 Ray Cherriman, business agent for Local 1-417, wrote to Mr. Meyer confirming that there were no outstanding grievances to be dealt with although the grievance of one specified employee had some issues to be addressed.

From paragraph 7 of the Statement: In the spring of 2007, VFP discussed the Company's intentions regarding ongoing operation. The operating plan called for the start of the sawmill and the shipping of rough lumber to [Carrier's] Prince George operation to be dried and planed. The parties met on several occasions, and exchanged emails and telephone conversations, to discuss an agreement related to offering severance to persons

whose positions would henceforth be excluded from the bargaining unit. The parties eventually agreed upon a number of days entitlement which was approximately half way between “technological change” (7) and the “permanent closure” (10) in the collective agreement. Final resolution of all of the collective agreement issues took place by a vote of VFP union members on May 15, 2007.

This was nearly one year after the initial cessation of operations at the mill. I was informed by Union counsel in her opening statement that the employees had various lengths of seniority retention based on length of service but that a large group lost seniority retention in or around May, 2007.

Over time, the Employer worked towards the objective of putting together the pieces of the puzzle so that the operation could resume. Having negotiated amendments to the Collective Agreement with the Union, and having them ratified, the Employer addressed the log supply issues through the purchase of a new forest license. It explored means of resolving the burner issue and had identified a possible solution. It spent considerable time on the mill reconfiguration issues, which appeared to be in hand.

Throughout this period, the Employer continued to carefully monitor lumber prices and business conditions, neither of which was particularly favourable. Despite this, the Company remained confident it would succeed in reopening the operation. Carrier had shown resiliency in the face of poor market conditions in the past.

As it was explained in paragraph 19 of the Statement: Historically, Carrier's position has been stated to be that “markets don't matter”. Carrier's past practice has been to produce lumber for inventory purposes during the low points of the commodity price cycle and, based upon its past experience, it has been able to sell this lumber at a premium once normal commodity pricing resumes. The Company's normal position in this regard was communicated to the Union during discussions.

It was expressed in the evidence by Mr. Oja that the Union was well aware of this but less confident than the Employer as time went on that the plant would re-open. It remained hopeful nonetheless.

In the fall of 2008 and continuing into the early part of 2009, it became increasingly apparent to the Employer that the market conditions piece of the puzzle was not going to fit. As explained in paragraph 21 of the Statement: The decline in the lumber commodity price was coupled with the collapse of the world financial markets in the fall of 2008 and spring of 2009. The Company's evidence would be that the concerns generated by the historic low prices, the length of the downturn in commodity prices and the collapse of the world financial markets led senior management of VFP to conclude that they could not bear the cost associated with maintaining the mill in market-ready condition any longer.

I say parenthetically that although the Statement used the construct “The Company’s evidence would be”, the evidence of Mr. Kordyban satisfied me that the coming of what

was called in the evidence "the great recession" proved to be the stumbling block in the plans to re-open. The gist of his evidence was that although the Employer was prepared to brook high waves and unsettled seas on the economic front, the events of late 2008 were the equivalent of a tsunami which wiped away all hopes of re-opening the mill. The Company announced the permanent closure of operations at VFP on March 2, 2009. The Union filed its grievance one day later.

If there is an issue about this (some cross-examination appeared to go to the point), I will state my conclusion now that that there was nothing untimely about the Union's grievance.

IV SUBMISSIONS

The parties provided written outlines of their arguments and supplemented them with oral submissions at the hearing. I have attempted to capture the major elements of their submissions below.

While this Award will be lengthy enough, it will not attempt to capture and respond to every point of evidence or argument made in this case. This should not be taken to mean that the evidence or argument was not considered.

The submissions set out below deal with the substantive issue of whether the employees are entitled to severance pay under the Collective Agreement. The estoppel issue will be dealt with separately later.

Union

The Union posits the issue as follows: when a manufacturing plant has been deemed permanently closed, are the employees who were on the seniority list when production was suspended entitled to severance pay for permanent closure or does the effluxion of seniority prior to the notice of closure bar their entitlement to severance pay?

It is the Union's position that whether a permanent closure has occurred is a question of fact founded on all of the circumstances of the case. Based on the authorities, and most recently the decision of Arbitrator Hope in *Hayes Forest Services Ltd. v. Industrial Wood and Allied Workers of Canada, Local 2171,* [2006] B.C.C.A.A.A. No. 115 (Hope, Q.C.), the Union submits that when there is a closure and the operation never re-opens but remains closed throughout, and where the closure is ultimately found to be a permanent closure, the judgment that the closure is permanent has effect as of the date of the original cessation of operations.

The fact that the closure is not declared permanent until a later date is immaterial, says the Union. The closure, as a matter of fact, was permanent from the point of the initial closure of the mill even if that had not been the original intention of the Employer. This is also true, says the Union, where the Employer has made best efforts to re-open (and the Union accepts that it has done so here) but those best efforts do not result in the re-

opening of the mill. In these circumstances, whether it was a known fact at any point along the timeline from initial closure to permanent closure, the mill was de facto always permanently closed.

The Union says that this proposition is amply supported by the cases, and, as mentioned, most recently so in the decision of Arbitrator Hope in *Hayes*.

The Union submits that there is another equally compelling reason why the issue of the effluxion of seniority prior to a determination of a permanent closure does not disqualify employees from their entitlement to severance pay. That is because, says the Union, nothing in the Collective Agreement compels the conclusion that employees are "terminated" by the effluxion of seniority. The Union says that after the expiry of seniority retention employees remain employees, albeit without seniority for the purpose of benefits such as recall, vacation pay and job postings. The Collective Agreement, read as a whole, does not equate employment status with seniority. As just one example, argues the Union, employees who are absent without leave forfeit all seniority yet remain employees.

Employees who lose their seniority due to a lengthy layoff are in no different position, says the Union. Hence, there is no correlation between the effluxion of seniority rights and severance pay for permanent closure. Accordingly, the effluxion of seniority during a temporary closure, prior to the crystallization of the closure, does not preclude severance pay for permanent closure.

In the final analysis, says the Union, the plant was closed and never re-opened. Regardless of the intentions of the Employer and the work it put into its plans for re-opening, the fact is that the mill did not re-open. As a matter of fact and law, it was permanently closed on May 24, 2006.

Employer

The Employer, of course, emphatically disagrees with the Union's approach.

The Employer says that when it purchased the mill, it did so with the intention of bringing it back into production, and this evidence is undisputed. Therefore, it would be a factual and legal fiction to say that the mill was closed as of May 24, 2006 when the employees were first laid off. This, argues the Employer, is precisely what the Union wants this arbitration board to declare. Yet, if it were to do so, the board must ignore all of the evidence of events that occurred after the initial closure, evidence which demonstrates with certainty that, while there can be no doubt the mill eventually permanently closed, it most certainly was not permanently closed as of the date of initial cessation of operations. No arbitration board, says the Employer, has accepted the proposition that everything that comes after the initial closure is irrelevant. All have found that the events after the initial closure are highly relevant and are essential ingredients in the judgment that must be made as to whether employees have been terminated because of a permanent plant closure.

Looking at the evidence post-initial closure, the Employer points out that the evidence shows that the Employer had a careful, workable and multi-faceted plan. It did not simply create the plan; it brought it into effect over a lengthy period during which each of the pieces of the puzzle was put, or was being put, in place. There was every reason to consider that the closure was not permanent as the plan played out. Unlike other operators, the Employer was an enterprise which was not unduly put off by bad markets; it had a history of weathering bad markets and profiting when they turned. It was not until the end, when the Employer was unexpectedly faced with the great recession, that it had to abandon its plan to re-open. The great recession involved the destruction of the very markets that the Employer required in order to maintain itself in a state of readiness and to re-open as an operating entity.

While the Employer acknowledges that employees were losing their seniority retention as time went on – and thus it says were being "terminated" for all practical and legal purposes – the ultimate decision to permanently close was both unexpected and unavoidable. During all material times prior to the Employer's reluctant acknowledgement of the impact of the great recession, the mill was destined to open.

Put differently, says the Employer, it could not be said on the evidence that at any time prior to that, the Employer was in a state of permanent closure. Were the arbitration board to find that the mill was permanently closed prior to the Employer's decision that it could not re-open, the effect would be to give the permanent closure in March 2009 retrospective effect. No case has held that the final outcome is to be given retrospective effect, argues the Employer.

The Employer submits that although there have been decisions where companies have put considerable efforts into their plans for re-opening, the current case illustrates a high degree of planning and execution which is perhaps unprecedented in the cases. Additionally, this Employer, unlike others, maintained a bargaining unit workforce throughout and so, while there was clearly a discontinuance of operations, there was no plant "closure" until it was announced in 2009.

The Employer does not say that an arbitrator cannot find that an employee was terminated due to permanent plant closure without a declaration to that effect already having been made by the time at which the employee was terminated. Instead, it says that on the evidence before this board there could have been no such declaration given the situation that existed at the time that the employees lost their seniority. The fact is, it says, that the mill was not permanently closed at that time.

Looked at as a matter of construction of the contract language, says the Employer, Article XXVIII requires that there must be a direct causal relationship between permanent plant closure and termination. Here, the necessary nexus between permanent plant closure and the termination was simply not present. There have been no cases, says the Employer, in which employees who lost their seniority during the time that the mill was not permanently closed were subsequently awarded severance pay when it did close.

The key issue, says the Employer, is simply this: when did the plant permanently close? If it was permanently closed as of the original date of closure or at the dates upon which employees lost their seniority, then that would be one thing. If it was not permanently closed at those times, but instead became permanently closed only later, then this would compel the conclusion that the grievances must be dismissed as the terminations could not be said to have been "because of" permanent plant closure. In short, the Union will have failed to establish the necessary causation between the permanent plant closure which ultimately ensued and the state of affairs at the time at which employees were terminated.

The parties relied on many of the same cases, and hence a listing of all the cases referred to by one or both of them is appropriate:

Ainsworth Lumber and IWA, Local 1-425, October 21, 1983, unreported (Hope); Atco Industries (N.A.) Ltd. (Pacific Division) v. United Brotherhood of Carpenters and Joiners of America, Local 2511 (Lay-Off Grievance) [1984] B.C.C.A.A.A. No. 399 [Munroe] *Atco Lumber and IWA, Local 1-405*, [2004] B.C.C.A.A.A. #105 (Gordon); *Bendickson Contractors Ltd. v. United Steelworkers of America, Local 1-2171* [2005] B.C.C.A.A.A. No. 235 (J. Kinzie) City of Vancouver and Canadian Union of Public Employees, Local 1004 (Vancouver Civic Employees Union) BCLRB No. B12/2008 *Copper Canyon Timber Ltd. v. United Steelworkers, Local 1-80 (Permanent Closure Grievance)* [2008] B.C.C.A.A.A. No. 72 (Sullivan) *Crown Forest Industries Ltd. and IWA, Local 1-71,* February 26, 1986, unreported (Kelleher); *Cypre River Falling Ltd. v. Industrial Wood and Allied Workers of Canada, Local 1-85,* Award no. A-015/01 (Kinzie). *Downie Street Sawmills Limited and International Woodworkers of America, Local 1-417,* November 28, 1988, unreported (Munroe); Ecco Heating Products ltd. and Sheet Metal Workers' International Association, Local 280 (Gill Grievance) [2002] B.C.C.A.A.A. No. 36 (W. Moore) Harbour Cruises Ltd. and The Pulp, Paper and Woodworkers of Canada, Local No.3 BCLRB Decision No. B181/2004 Hayes Forest Services Ltd. v. Industrial Wood and Allied Woodworkers Union of Canada, Local 2171 [2004] B.C.C.A.A.A. No. 129 (Hope) *Hayes Forest Services Ltd. v. Industrial Wood and Allied Workers of Canada, Locals 1-80, and 1-85 certified for Weyerhaeuser Company Limited*, unreported March 15, 2005 (Mackenzie J., Interpreter) (and letter dated May 19, 2005 to the parties) *Hayes Forest Services Ltd. v. Industrial Wood and Allied Workers of Canada, Local 2171* [2006] B.C.C.A.A.A. No. 115 (Hope, Q.C.) Hayes Forest Services Ltd. v. Industrial Wood and United Steelworkers of America, Local No. 1-2171 [2007] B.C.L.R.B.D. No. 133 International Forest Products Ltd. v. Sandhu [2008] B.C.J. No. 844 (BCCA) *Island Shake and Shingle Co. Ltd. and International Woodworkers of America, Local 1-80,* December 31, 1982, unreported (McKee); *Island Shake and Shingle Company and International Woodworkers of America, Local 1-80,* October 9, 1981, unreported (McKee); *Pacific Forest Products and IWA, Local 1-85*, [1993] B.C.C.A.A.A. #337 (Albertini); *Re Council of Marine Carriers and Canadian Merchant Service Guild* (1983) 10 L.A.C. (3d) 375 (Munroe) Re Westar Timber Ltd. (Skeena Pulp) and PPWC, Local 4 (1985), 22 L.A.C. (3d) 406 (Vickers) *Skeena Cellulose Inc. v. Christian Labour Assn. of Canada, Local 44, [2001]* B.C.C.A.A.A. No. 366 (Somjen) *Skeena Cellulose*

Inc. v. Christian Labour Assn. of Canada, Local 44, [2002] B.C.C.A.A.A. No. 433 (Somjen) *Stave Lake Cedar Mills Inc. and International Woodworkers of America, Local 1-367*, September 12, 1989, unreported (McKee); *Uniroyal Ltd. and United Rubber, Cork, Linoleum and Plastic Workers, Local 67*, (1979) 23 L.A.C. (2d) 386 (Weatherill); *Various Forest Products Industries (Coast Region) represented by Forest Industrial Relations and IWA-Canada, CLC*, May 31, 1989, unreported (Lysyk); *West Fraser Mills Ltd. (100 Mile Lumber Division) and United Steelworkers of America, Local No. 1-425* BCLRB Decision No. B199/2006

V REVIEW OF THE CASE AUTHORITIES

In order to succeed in a claim for severance pay under Article XXVIII, the Union must establish on behalf of the employee that:

(1) the employee claiming the benefit has been terminated by the Employer; and

(2) the employee's termination has been "because of" permanent plant closure.

With respect to the first above-noted question, the Union presented alternative arguments regarding when a "termination" can be said to have occurred. The first assumed that the employees had been terminated coincident with their loss of seniority and the alternative argument proceeded on the footing that the terminations only came at the date of the announced plant closure. The employer argued that the employees were terminated when they lost their seniority.

I will proceed with the analysis of the case authorities on the assumption that the employee terminations occurred at the time of the loss of their seniority. If it becomes necessary to do so, I will address the Union's alternative argument.

This is not a case of first instance. The parties agree that, while this case like others will turn on its own facts and circumstances, the means of analyzing those facts and reaching conclusions based on them depends on a proper understanding of the precedents. The parties have provided me with a wealth of case authorities on point, many of which were decided on the precise language of Article XXVIII. The parties acknowledge that their positions differ fundamentally on the meaning I should derive from the cases.

Accordingly, it will my purpose in this part of the Award to comprehensively review the case authorities with which I have been provided and determine what principles should guide me in answering the question of whether the employees (I am dealing with the bulk of the employees and not the separate cases) have established an entitlement to severance pay.

A review of the cases reveals that there are three basic fact patterns or scenarios.

Scenario A: In Scenario A, the operation ceases production and the employees are laid off. The operation remains closed but the employer expresses intentions to re-open and, in many cases, takes active steps towards an eventual re-opening. The closure is lengthy and, over time, employees lose their seniority retention. Finally, the unique feature of this scenario: the matter comes on for hearing before an arbitration board while the closure is ongoing; the employer is continuing to express an intention to re-open but has announced no fixed date for re-opening the mill and recalling the employees. The arbitrator is asked by the Union to declare that the ongoing closure is in fact permanent regardless of the employer's stated intentions.

Scenario B: Scenario B differs from Scenario A in one respect. By the time of the hearing, the Employer has announced a fixed date on which it will re-open and recall employees. As will be seen, an arbitration board is directed by the jurisprudence that it must not declare an operation to be permanently closed in these circumstances. The issue for the arbitrator will be the credibility of the commitment and whether jurisdiction should be reserved in case the commitment is not met.

Scenario C: Scenario C also differs from Scenario A in only one respect. By the time the matter comes on for hearing, the final outcome of the long closure is known. The employer has either re-opened the operation and recalled the employees or it has declared that the operation is permanently closed. In this situation, there is no need for an arbitral declaration as to whether or not the mill is permanently closed as the outcome is known. What is needed is an arbitral determination of whether or to what extent this outcome has relevance or implications for the severance pay entitlements of employees whose terminations occurred before the final results were known.

The case before me is obviously a "Scenario C" case.

If the Employer's approach is correct, we should find that arbitrators dealing with Scenario A and Scenario C situations will analyze the cases before them in substantially the same way. This is, regardless of whether the final outcome of the closure is known at the time of hearing, we can expect that the arbitration board will seek to determine at what point along the chronology of events from initial cessation of operations to ultimate closure (or re-opening) the plant could be said, based on the evidence, to have become permanently closed. Arbitration boards dealing with either scenario can be expected to ask the same question, namely: given the subjective intentions of the Employer and the measures taken by it to bring them to fruition, and given the objective facts known to the arbitration board as at that time or times (the date(s) of termination), has the Union established that the mill was in a state of permanent closure? If not, then the employees' will not have established a right to severance pay regardless of whether or not the closure is ultimately declared to be permanent.

If the Union's approach is correct, we can expect to find a distinct difference between Scenario A and Scenario C cases. Arbitrators hearing Scenario A cases will not know the

final outcome of the lengthy closure with certainty. They will seek to determine based on the evidence before them if the closure is permanent. By contrast, arbitrators hearing cases of the Scenario C type will know the outcome of the lengthy closure with certainty. They will be expected to find as a fact that the operation is permanently closed or has been re-opened, as the case may be, and this finding will govern the outcome of the case with retrospective impact to the date of initial cessation of operations.

Scenario B has the merit of being the subject of an undisputed principle which holds that an arbitrator will not declare an operation to be permanently closed, despite the fact it is not in operation, where a date has been fixed for re-opening and recall of employees. As might be expected, arbitrators tend not to take commitments on their face value without verification. Accordingly in these scenarios, arbitrators have the option of retaining jurisdiction to wait out the results. Although this is a very different scenario than those of A or C, there is one point at which the cases can provide guidance. When the employer does not meet its commitment to re-open, and the mill is declared then to be permanently closed, the arbitrators face the same question as in Scenario C, namely, what implications does this "later" closure have for the severance pay entitlements of employees whose terminations occurred well before?

I will now proceed to review the cases. Once I have done so, I will provide my conclusions on this issue.

***Re Island Shake and Shingle Company and International Woodworkers of America, Local 1-80*, unreported, October 9, 1981(McKee)**

This decision of Arbitrator McKee appears to be the first to tackle the question which concerns us in this case.

The issue before Arbitrator McKee was whether the Company had permanently shut down its mill and whether severance pay was due to the 46 grievors in accordance with a provision that read:

> Article XXX - Severance Pay for Permanent Plant Closure
>
> (a). Employees terminated by the Employer because of permanent closure of a manufacturing plant shall be entitled to severance pay equal to one (1) week's pay for each year of continuous service with the Company.

As can be seen, the language of the provision was identical (in all material respects) to the language in the instant case.

The facts before Arbitrator McKee were as follows. In December 1979 the entire bargaining unit was laid off due in part to poor market conditions and in part to the usual company practice of ceasing operations over the Christmas holidays. Five months later, the mill was destroyed by fire and the company was placed into receivership. In June 1981, the company was released from receivership. It was in or around this period that the Union brought its grievance, arguing that although there had been no declaration by

the employer to this effect, in reality the mill was permanently closed. The matter came on for hearing before Mr. McKee on October 1, 1981. By that point, the closure had spanned some 22-23 months and was ongoing. No employee had worked since the original layoffs in December 1979.

The company in that case disputed the Union's characterization of the closure. A principal of the company testified before the arbitrator that "given suitable financing, leasing and market conditions, it will be rebuilt." In fact, the company went further. Its representative undertook before the arbitrator that the company would rebuild by October 1, 1982, one year hence, failing which it would pay severance pay to the employees.

This case thus fell into the Scenario B category of cases. It was not until the collective agreement interpretation of Mr. Justice Lysyk in *Various Forest Products Industries (Coast Region) Represented By Forest Industrial Relations Limited and IWA- Canada, C.L.C.* unreported, May 31, 1989 (the "Lysyk Award"), some years later that it would be definitively ruled that where a date for resumption of operations and recall of employees has been fixed, there is no permanent closure. However, Mr. McKee was thinking precisely along these lines, motivated by a desire not to issue a declaration of permanent closure which might have the effect of being the trigger for the company to actually permanently close operations.

That conclusion is supported by the manner in which Arbitrator McKee decided the case. First, since he was asked for a declaration by the union, he decided that he had to answer it. After reviewing the steps that the company had taken and was willing to take in the future, he found as a fact that: "The Company mill, while burned to the ground, is not in a state of permanent closure as foreseen in Article XXX." But he went on to hold the company to its statement that it would re-open the mill by a certain date or pay severance pay.

Interestingly, there was no discussion in the case about whether employees had lost recall rights. In fact, the arbitrator noted in the Award that "No evidence was led to establish that the Company had at any time terminated the employees." To the arbitrator, this appeared to be of no particular importance. "The intent of the [plant closure] Article seems, on its face, to be quite clear", he said: "When a Company, due to market conditions, lack of lumber, or the many other factors that lead to unprofitability, decides to close its doors and go out of business, it must pay severance pay as foreseen in Article XXX." (at p.3)

I take from this that to Arbitrator McKee the termination of all work by permanently closing a plant meant, de facto, the termination of all employment. He did not appear to consider it necessary that there be a direct causal link in the sense that the permanent closure occurred at the specific point at which employees were losing seniority retention. Nor could his judgment that the plant was not permanently closed at the date of hearing be considered to be a final one. It was Arbitrator McKee's further order that:

> If the Company cannot fulfill its intent to re-open, it is then clear that the situation will quickly move from an intent to rebuild to a plant closure and the employees will be entitled to receive severance pay in accordance with Article XXX. (at p. 7)

And later in the Award:

> In the event that it is not necessary for the Company to take so long to correct the current situation and it becomes aware in a shorter time that it will not be able to re-open the mill, I am prepared to entertain an application from the Union that at that time a state of permanent closure exists. (at p. 8)

As can be seen, the question of whether an employee's seniority expired or not was not an issue. The adjudicator's concern was whether or not there was a permanent plant closure. If not, there would be no severance. If so, then there was no plant to come back to and the employees would be awarded their severance pay.

As it turned out, the company did not meet its commitment to re-open the plant. In his later Award dated December 31, 1982, the arbitrator reconvened and heard the union's request that he:

> … now find the mill that the mill is in a state of permanent closure as foreseen in Article XXX and that it has been in such state since December 1979, and that severance pay be awarded plus interest in accordance with the Court Order Interest Act. (at p. 2, my emphasis).

Arbitrator McKee ruled as follows:

> After consideration of all the circumstances in this case, I consider that the argument made by the Union is justified and therefore make the following Declaration.
>
> I hereby declare that Island Shake and Shingle Co. Ltd. is obligated to pay severance pay to each of its former employees pursuant to its collective agreement with the International Woodworkers of America, Local 1-80 … (at p. 2)

Lest there be any doubt about the arbitrator's intent, the Award appends a two-page schedule on which are indicated the names of the employees, their severance pay entitlements and the interest accrued to the date of the Award. According to the schedule, the interest for the employees began to accrue on December 14, 1979, which, as Arbitrator McKee ruled, was the effective date of the permanent plant closure.

From this, it is clear that in the first case in the industry under this language, the arbitrator first made a declaration that at the time of the hearing there was no permanent closure. When the closure proved to be permanent because the company did not meet its commitment, the arbitrator related the closure at that point back to the date of original closure in December 1979 and awarded damages and interest from that period.

Re Council of Marine Carriers and Canadian Merchant Service Guild **(1983) 10 L.A.C. (3d) 375 (Munroe)**

The dispute before Mr. Munroe in this case arose in the context of an economic recession, particularly as it affected the British Columbia forest industry on whose fortunes (among others) the Council's tow-boat industry members were dependent. The member companies had instituted layoffs. Some of the employees of the member companies had been out of work for more than a year by reason of lack of work and a "credible prediction about recalls was impossible."

The dispute revolved around the proper interpretation to be given to a provision in the Collective Agreement which provided severance pay to employees who were

> …displaced and for whom no job is available due to … permanent reduction in the … number of employees …

A key question for Arbitrator Munroe's consideration was: at what point in the chronology of the events was it appropriate for an adjudicator to measure whether there was a permanent reduction in the number of employees. Should it be measured at the time of its initiation or at some later point when more was known about the duration of the layoff and the events surrounding it?

The issue arose because the company argued that the time at which the question of permanency should be measured was the time of the initial layoff, not some later time. Moreover, it argued, when assessing the question of whether or not the initial displacement of the employee was temporary or permanent, the arbitration board should be governed by a review of the subjective intentions of the company. The determination of permanency, said the company, must depend on "what was in the mind of the employer at that time of the displacement." Further, it said, the arbitral review of the employer's initial characterization was limited to ensuring an absence of mala fides: i.e., to ensuring that the initial characterization was not "colourable."

Arbitrator Munroe rejected the company's arguments. At paragraphs 17-19, he said as follows:

> **17** I am unable to accept that submission. I prefer what was said in *Re Consolidated Aviation Fueling of Toronto Ltd. and Int'l Assoc. of Machinists* (1972), 1 L.A.C. (2d) 377 (Shime). There, the issue was whether an eight-day lay-off was temporary within the meaning of a provision which required that seven days' notice of lay-off be given, except in the case of a temporary lay-off. At p. 378, the arbitrator expressed the problem as follows:
>
> > Preliminary to deciding the issue is the question as to how one measures a lay-off. Is it to be measured by the intent of the parties at the time of the layoff, or is it to be measured when all the facts are in, that is, after the event and looking backwards? In the first instance the test is a subjective one based on the view of the employer at the inception of the lay-off, and in the second instance it is an objective ... after the fact assessment.

18 The arbitrator opted for the latter approach. In arriving at that judgment, he was influenced by the decision in *Hunter v. Smith's Dock Co., Ltd.*, [1968] 2 All E.R. 81. There, an individual had been intermittently employed by a company for a period of 40 years. An issue arose as to the individual's entitlement to redundancy payments under the applicable legislation. The individual claimed that the entire 40 years should be taken into account. The company said that the redundancy payment should be based only on the period subsequent to the last break in service. The issue narrowed down to whether the last break in service was temporary within the meaning of the statute. At pp. 84-5, Lord Parker C.J. said this:

> The only question, then, and I think the more difficult question, is what the word "temporary" means in the connexion of "temporary cessation". The court has been told that many divisions of the industrial tribunal have dealt with these cases on the basis that whether a cessation of work is temporary or not is to be determined by reference to the position when the period began, and that the proper approach is to ask oneself what both employer and employee intended at the time when the man was stood off. ...
>
> For my part I see very great difficulties in construing the word "temporary" in that way. One observes in the first instance that no such words in regard to intention appear in the Contracts of Employment Act 1963 at all. To give it that interpretation is, I think, to add something which is not there. It seems to me that the proper approach is to look at the matter after the event, looking backwards, and say to oneself: when the employee is re-engaged, if he is, has the cessation been a temporary cessation? If there is evidence of an intention when it began that it should be temporary, that will be very relevant, but the absence of such an intention does not conclude the matter. It can, of course, be asked: what are the limits of "temporary"? If an employee is re-engaged after three years or after three weeks, or whatever it may be, what guide is there: what is the test as to what is temporary? For my part, I do not propose to lay down any test. It is a question of fact for the tribunal in all the circumstances of the case, bearing in mind that we are dealing here with working weeks, and that, at any rate in the case of sickness and injury, an absence of twenty-six weeks is permissible. That is, however, not the test, but at any rate it is some guide. I would only add that, if one had to look solely to intent, there are great practical difficulties. Is the matter to depend on the exact words that a foreman said when cards were handed to an employee? No doubt if one had to go into that, there would be a difference in words used, there would be conflicts of evidence as to the exact words used, and matters of that sort. Those difficulties are not decisive on interpretation, but I should certainly come with reluctance to a decision that one had to look solely at the intention or arrangements specifically made at the time an employee was handed his cards.

19 In my view, the thoughts expressed in that passage are unanswerable. It is trite that unilateral expressions of intent do not a contract make. Similarly, a claim of unilateral right to define and apply a provision in a contract (with virtually no third party review) is a large claim indeed. Moreover, to "freeze" the issue may well be to deny arbitral access to the facts, a denial which would be inconsistent with the very *rationale* for the inclusion of a severance pay clause in the first place. At least in part, the *rationale* is to assist the employee who has been permanently displaced, through no

> fault of his own, as he sets about the rebuilding of his working life. That is not the only reason for severance provisions: see *Re Telegram Publishing Co. Ltd. and Marc Zwelling & Gottlob Essig* (1972), 1 L.A.C. (2d) 1 (Carter) [application for judicial review granted 3 L.A.C. (2d) 247*n*, 41 D.L.R. (3d) 176, 1 O.R. (2d) 592; vard 13 L.A.C. (2d) 112*n*, 67 D.L.R. (3d) 404, 11 O.R. (2d) 740, 76 C.L.L.C. para. 14,047], and *Re National Grocers Co. Ltd. and Retail, Wholesale & Department Store Union, Local 414* (1979), 24 L.A.C. (2d) 422 (Kennedy). But it is part of it. Whether that underlying purpose has been satisfied is largely a question of fact. It is the real facts, perhaps as they emerge over time, that should be what counts; not an artificially frozen package.

As can be seen, Arbitrator Munroe adopted the reasoning in *Consolidated Aviation Fueling*, and the authority on which it relied, *Hunter v. Smith's Dock.* The question of whether an employee's displacement was temporary or permanent was "largely a question of fact". That meant that the unilateral intentions of the company were relevant but not conclusive of the issue of permanency. More importantly for our purposes, the arbitrator must have regard not only to the subjective intentions of the company but as well to the objective facts before the arbitrator.

Those facts, said Arbitrator Munroe, could not be measured as of the date of the initial closure. So what was the proper focus? The adjudicators in both the *Consolidated Aviation Fueling* and *Hunter v. Smith's Dock* cases had identified the proper approach in a similar way. It was Arbitrator Shime's conclusion in *Consolidated Aviation Fueling* that the proper approach was to measure whether the layoff was temporary or permanent not at the time of the initial layoff but "<u>when all the facts are in</u>, that is, <u>after the event and looking backwards</u>". It was an "after the fact assessment." Lord Parker identified the proper approach as being "to look at the matter <u>after the event</u>, <u>looking backwards</u>, and say to oneself: when the employee is re-engaged, if he is, has the cessation been a temporary cessation?" (my emphasis in both quotes)

It was Arbitrator Munroe's view that Lord Parker's conclusions were "unanswerable". From his perspective, to "freeze" consideration of the issue at the point suggested by the company, namely, at the time of the initial layoff, would have the effect of "deny[ing] arbitral access to the facts". What facts? Arbitrator Munroe summed up his assessment of the issue by concluding "[It] is the <u>real facts</u>, <u>perhaps as they emerge over time</u>, that should be what counts; not an artificially frozen package." (again, my emphasis)

In the case before him, Arbitrator Munroe concluded that the permanency of the layoff would be best measured at the time at which the laid off employees were losing their seniority retention rights. His judgment was the following:

> The pre-condition "permanent" is satisfied where the reduction of the employee complement has endured for 12 months with no date of recall having been fixed. Hence, the trade union's general interpretive view of art. 1.33 is sustained. Those employees whose lay-offs have been part of a reduction of the employee complement due to lack of work, and whose lay-offs have endured for 12 months without a fixed date of recall, are entitled to the severance pay benefit (subject, of course, to the threshold condition of having "more than one year's service").

Without more, the *Marine Carriers* case might have endured as a major authority in favour of the overall position that the Employer takes in the instant case.

First, with respect to the issue of focus, the Employer in the instant case argued that it was inappropriate to focus on the initial date of closure and determine as of that date whether the closure was permanent. All arbitration boards have considered evidence subsequent to this date to be relevant, it argued, and I agree. The *Marine Carriers* decision is merely one of the first to expressly or implicitly agree with that argument.

Secondly, Arbitrator Munroe identified the same point in the time line as has the Employer in the instant case – when seniority is lost – as the appropriate point at which to measure the permanency of the relevant event. The difficulty with respect to this point is that the *Marine Carriers* case did not deal with a question involving the permanent closure of a physical plant. It dealt with the permanent layoff of employees.

Arbitrator Munroe addressed this distinction in the case reviewed below.

***Downie Street Sawmills Ltd. and IWA, Local 1-417,* unreported, November 28, 1988, (Munroe)**

The issue in this case was whether the Employer was liable to pay employees severance pay pursuant to a provision in the Collective Agreement which was in all material respects the same as in the instant case, and which read:

> Employees terminated by the Employer because of planned permanent closure of a manufacturing plant shall be entitled to severance pay equal to one week's pay for each year of continuous service and thereafter for partial years' in increments of completed months of service with the Company.

For the purposes of this discussion, nothing turns on the fact that the language spoke of a "planned" permanent closure as opposed to a mere "permanent closure".

The facts were these. The plant closure that led to the case before Mr. Munroe was not the first time that Downie Street Sawmills had discontinued operations in the 1980's. The plant had closed from October 1981 to May 1983, a period of about 18 months. Apart from engaging watchmen, there was a complete cessation of operations. Most, but not all, of the employees lost their seniority while on layoff during the closure. Meanwhile, the company kept the plant in a position to re-start operations at a future time. The mill was re-opened in May 1983 when market conditions improved. The union had not grieved the 18 month closure and no severance pay was paid to the employees who had lost their seniority during that time.

After operating for the better part of three years, the mill then closed again on January 19, 1986. The company characterized the closure as being "... a temporary closure for an indefinite period." The company took the same steps to preserve the assets as it had during the previous closure and kept the mill ready for resumed operations. The

employees, as before, were laid off. The company maintained its position throughout that the plant was not permanently but only temporarily closed.

Market conditions, however, were not the company's only problem in respect of this second closure. In September 1986, some 8 months after initial closure, the government canceled the company's forest licenses. The plant remained closed. The owner then began an effort to sell the plant as a going concern. In or about June 1987, the seniority of the most senior employees expired, some 18 months after this second cessation of operations. As it was put in the Award, "[a]s the last of the 'seniority retention' rights were expiring", the trade union made a claim for severance pay and, having been turned down, filed a grievance.

Had the case been heard in June of 1987, Arbitrator Munroe would thus have been dealing with facts and circumstances that would characterize the case before him as a Scenario A situation. The status quo at that time would have been that there was a mill that had ceased operations some 18 months before and there was no fixed date for resumptions. As such (and as later cases have confirmed) the task of Arbitrator Munroe would have been to assess the subjective and objective facts of the case and make a decision as to whether the closure was permanent.

As it turned out, Arbitrator Munroe's task proved to be a quite different one. For reasons not discussed in the Award, the grievance did not come before Arbitrator Munroe for hearing in June 1987 when the grievances were filed and the plant was still in a state of closure. The case instead came before him for hearing more than a year later, on October 20, 1988.

By that time, the final outcome was a known fact, as in a Scenario C situation. Several months before the hearing, in May, 1988, the mill had been re-opened by a new owner. It was continuing to operate when the case came before Mr. Munroe. Virtually all of the employees had been reemployed and were working at the plant as they had before.

Regardless of these developments, the trade union argued that the employees had lost their seniority in 1987 due to the lengthy closure which, said the union, amounted to a permanent closure as of that time. The union asked the arbitrator to declare that the plant had been permanently closed as of June, 1987 and that the employees were thus entitled to their severance pay.

For its part, the company pointed to the fact that the plant had been re-opened – albeit almost a year after the last of the employees had lost their seniority retention – in favour of its argument that the closure was not permanent.

It is worth noting at this point that the roles in the instant case are reversed. In the hearing before me, it is known to the point of certainty that the closure of the VFP mill was permanent at or around March 2, 2009. There is not a scintilla of doubt about that, no more doubt than was present in the *Downie Street Sawmills* case about the fact that the closure there had not proved to be permanent. In *Downie Street Sawmills*, the trade

union's prospects for success were directly referable to its ability to focus the arbitrator's attention on the facts as they were known in or around June 1987. In the instant case, the Employer makes the same argument as the trade union in *Downie Street Sawmills*, arguing that the material time to measure the permanency of the closure was before or as at the time at which the employees were losing their seniority, not on the facts known at the time of hearing.

What was Arbitrator Munroe's approach? From the *Marine Carriers* case, it is clear that the arbitrator had adopted the approach that making judgments about permanency was only appropriately made "after all the facts were in." But what facts? Would they include the facts which post-dated the points of loss of seniority retention and include the facts known by the time of the hearing, namely, that the plant was open?

Arbitrator Munroe dismissed the grievances and the trade union's argument for a focus on the earlier events. It was his conclusion that whether a cessation of operations was a permanent closure was a question of fact which stood to be determined in every case according to the circumstances proven in evidence. The circumstances proven in evidence before him included the fact that the closure had proved over time to be a temporary closure. The objective and unavoidable fact was that the mill had been re-opened.

Although more will be said shortly about that, it should first be said that Arbitrator Munroe's Award in *Downie Street Sawmills* was the first express repudiation of the notion that the logical time at which to determine whether a plant closure is permanent is the time at which employees are losing their seniority retention. Although Arbitrator McKee's judgment in *Island Shake and Shingle* was not mentioned in the *Marine Carriers* decision (and may not have been cited to Arbitrator Munroe in that case), Arbitrator Munroe was aware of it by the time of the *Downie Street Sawmills* Award. It will be recalled that Arbitrator McKee made no mention whatever in the *Island Shake and Shingle* decision about seniority rights. Making the observation that Arbitrator McKee in the *Island Shake and Shingle* case had been unwilling to declare a state of permanent closure until some 34 months had elapsed from the initial point of closure, Arbitrator Munroe added: "The fact that the employees' 'seniority retention' would long since have expired did not attract attention."

His review of the *Island Shake and Shingle* decision led Arbitrator Munroe to draw several oft-quoted conclusions on the appropriate approach to cases of the type before him:

> The central point to be drawn from *Island Shake and Shingle* is this: whether a cessation of operations is a permanent closure is a question of fact which is to be determined in every case according to the circumstances proven in evidence. In some cases, it would be proper to make such a finding at the first moment of the cessation. <u>In other cases a very prolonged closure and an evolution of circumstances will be required for the declaration to be warranted.</u> Thus the decision as to whether a permanent closure has occurred may be a mix of objective and subjective considerations. It is not a decision which is automatically made upon the arrival of the date on which seniority retention

> will be lost. Neither on the face of the collective agreement, nor as a matter of logical necessity, is there an inevitable or automatic link between the seniority retention provision and the permanent closure provision of the Master Agreement. (my emphasis; at pages 11-12)

Given that analysis, Arbitrator Munroe considered his task to be a rather simple and straight-forward one, as he explained in the following passage:

> Of course, unless one is governed by an automatic criterion like “seniority retention", the conclusion is inescapable that the company's mill was not permanently closed. The plain fact is that it re-opened in May, 1988, with many of the same employees working at their former jobs, using the same machinery and equipment, for essentially the same manufacturing purpose. The only real difference was that the shares of the Company had been sold to someone new. However, Article XXIX of the Master Agreement is not concerned with new ownership. It is concerned solely with whether the plant has been permanently closed. (at p. 14)

Thus, the “inescapable” conclusion and “plain fact” before Mr. Munroe was that the company’s mill was not permanently closed. The plant could not be declared to be permanently closed because the evidence before him was that it was clearly and unequivocally open.

Arbitrator Munroe was mindful that the point in time at which the adjudicator “looks backwards” to make the assessment of permanency is a feature of chance. In a less frequently quoted passage from the Award, Arbitrator Munroe expressly acknowledges that the clarity of the circumstances before him in October was a result of the timing of the proceedings and nothing else:

> I appreciate that if the hearing of this grievance had been conducted in, say, January, 1988, instead of November, 1988, the immediately preceding paragraph could not have been written (recall that the company was not sold, and the mill was not re-opened, until May, 1983). <u>But the facts as we now know them cannot be denied or ignored.</u> In any event, an earlier hearing likely would have produced a decision no more favourable, from the trade union's perspective, than the award in *Island Shake and Shingle*. The company's witnesses testified that the intention was never one of permanent closure; that it was always the intention that the mill would be reopened, either by the company itself when market conditions permitted, or by a new owner if a sale could be consummated. No doubt, such unilateral statements of intention, whether of future intention as in *Island Shake and Shingle* or of past intention as in this case, must be examined with care. But here, the objective facts do appear to be consistent with the more subjective testimony. (at pp. 14-15)

Arbitrator Munroe could not ignore the facts proven in the evidence before him. The company had been submitting all along that it would be re-opening and the objective evidence was consistent with this subjective testimony.

Applying the logic and analysis in the *Downie Street Sawmills* decision, is it possible to predict what Arbitrator Munroe would have done had the plant been declared permanently closed in May 1988 rather than re-opened? I am compelled to the

conclusion that the permanent closure of the mill would be the unassailable, inarguable fact that Arbitrator Munroe would have had before him to compare with the subjective testimony of company representatives, as well as their prior efforts to re-open the mill. The simple fact would have been that the plant was closed permanently.

***Various Forest Products Industries (Coast Region) Represented By Forest Industrial Relations Limited and IWA - Canada C.L.C.*, unreported, May 31, 1989 (Lysyk)**

This case involved a stated question being put before the Forest Industry Interpreter, Mr. Justice Lysyk. It initially arose in a case which had come before Arbitrator McKee but that grievance had been withdrawn in favour of bringing the interpretation question before the Industry Interpreter: see *Stave Lake Cedar Mills Inc. and International Woodworkers of America - Canada, Local 1 - 367*, unreported, September 2, 1989 (McKee), discussed later.

The question brought before the Industry Interpreter was generic, not being tied to any given set of facts or a particular employer. It was the following:

> Is an employee deemed to be "terminated by the employer because of permanent closure of a manufacturing plant" and thereby entitled to severance pay under Article XXXII when a manufacturing plant has not operated for 18 months with no date of resumption of operations and recall having been fixed?

Article XXXII provided:

> (a) Employees terminated by the employer because of permanent closure of a manufacturing plant shall be entitled to severance pay equal to one week's pay for each year of continuous service and thereafter in increments of completed months of service with the company.
>
> (b) Where a plant is relocated and the employees involved are not required to relocate their place of residence and are not terminated by the employer as a result of the plant relocation, they shall not be entitled to severance pay under this article.

It is apparent that, while generic and sparse in content, the facts fit what I have called the Scenario A situation: a manufacturing plant had not operated for 18 months and no date of resumption of operations and recall had been fixed. The final outcome, whether it be a permanent closure or re-opening, had not yet revealed itself.

From the Union's perspective, the choice of the 18 month period for the stated question was not an arbitrary one. This period corresponded with the maximum period of seniority retention for the employees under the collective agreement. It was the Union's position, which it asserted was supported by the *Marine Carriers* decision, that the 18 month point supplied an appropriate indicator (absent evidence of an earlier closure) of the point at which an ongoing plant closure ought to be considered permanent for the purpose of Article XXXII.

It was the employer's position that the issue of whether a closure was permanent within the meaning of the Collective Agreement ought not to be tied to a specified time period. An employer, it said, might well have a bona fide intention to re-open a plant although 18 months had elapsed since its closure and no date for resumption of operations had been fixed. And striking a theme that had already been accepted as a legitimate one by Arbitrator McKee in the *Island Shake and Shingle* case, the employer noted that were an arbitrator to declare the operations permanently closed, this would trigger an obligation to pay severance pay, which itself could have the practical economic consequence of derailing an impending resumption of operations.

Mr. Justice Lysyk arrived at the following conclusions, which have guided arbitrators since the Award and in particular those dealing with cases falling within the situations encompassed by Scenarios A and B:

1. There is no decisive importance to the period of 18 months in determining whether a closure is permanent. A closure may be found to be permanent within that same period. By contrast, a "closure of longer duration" will not be considered permanent if a date for "resumption of operation and recall" has been fixed.

2. However, if a date for "resumption of operation and recall" has not been fixed, the permanent plant closure provision requires an arbitrator to decide in light of all the relevant circumstances whether or not the closure is permanent.

3. The seniority retention clause, while properly considered as a relevant factor, does not control the clause governing severance pay for permanent plant closure. There is no inevitable linkage between lapse of seniority rights and the permanent plant closure provisions.

4. A conclusion concerning the permanence of a particular plant closure will turn on the facts of a particular case and the issue cannot be resolved in the abstract by the interpretation in the Award.

This decision illustrates the flexible character of Article XXVIII. The parties could have agreed to a clause in which a manufacturing plant would be deemed to have been permanently closed at a time at which the most senior employees (or some other formulation) lost their seniority retention. Similarly, they could have agreed to a provision which tied the entitlement to severance pay to a "closure" as opposed to a "permanent closure."

In either event, the determination of whether severance pay was payable in a given set of circumstances would have been much simpler. Instead, the parties tied the entitlement to severance pay to a closure which is "permanent". This provided a struggling employer with the flexibility to weather a lengthy closure without being tied to a particular date for resumption of operations. This would be good for the employees to the extent that they had a job and a mill to go back to.

There was also a downside for the employees of this flexibility. If a fixed date for resumption of operations and recall was established, and that date was set at some point

past the date on which employees would lose their seniority retention, then the employees would lose their seniority without recourse, as this Award stated clearly that a plant would not be considered permanently closed in these circumstances. In those circumstances, it would be expected that they would be "recalled" and thus be assigned into jobs but it would not be the kind of "recall" with which one would be more familiar, namely, recall in order of seniority from a list. The recall after loss of seniority would neither preserve nor refresh their previous seniority. But the plant would be operating and employees would be working, as was the case in the *Downie Street Sawmills* case (note that I have not said that they would lose their employment as opposed to seniority – that is an open question which is being deferred unless I am required to address it as the result of my conclusions on this aspect of the case).

Mr. Justice Lysyk was not asked and so did not comment on two questions of importance to the instant case. What would happen if, having fixed a date for resumption of operations and recall, the employer did not follow through at the appointed time? And what would happen if, prior to the re-opening, the employer announced that the plant was permanently closed after all? How would those events affect the entitlement to severance pay, if any, of the employees who had lost their seniority at the 18 month point when it was declared that, because of the fixed date for resumption of operations, there was no permanent plant closure at that time?

***Stave Lake Cedar Mills Inc. and International Woodworkers of America - Canada, Local 1 - 367,* unreported, September 12, 1989 (McKee)**

This was a grievance over an alleged permanent plant closure which initially came before Arbitrator McKee in 1988. As mentioned earlier, it was withdrawn when the parties decided to take the question to Mr. Justice Lysyk, whose Award is discussed above. Having had the question answered, the parties returned to Arbitrator McKee for a hearing, this time on August 1, 1989, almost three years after the initial and continuing closure.

The clause in question was a familiar one:

> Article XXXI - Severance Pay for Permanent Plant Closure
>
> Employees terminated by the employer because of permanent plant closure shall be entitled to severance pay equal to one (1) week's pay for each year of continuous service and thereafter in increments of completed months of service with the Company.

The timeline was as follows. The mill shut down on August 7, 1986 because of a strike. Although the strike ended that fall, the mill never reopened. While the mill did not re-open, the owners of the mill continued to maintain the mill so that it could readily become operational again. To that end, the owners continued to employ one member of the union. The owners claimed expenditures of roughly $60,000 per year to keep the mill in readiness, or least partial readiness, to reopen. It was the employer's assertion that it was merely awaiting an upturn in the future of the shake and shingle industry before reopening the mill and that there was no intent to close the mill permanently. It asked the

Arbitrator to "rule that the mill is not closed down and that it is maintaining the mill until such time as it is appropriate and propitious for it to re-open." (at p. 7)

Against the wishes of the trade union, which presented a forceful argument that three years of no operations and no immediate plans for same should be adjudged to be a permanent closure, Arbitrator McKee once again accepted a commitment from the mill owner that the mill would open by a certain date or the company would pay severance pay. "It is not usual", said Arbitrator McKee, "that a company moves towards closure, permanent or otherwise, because of financial problems. Thus, giving it a chance to work out its problems and subsequently provide employment or re-employment is surely something to be encouraged and supported."

The case before Arbitrator McKee was of the type I have described as being a Scenario B case. At the hearing, Arbitrator McKee was given a commitment by the employer that it would re-open by a certain date and recall certain of the employees, failing which it would pay severance pay. In accepting this commitment, Arbitrator McKee relied on the passage from the Lysyk Award in which the Interpreter had noted that a closure of longer duration than 18 months would not be considered permanent if a date for resumption of operation and recall had been fixed. Although the company was only committing to recall three employees at the date of initial re-opening, Arbitrator McKee was not prepared to declare the mill closed at the time of the hearing. Instead, he and the parties would wait to see how the events unfolded.

In reaching this judgment, Arbitrator McKee was conscious of the fact that there had been a much longer period of closure here than in the hypothetical case decided by the Lysyk Award. However, he found support in Arbitrator Munroe's observations in *Downie Street Sawmills* that: "In some cases, it [will] be proper to make such a finding [that the operation was permanently closed] at the first moment of the cessation. In other cases a very prolonged closure and an evolution of circumstances will be required for the declaration to be warranted." Clearly, the final outcome in the *Stave Lake* decision would not be known until there had been a "very prolonged closure" and an "evolution of circumstances."

What is noteworthy by its absence in this case is any discussion whatever about the significance, if any, of the expiry of employees' seniority retention along the way. There was simply no discussion in the case about whether employees had lost seniority rights or whether or not a plant closure occurring later, or even much later, than the date on which seniority retention was lost could be the trigger for a payment of severance pay under the Article in question. In view of the conclusions drawn in the Lysyk Award, Arbitrator McKee declared that: "Self-evidently, after the ruling of the Interpreter, there can be no support for the notion that a judgment in respect of Article XXXI should be based on any question of seniority retention." (at p. 8) It is perhaps for this reason that there was no discussion in the case about lost seniority retention rights. More likely, the absence of discussion of lost seniority rights can be attributed to Arbitrator McKee's interpretation of the meaning and application of the language of the severance pay article itself, as he explained in the following passage from the Award (at pp 6 -7):

> The intent of the language of Article XXXI (1986/88) or Article XXXII (1988/91) is, in my view, quite clear. It is a protection clause for employees when their employer permanently closes the enterprise in which they work. In such circumstances, they must be paid severance pay, as defined in the Article, not only as a reward for service - because the payment is based on service - but also as a cushion while they endeavour to find alternative employment and re-adjust their way of life. The amount of severance money due to a long-term employee is not a small amount in these cases.
>
> The key to such payment is, of course, two-fold: an employee has to be terminated and the plant has to close permanently. "Terminate" is usually read in labour relations terms to mean "to bring to an end" (the Shorter Oxford English Dictionary, third edition), a term of employment as by discharge or in the use of the phrase foreseen in this Article "the termination of all work by permanently closing a plant".
>
> "Permanently" one would assume to mean the ceasing of the manufacturing activity in the location described so that that site does not need again to employ people to manufacture the Company's product. The status of the Company which can be described as "lasting or designed to last indefinitely without change" (the Shorter Oxford English Dictionary, third edition).
>
> As I stated In Island Shake and Shingle Company and International Woodworkers of America, Local 1-80, October 1981:
>
> > The intent of the Article seems, on its face, to be quite clear. When a company, due to market conditions, lack of lumber, or the many other factors that lead to unprofitability, decides to close its doors and go out of business, it must pay severance pay as foreseen in Article XXX.

"Termination", in Arbitrator McKee's interpretation, came about not through the loss of seniority rights but through the termination of all work through the closure of a manufacturing plant. That closure would be permanent when "that site does not need again to employ people to manufacture the Company's product."

Arbitrator McKee's judgment cannot be said to be without its bounds. In the Award he acknowledged that employees could lose their employment without recourse to severance pay if an operation "after attempts to re-open [became] unable to do so and also then found itself in financial straits." (at p. 9) Apart from that, however, a failure to meet the commitment to re-open would result in a declaration that the plant was permanently closed and the employees were entitled to severance pay. On the face of the Award, it was apparent that it was of no importance in the judgment whether and when employees had lost their seniority retention rights under the Collective Agreement.

Arbitrator McKee reserved jurisdiction in the matter "until it [was] finally resolved …"

***Stave Lake Cedar Mills Inc. and International Woodworkers of America - Canada, Local 1 - 367,* unreported, December 23, 1991 (McKee)**

This Award can be seen as a necessary footnote to the decision of Arbitrator McKee of September 12, 1989.

As it turned out, and in contrast to the *Island Shake and Shingle* case, the company here met its commitment by the due date, re-opened the plant and hired back the three union members it had promised to re-hire. In the previous case, Arbitrator McKee had stated the view that, while the plan to re-open was an unambitious one, it was expected to be a beginning point in the process of returning to a "fully functional mill".

The Union brought the matter back to Arbitrator McKee pursuant to his reservation of jurisdiction in the previous case. To the Union's eyes the company was making little if any progress towards the "fully functional mill." The Employer argued that the arbitrator did not have jurisdiction to follow the matter up but this argument was not successful.

The result of the case – which itself is not material to our discussion here – was that a discrete question regarding the interpretation of what was a "manufacturing plant" was referred by the arbitrator back to the parties to be put before the parties for settlement by Right-of-Reference or the Interpreter. However, Arbitrator McKee once again reserved jurisdiction, this time clearly stating that his retained jurisdiction was over the original grievance (and the question of whether the closure was permanent):

> I shall retain jurisdiction in order to make a decision in respect of the grievance before me once the necessary interpretation or understanding of what is a "manufacturing plant" is made. (at para. 53)

What is significant about the case is that a judgment that a plant is not in a state of permanent closure at the time of the hearing was not treated in either of the McKee awards as being a final decision. If the company's commitment to re-open was not met, the situation would turn quickly into one which would be characterized as a permanent closure. At that point, the employees would be entitled to their severance pay. In the *Stave Lake* case, that might be five years after the fact, namely, after the initial closure of the mill.

***Cypre River Falling Ltd. v. Industrial Wood and Allied Workers of Canada, Local 1-85,* [2001] B.C.C.A.A.A. No. 22 (J. Kinzie)**

This case dealt with the alleged closure of a logging camp and the right of employees to severance pay in connection with it. The case is relevant because it addresses the question of the closure of a physical plant, and not the status of the employees laid off as a consequence.

The clause in question read:

> Article XXXIII
>
> (a) Employees terminated by the employer because of a permanent closure of a manufacturing plant or a logging camp shall be entitled to severance pay equal to seven (7) days' pay for each year of continuous service and thereafter in increments of completed months of service with the company.
>
> (b) Where a plant is relocated and the employees involved are not required to relocate their place of residence and are not terminated by the employer as a result of the plant relocation, they shall not be entitled to severance pay under this Article.
>
> (c) Where a logging camp is relocated and the employees involved are not terminated by the employer as a result of the logging camp relocation, they shall not be entitled to severance pay under this Article.

In this case, the company had entered into an agreement with a third party, Hayes Forest Services Ltd., to fall trees on its behalf in an area called the Walbran. The three employees who were the subject of this grievance worked for the company. They were laid off on November 9, 1998. By the early summer of 1999, the company concluded that based on a consideration of the quality of the wood that remained to be cut and its financial circumstances, it could not recover its costs by continuing with the contract. After a failed attempt to secure concessions from the trade union which would lower its costs, the company then cancelled its contract with Hayes. Shortly after, it removed all of its equipment from the area in which it was conducting falling operations with the exception of one of the principal's own vehicles. Since the layoff none of the employees on the company's seniority list, except the principal, performed any work for the company.

The Union sought a declaration that the Walbran logging camp was permanently closed and its members were entitled to severance pay. The company maintained that it was continuing to operate (albeit in other locations) and to seek out new contracts and that it had not been permanently closed. Unlike in the cases heard by Arbitrator McKee, the company made no commitment to re-open the logging camp or recall any of the employees. Nor, prior to the hearing, did the company either re-open the camp or declare that it was permanently closed. In short, the situation before Arbitrator Kinzie was a Scenario A case, one which called for a declaration to be made in a situation in which the permanency of the closure could not be known to the point of certainty.

Following the decision in the Lysyk Award, Arbitrator Kinzie determined that in the absence of any fixed date for the resumption of the Walbran operations, he was required to decide in light of all the relevant circumstances whether or not the closure was permanent.

Arbitrator Kinzie had no difficulty finding as a fact that the closure of the Walbran logging camp was permanent:

> 21 The Employer does not have independent cutting rights in the Walbran. It is not in a position to decide that it wishes to resume cutting there and simply go in and start. Its rights in the Walbran were based on a contract it had with Hayes. On June 14, 1999, the Employer gave up that contract and Hayes replaced the Employer with other contractors. There was no evidence to suggest that the Employer will be returning to a contractual relationship with Hayes in the Walbran. Further, all of the Employer's equipment used by its crew at its Walbran logging camp has been removed from the area and none of it is retained by the Employer except one truck used by its principal, Hiebert. In light of all of these circumstances, I am satisfied that the Employer's Walbran logging camp has been permanently closed within the meaning of Article XXXIII (a) of the collective agreement.

Accordingly, Arbitrator Kinzie awarded severance pay to the grievors, observing that:

> 23 …[T]he employment of the three grievors was terminated as a result of the permanent closure of the Employer's Walbran logging camp and they were not relocated to any of the Employer's new logging operations. They have not worked for the Employer since and their seniority retention rights have expired.
>
> 24 In summary, I have concluded that the three grievors are entitled to be paid severance pay in accordance with Article XXXIII (a) of the collective agreement in light of the permanent closure of the Employer's Walbran logging operations and camp. Accordingly, the grievance succeeds. It is so awarded.

The Employer in the instant case contrasts the facts in the *Cypre* case with the facts before me. Quite correctly, it asserts that there is no comparison between the credibility of the assertions made by the company there and its own credibility in stating throughout that it intended to re-open the VFP mill. Similarly, the steps taken by the company in *Cypre* pale in comparison with the steps taken by the Employer in carrying out its intention to re-open.

Does this case, then, support the Employer's argument in the instant case that whether or not the mill ought to be declared permanently closed must measured on a review of the facts as they were known at the time when the employees lost seniority rights and were thus terminated from their employment? In some respects, the case takes a step in that direction. It is the first of the cases discussed which involves an arbitrator in making a judgment about the permanency of a closure in the absence of (a) a commitment by the employer to re-open and the knowledge of whether the commitment was met, or (b) the unmistakable and final fact of permanent closure or subsequent re-opening being known to the arbitrator at the time of the hearing. In short, this case demonstrates that there is no legal principle or even unwritten convention in place that would require an arbitrator to wait out the events until certainty of result is at hand.

However, the *Cypre* case fails to provide support for the proposition advanced by the Employer that since the Union must prove a direct causal relationship between permanent closure and termination under Article XXVIII, the arbitrator must take the measure of whether the closure was permanent by assessing the state of the evidence at the time of the loss of seniority and determining if, at that time, the operation was in a state of

permanent closure. The case is not helpful to the Employer on that point as it does not address the point specifically. Arbitrator Kinzie instead simply declared that (a) the logging camp was permanently closed, and (b) the employees who had lost their seniority rights and been terminated were entitled to their severance pay.

To elaborate on this, Arbitrator Kinzie did not attempt to determine whether, at the time (unknown on the facts) that the employees lost their seniority, the state of the camp on the evidence available at that specific time justified the conclusion that the camp was permanently closed. Instead, it appears unmistakable that Arbitrator Kinzie considered that a declaration of closure made 26 months after the event, and presumably well after the expiry of the employee's seniority retention rights, was sufficient to ground a claim for severance pay under the Article. In this, his judgment was consistent with that of Arbitrator Munroe in *Marine Carriers* which adopted the "looking back" method of determining permanency, later implemented by the same arbitrator in *Downie Street Sawmills*.

***Skeena Cellulose Inc. v. Christian Labour Assn. of Canada, Local 44*, [2001] B.C.C.A.A.A. No. 366 (Somjen)**

Like the *Cypre* decision, the *Skeena Cellulose* case was decided on facts that fit it into the Scenario A category.

Here, the language of the severance pay provision provided in its material part that employees would be entitled to severance pay if they were "terminated as a result of a permanent closure of the mill."

The company operated a sawmill and a planer. The planer continued to operate but the sawmill was shut down in the summer of 2000, with a brief re-opening in the fall of that year. The Union's claim for severance pay on behalf of the sawmill employees came before Arbitrator Somjen in July 2001, which was approximately a year from the date of the initial closure or, if measuring from the temporary re-opening in the fall of 2000, somewhat less than that. The facts did not disclose whether or when the employees had lost seniority as a consequence of the closure.

The Arbitrator's comments about the closure are strictly speaking obiter as he was able to decide the case on another point. Based on the evidence before him, which he likened in degree and kind to the evidence of employer action before Arbitrator Munroe in *Downie Street Sawmills,* it was his judgment that there had "not been a permanent closure of the mill." He went on to say, however, that "[t]hat does not mean that at sometime in the future if the mill remains closed for a lengthy period of time and there is little prospect of reopening that there may at that time be a permanent closure." (at para. 22).

Arbitrator Somjen's comment about the relevance of future events might have been put down to a mere observation except that they accorded with what he determined was the true focus of a case of this kind. This was not a case which concerned itself with the status of the employees, as would a case in which the relevant language provided that the

employees were entitled to severance pay after a particular period of time on layoff. Instead, it was a case which focused on the physical plant and posed the question of whether that physical plant was permanently closed. Here it was not – yet. The Union's grievance was dismissed.

***Skeena Cellulose Inc. v. Christian Labour Assn. of Canada, Local 44,* [2002] B.C.C.A.A.A. No. 433 (Somjen)**

In this case, the Union took the arbitrator up on what it must have seen as an implicit invitation in the previous *Skeena* decision to revisit the issue of closure if the circumstances changed.

The circumstances had changed. Shortly after the previous hearing, the sawmill had reopened for a period of time and then the entire mill shut down as of the fall of 2001. Although the company sought protection from its creditors under the *Company Creditors Arrangement Act*, it emerged from such protection in April 2002 and went about the business of attempting to get the plant back into operational state. This was to be accomplished through a sale, which was in the works, or, failing that, the company representative testified that the company would re-start the operations itself.

Arbitrator Somjen was faced with a similar Scenario A dilemma as had been present in the previous case. By the time of the hearing, the mill had been closed for some 14 months and all employees, save a skeleton crew which had been retained, had lost their seniority and recall rights.

It is worth setting out the balance of Arbitrator Somjen's award as it is instructive in respect of how temporal factors bear on the interpretation of the severance pay clause:

> **11** I can only determine the eligibility of Employees to severance pay under Article 23.01 as of the date of the hearing (December 11, 2002). At that time, all aspects of the Smithers operations had been closed for approximately fourteen months (although, a skeleton staff was retained).
>
> **12** As of that date, Employees, under the Collective Agreement, had lost their seniority and recall rights. If that were the only consideration, then I could conclude, as of December 11, 2002, that Employees had been "terminated" within the meaning of Article 23.01. However, the second condition, which is that there must be a "permanent closure of the mill", is still not clear. If, after fourteen months of closure, there were no prospects of reopening the Mill, then I would conclude that there had, by now, been a permanent closure of the Mill within the meaning of Article 23.01.
>
> **13** However, from the evidence I heard, the intention of Skeena Cellulose Inc. appears to be either to reopen the Mill or part of it by May of 2003 or that the sale of the Mill would conclude and West Fraser Timber would operate the Mill or part of it around the same time. If neither of these events occurs and by May of 2003 the Mill is still not operational, I may then conclude that there has been a permanent closure. However, at the present time, I cannot reach that conclusion in light of the evidence before me.

> **14** I, therefore, find that, as of December 11, 2002, there had not yet been a "permanent closure of the mill" within the meaning of Article 23.01. Because of the ongoing nature of this dispute, I will remain seized of this matter. Either party may make application to me to hear further evidence at a later date to determine whether there has been a permanent closure as of that date.

The notable things about this Award are these. First, Arbitrator Somjen said in express terms what the previous arbitrators had implicitly adopted, and that was that as an adjudicator he could only determine the eligibility of employees to severance pay under the applicable article as of the date of the hearing. He did not conclude that the measure of permanency should be determined as at an earlier point in time, such as the date on which the employees had lost their seniority retention rights and been terminated. Certainly, that had occurred. But that amounted to proof of only one of two requirements under the applicable article. The other was for the plant to have permanently closed. The conclusion to be drawn from the Award is that if Arbitrator Somjen had found the plant to be in a state of permanent closure at the time of the hearing, the employees would have established their entitlements to severance pay, regardless of how much earlier in the chronology they had been terminated.

Far from requiring the state of permanent closure to be known at the time employees were terminated, Arbitrator Somjen, like Arbitrator McKee before him, was reluctant to make a final decision in the absence of greater clarity about the situation. If the plant had not re-opened, at least in part, by May 23, 2003 he said, "I may then conclude that there has been a permanent closure. However, at the present time, I cannot reach that conclusion in light of the evidence before me."

This last passage was the subject of disagreement between counsel in the instant case as to its meaning. It was the Union's view that this meant that Arbitrator Somjen might be prepared to make a declaration of permanent closure as of May 23, 2003 which, if made, would result in severance pay being awarded to the terminated employees. It was the Employer's view that Arbitrator Somjen had dismissed the claims of the dismissed employees to severance pay and all that he was saying in his closing remarks was that the plant might be in a state of permanent closure in May 2003, which could by then only affect the entitlement of the skeleton crew to severance pay.

I cannot read the passage as the Employer would have me read it. There is nothing in either of the two *Skeena* cases that suggests that the Union had brought a claim for severance pay on behalf of the employees who were working, and if it did, that claim attracted none of the attention of the parties in their evidence and argument. A careful review of the final paragraph of the award discloses that Arbitrator Somjen did not in fact dismiss the grievance before him nor the claims of the dismissed employees which were contingent on its success. Instead, he found that there had not yet been a permanent closure but, "[b]ecause of the ongoing nature of this dispute", he would remain seized of the matter with both parties having the right to make application to him "to hear further evidence at a later date to determine whether there has been a permanent closure as of that date."

Clearly, Arbitrator Somjen was retaining jurisdiction for the same reason as had Arbitrator McKee in the previous *Island Shake and Shingle* and *Stave Lake* decisions, namely, to allow for more time in which the issue of whether the closure was permanent could finally be resolved.

Bendickson Contractors Ltd. v. United Steelworkers of America, Local 1-2171, **[2005] B.C.C.A.A.A. No. 235 (J. Kinzie)**

In this case, the Union claimed that the company had permanently closed its Johnstone Strait logging camp and sought severance pay on behalf of its employees pursuant to article XXXIII of the Coast Master Agreement. That article provided for severance pay in the case of a permanent closure of the logging camp.

This case has a somewhat complicated history and provides little if any assistance on the current issue. The issue in the case was not whether employees had been terminated from their employment by virtue of a permanent closure of a logging camp but rather, regardless of whether or not the logging camp had permanently closed, had the employees in fact been terminated at all? Although it was the union's contention that all that was required to ground a claim for severance pay was proof of permanent camp closure, Arbitrator Kinzie concluded, not surprisingly, that this was only one of two prerequisites for the payment of severance pay under the collective agreement. The other was, of course, that the employees were terminated as a result.

In respect of the latter point, the arbitrator found that the union members here continued to work in the Employer's logging operations under their collective agreement with their seniority intact. Hence, the severance pay article did not apply.

Copper Canyon Timber Ltd. v. United Steelworkers, Local 1-80 (Permanent Closure Grievance), **[2008] B.C.C.A.A.A. No. 72 (Sullivan)**

The case involved a policy grievance filed by the union on October 26, 2006 alleging the company had permanently closed its planer division, thus giving rise to an entitlement on the part of the employees to severance pay.

The severance pay article provided as follows:

> 18. PERMANENT CLOSURE
>
> (i) The Company agrees that employees affected by a permanent plant closure of the operation shall be given ninety (90) days notice of closure.
>
> (ii) Employees with one or more years' service with the Company who are terminated by the employer because of a permanent closure shall be entitled to severance pay equal to one weeks pay for each year of continuous service with the company up to a maximum of 8 weeks pay.

On December 22, 2005, a predecessor company shut down its kiln and planer operations at its mill at Chemainus, B.C. The employees were laid off at that time. Copper Canyon purchased the operations from the predecessor in June 2006. It intended to re-open them. However, market conditions were difficult. Between December 22, 2005 and the commencement of the proceedings before Arbitrator Sullivan in January 2008, employees worked about three planer mill shifts in 2007, and about 30 partial shifts at various times doing compacting and packaging work. There was no activity at the planer mill between the end of December 2005 and April 2007, when dates were confirmed for the arbitration proceeding.

At the time of sale to Copper Canyon in June 2006, there were about 20 employees on the planer mill seniority list. At the beginning of April 2007, 12 employees remained on that list.

Commencing April 10, 2007, the company made efforts to recall employees to work a few shifts for a program that had been obtained by the company, but was unable to find enough employees to perform the required work. In mid-May 2007, Copper Canyon again attempted to recall employees for a small number of shifts and again encountered a problem in obtaining enough employees.

Copper Canyon's planer mill had been maintained, its equipment had been greased and oiled, and components turned periodically. The sprinkler system for fire protection was operational, the premises insured, and the environmental permit acquired.

Evidence was led regarding the poor state of the industry generally, as a result of the United States housing market and subprime mortgage crisis and the relatively strong Canadian dollar.

At the time of the hearing, the company maintained that the operation was not permanently closed. It was also apparent, however, that it had not been “re-opened” for normal production. The company made no commitment as to when the mill would re-open.

The *Copper Canyon* case, thus, fell within what I have termed a Scenario A case. The end result of the closure was not known to the arbitrator with certainty. It was his task to assess the evidence, subjective and objective, and make a declaration based on that evidence.

Arbitrator Sullivan determined that he could not declare the operation to be permanently closed on the evidence before him. His reasons for this conclusion are set out in the passages that follow:

> **41** Given all of the evidence, I am unable to conclude that Copper Canyon, and Mr. Doman as its President, is essentially engaging in subterfuge to avoid the payment of severance, or that Mr. Doman is actually deceiving himself into believing the business is actually viable when it is not. Clearly the industry is currently "in the tank". Also clear, however, is that the Company is debt free, and constitutes the largest integrated

> reman operation on Vancouver Island. The Company's customer base for its kiln division has grown from zero at the time of the purchase from Interfor to about twenty, and this lends support to Mr. Doman's expressed plan to develop business at the kiln division first, and then the planer mill. The planer mill's close proximity to numerous kilns and vast dry storage facilities on site has some inherent competitive advantages, particularly in regards to large kiln dried programs, which are comparatively difficult to run at Chemainus Forest Products. There is some reasonable basis upon which to believe the Copper Canyon planer mill is in a position to survive the prevailing dismal market conditions.
>
> **42** It is relevant that the Company's planer mill has been maintained and is operational. The Company has not sold any of its assets and some improvements have been made. The planer mill blower has not been repaired since it broke down at the end of December 2005, but this is not necessarily required as it depends on the volume of work to be performed. There is no basis to conclude the Company will not incur this expenditure when it needs to. Nor is there any basis to conclude the Company will not spend the money necessary to deal with the longer length it could not run in regards to the Japanese kiln dried product commenced at Copper Canyon and then moved to Chemainus Forest Products in June 2007.
>
> **43** In arriving at my conclusion I accept that a proper interpretation of Article 18.02 invites an assessment of the intentions and expectations of the parties. In the face of all of the circumstances surrounding the grievance, however, I am unable to conclude that this necessarily compels a result in the Union's favour.
>
> **44** The grievance is therefore denied.

The Employer in the instant case relied upon *Copper Canyon* as being a similar situation in some important respects. Copper Canyon too had purchased a non-operating mill and intended to operate it. Faced with the fact of the efforts made and being made to ensure the mill was ready to operate when that became possible, the Arbitrator was unable to conclude that it was permanently closed. That is a conclusion that should be made as well in the instant case, argued the Employer.

In my view, the *Copper Canyon* case is consistent with the previous authorities with two differences. One is that, unlike the Arbitrators in the *Island Shake, Stave Lake* and *Skeena* cases, Arbitrator Sullivan dismissed the grievance without reserving jurisdiction as to the final outcome. Secondly, and more importantly for our purposes, the mill had not re-opened nor had it been declared by its owners to be permanently closed. Absent certainty in the result, Arbitrator Sullivan reached a conclusion based on the facts known to him at the time of the hearing, a conclusion which appears well supported on those facts.

Hayes Forest Services Ltd. v. Industrial Wood and Allied Workers of Canada, Local 2171, [2006] B.C.C.A.A.A. No. 115 (Hope, Q.C.)

The was the case that most occupied the attention of the parties in argument in this hearing It is the main case on the merits in a series of cases between the parties on the same issues.

In the first case before Arbitrator Hope, Q.C., *Hayes Forest Services Ltd. v. Industrial Wood and Allied Woodworkers Union of Canada, Local 2171*, [2004] B.C.C.A.A.A. No. 129 (Hope, Q.C.).), the arbitrator heard and granted an application by Hayes to submit a question to the Industry Interpreter.

The subsequent decision of the Interpreter, *Hayes Forest Services Ltd. v. Industrial Wood and Allied Workers of Canada, Locals 1-80, and 1-85 certified for Weyerhaeuser Company Limited*, unreported March 15, 2005 (Mackenzie J., Interpreter), and Clarification Letter to the parties dated May 19, 2005, addressed the question of whether employees were entitled to severance pay for permanent closure when their logging camp was closed if they were hired at other existing operations of the company, without reference to seniority, other than for the purposes of vacation entitlement.

There are two reasons why I need not address the Interpretation Award in depth on the issue under consideration in this part of the Award.

First, the principal issue in the Interpretation Award was whether or not the employees were in fact terminated. The Interpreter found that the permanent plant closure (which he assumed as being factual) had caused the loss of seniority which amounted to a termination of employment "in that sense." In the instant case, it is assumed for the purposes of discussion of this issue that the VFP employees were terminated coincident with their loss of seniority. Accordingly, as relevant as this Interpretation might be for the second issue, if we get to it, it is not on the point of the dispute I am seeking to resolve at this point.

Secondly, the Interpreter's assumption that the Employer had conceded that the logging camp had permanently closed was challenged by the Employer after receipt of Mr. Justice MacKenzie's Award. It was the Interpreter's response to refer this issue of fact, among others, back to Arbitrator Hope for determination. For our purposes, the important judgment is the one issued by Arbitrator Hope when the matter came back to him for determination on its merits.

In the 2006 Award, Arbitrator Hope dealt with the Union's claim for severance pay for employees who it said had been terminated as a result of the permanent closure of a logging camp. The language of the relevant clause was identical to our own in the material respects. Although the case dealt with the closure of a logging camp, as did certain of the other cases already discussed, that fact alone does not serve to distinguish it in any meaningful way from the instant case.

In *Hayes*, the Employer operated a logging camp (the "Camp") under a contract with Western Forest Products Ltd. ("Western") within the Great Bear Rainforest. The contract was entered into on January 1, 1999. While the contract directly with Western was new, the camp was not. Hayes had actually operated the camp for the previous two years under an assignment from an unrelated company which held the contract with Western.

There was an ongoing environmental dispute concerning lands in the area around and including the Hayes logging camp. As a consequence, Western was required to surrender a portion of its timber cut to accommodate the dispute. On January 27, 2000, Western wrote to Hayes to advise it that the logging plans for the areas serviced by the Hayes logging operations were being deferred "due to third party interference."

Although the arbitrator found that there was some confusion regarding the precise date of closure, it was conceded by the parties that the logging camp was closed sometime in June or August of 2000. It was a matter of agreement, as well, that the camp never re-opened after that.

On April 4, 2001, the provincial government issued a Provincial Government Land Use Decision with the result that Western terminated the Hayes operation on Roderick Island, the location of the logging camp.

The Arbitrator accepted, however, that the Employer had no intention to close the camp and took every step possible to ensure that work would be available for employees after that. However, it ultimately did not succeed.

As with the original dates of closure, the evidence before Arbitrator Hope did not clearly identify a precise date on which the employer considered the logging camp to be permanently closed, but accepted that it was sometime in mid-2003. As Arbitrator Hope noted, regardless of the precise date in 2003, the permanent closure of the logging camp as it was subjectively determined by the employer came "long after the seniority retention rights of all employees had expired." (para. 12)

Given the inexactitude of the date of initial closure, the announcement in mid-2003 that the closure was permanent came some 35-38 months after cessation of operations.

As can be seen on the facts, the case before Arbitrator Hope was of the Scenario C variety. The fact that the closure was permanent was known at the time of the hearing, and required no declaration. What was required was a determination of how the employees' entitlements to severance pay, if any, were affected by that fact and the others before the arbitrator.

Arbitrator Hope heard the evidence and reached certain conclusions which led to an order that the subject employees were entitled to severance pay.

Near the outset of his Award, Arbitrator Hope expressed the basic positions of the parties as follows:

> **8** … The Union position was that the Camp was permanently closed when Western was required to surrender a portion of its quota to accommodate an environmental dispute that encompassed the Roderick Island operation. The dispute left Western without the timber needed to support the operation of the Camp.

> **9** In support of its position the Union relied on a line of authority which incorporates an analysis of levels of distinction that have been made with respect to the loss of retained seniority rights following closures of operations. The Union position was that the 12 Grievors were "employees terminated ... because of permanent closure of a ... logging camp" within the meaning of Article XXXII(a) of the collective agreement and were thereby "entitled to severance pay" within the meaning of that provision.
>
> **10** As stated, the position of the Employer was that the Grievors were not "terminated ... because of permanent closure" of the Roderick Island Camp. Rather, said the Employer, they were "terminated" by reason of the expiration of their retained seniority rights as described in Article XX(3). The maximum retention right under that provision is 18 months and, said the Employer, all of the Grievors had lost their retained seniority under that provision after the closure of the Camp but before it had concluded that the closure would be permanent. It was implicit that the Employer viewed the expiration of retained seniority as equivalent to termination of employment. Its position was that the closure did not become permanent until the Summer of 2003, long after the retention rights of all the Grievors had expired.

He elaborated somewhat later on the employer's position:

> **13** … As stated, the Employer's basic position was set out in its May 11, 2005 Outline. It reads as follows:
>
> > Hayes says that, throughout, it was always its intention to operate the Roderick Island camp. Hayes had no intention to close the camp and took every step available at law to ensure that work was available for the Roderick Island employees. The buyout of Hayes' cut came well after the expiry of the 18 month seniority retention period. Hayes' position is that no employees are entitled to severance pay under the collective agreement because there was never a "permanent" closure of the Roderick Island camp during the seniority retention period. The Roderick Island camp was permanently closed in June 2003, long after the expiry of the employees' seniority retention. (emphasis added)

And somewhat later than that, on the trade union's position:

> **27** The position of the Union was that the Grievors were terminated coincidental with the closure of the Camp and thus became entitled to severance pay. Its position, in effect, was that, viewed objectively, the closure in 2000 was "permanent" in the sense that there was no immediate or future expectation that a resumption of operations was likely. The fact that the Camp never reopened, said the Union, confirmed that the closure in 2000 was permanent. The submission of the Union, in effect, was that making the question of whether a particular closure is permanent contingent upon when the particular employer acknowledges that it is permanent is not consistent with the authorities and the language where the question is answered both prospectively and retrospectively on the basis of whether the closure was in fact permanent.

Before turning to Arbitrary Hope's judgment and reasoning, it is necessary to distinguish the positions taken before that arbitrator from those taken before me.

As I interpret its arguments, the union in the *Hayes* case argued that the objective facts of the case supported the proposition that the logging camp had closed permanently whether the arbitrator took the measure of its status in 2000 or at the time of its declared permanent closure in 2003. Looking first at the situation in 2000, it said that viewed objectively, the closure in 2000 was "permanent" in the sense that "there was no immediate or future expectation that a resumption of operations was likely." That is a forward looking analysis. The second prong of its argument was that, looking back, Hayes' declaration of closure confirmed the permanency of the closure in that the logging camp had closed and never re-opened – meaning that all along the closure had been de facto permanent.

In the instant case, the Employer would quarrel with the second approach but not the first. It would say: take the measure of whether VFP was closed at a material date either at or before the employee's seniority rights had expired – that is the appropriate time to take that measure, not the later point at which the declaration of closure is made. In the instant case, the Employer points to the fact that the evidence reflecting its intentions and efforts is much different than the facts in the *Hayes* decision. There, the employer was more or less stuck with relying almost entirely on its expressed subjective intentions to find timber and re-open, and there was no evidence to suggest that there was ever any real prospect of this coming to pass. Here, the Employer argues that its intentions to re-open were clear and accepted as being genuine, and the efforts it took to bring them to fruition were extensive and ongoing. In short, it says, any measure of permanency taken at the proper time would not result in a finding that the mill was permanently closed at that time.

For its part, the Union in the instant case did not seek to point to particular times along the way at which it would say that the closure was clearly and unequivocally permanent. Instead, it relies much more extensively on a review of the state of affairs at the end point. In an observation made by Arbitrator Hope early in his recital of the facts of the case, he said the following:

> **14** As with the date of closure, the date of permanent closure was variously recorded. The lack of particularity with respect to that date reflects the fact that "permanent closure", as seen by the Employer, was subjective in the sense that the Employer calculated it on the basis of its intentions. <u>The objective fact is that the Camp was closed in the summer of 2000 and the closure was permanent in the sense that it never reopened. (my emphasis)</u>

I should say before going on that although this last-quoted passage may seem like a significant factual judgment on Arbitrator Hope's part, I do not read it that way. The key words of the judgment for my purposes here are those emphasized. In my view, that is not a proposition with which there can be any real quarrel. In the sense that it closed and never re-opened, the closure was permanent. However, rather than answering, it begs the question. Is it this "sense" in which arbitrators have reached decisions as to whether the severance pay clause has been triggered or is it in the sense that it is argued by the Employer, namely, that although the final analysis may determine after-the-fact that the closure was permanent, that was not the case at the time that employee seniority rights

were expiring and hence, in that sense, the employees were not terminated because of a permanent plant closure?

If it can be determined on the face of the Award, what sense did Arbitrator Hope apply when he found in favour of the Union in the *Hayes* case?

During the course of the Award, Arbitrator Hope identified the issues in several ways depending on the subject area then under consideration.

First, he noted that "The issue ... is whether, as a matter of fact, the employees for whom the Union sought a remedy were 'terminated' as a result of the permanent closure or as a result of the expiration of their seniority retention rights under the provisions of the collective agreement." (para. 7) This was the overall question of substance in the case. Did the employees lose their employment because of a permanent closure? If they did not, then did the terminations come about by reason of the loss of seniority rights, as it might in any other case (not involving permanent closure) where an employee is laid off and never recalled?

Second, Arbitrator Hope was concerned to address the implications of the lapse of seniority rights in the absence of any declaration by the Employer that the closure would permanent. He noted : "The question arising under Article XXXII(a) is, accepting that there was a closure in the Summer of 2000 and that the Employer declared it to be permanent in the Summer of 2003, did the expiration of seniority rights retained under Article XX(3) during the 18-month maximum period of retention serve to extinguish the right of the Grievors to receive severance pay?" (para. 30) Later, he simplified the issue as follows: "The question in this dispute could be posed as follows: 'Does the expiration of seniority retention rights during the currency of a closure deprive employees of their entitlement to severance pay?'" (para. 45)

In setting out his answers to these questions, Arbitrator Hope first pointed to the themes struck in previous case authorities, the vast majority of which have already been discussed in my Award. He concluded, as had others before him, that the question of whether a shutdown, or closure, of a camp is a "permanent closure" within the meaning of the severance pay article is a question of fact to be determined in the context of the particular circumstances. Those facts relating to whether a closure is permanent can be both objective and subjective. However, on the authorities, the intent of an employer only has weight to the extent that it is consistent with the objective facts. The question of whether a closure is to be seen as permanent must be answered on the objective facts and, in effect, the subjective intentions of the parties cannot be relied on to find that a closure which was permanent in fact was not permanent until its permanence was affirmed by the particular employer.

That being said, Arbitrator Hope turned his attention to the period in April 2001 at which time the Provincial Government Land Use decision, to his mind, was the significant event. It is this passage on which the Employer in the instant case relies on to attempt to demonstrate that Arbitrator Hope, as a matter of fact, measured the status of the operation

as of that early date and concluded that the closure was already permanent. In saying this, the Employer says that this case is different from its own because it could not be said at any earlier date than perhaps late fall of 2008 that the closure the VFP mill was anything close to being permanent. The passages to which I refer are the following:

> **32** The implication in the evidence and authorities is that shutdowns are routine in the forest industry. They occur in mills and camps in response to a range of predictable and unpredictable factors including market influences, weather, fire season and the regulation of the resource. In terms of this dispute, it is recognized that some shutdowns are temporary and, coincidentally, some are permanent. In that context, the shutdown at issue fell outside the usual routine in the sense that it arose from the Government's Land Use Decision with no expectation that the Camp would reopen unless Roderick Island could somehow be excluded from the reach of the moratorium.
>
> **33** In that context the position of the Employer is something of a non sequitur in the sense that its assertion that the closure was not permanent was based entirely on the fact that it intended and hoped that a timber supply to reopen the Camp would be found. On the authorities, the intent of an employer only has weight to the extent that it is consistent with the objective facts. The objective facts in this dispute support the conclusion that the closure was permanent despite the Employer's intentions and protestations to the contrary.
>
> **34** The events that led to the closure were beyond the control of the Employer and of Western. In the final analysis, the closure was dictated by the Land Use Decision. In short, the events that led to the closure were set in motion by the Government and were implemented by Western in circumstances that, ultimately, left it with little choice. There were protracted discussions with respect to the implementation of the moratorium that resulted from the Land Use Decision but it was recognized by Western that it was likely that this Employer would be left without access to the timber required to maintain its Roderick Island operation.
>
> **35** That was the thrust of the evidence of Mr. Zimmermann. As time progressed, a reopening became less likely. Viewed retrospectively, the closure was permanent. The Camp never reopened. The position of the Employer in response to that fact was that the closure did not become permanent until the Summer of 2003 when it had negotiated the surrender of its agreement with Western. I accept the evidence adduced by the Employer in that context that it continued to pursue options with and through Western which would provide it with access to timber which would facilitate the reopening of the Camp.
>
> **36** But the objective fact is that operations were shut down and all employees were placed on layoff coincidental with the shutdown. Thereafter, the employees lost their employment in the context addressed in Article XXXII(a) of the collective agreement. As I read the agreement, the fact that the bargaining unit employees lost seniority retention rights held under Article XX(3) following the closure was coincidental and did not extinguish the right of employees to receive severance pay arising from the prior closure that became permanent in fact. That conclusion is consistent with the relevant authorities relied on by the parties.

What is clear from the passages is that Arbitrator Hope accepted that the employer was honest in that it did not view the closure as permanent until 2003. However, that was of little assistance to the employer as its own views were inconsistent with the objective evidence before Arbitrator Hope. As he said: "The objective facts in this dispute support the conclusion that the closure was permanent despite the Employer's intentions and protestations to the contrary."

I have highlighted several passages in the foregoing paragraphs from the Award. They indicate that there is some ambiguity regarding the question of whether Arbitrator Hope was taking the measure of the situation solely as of 2001 or was calling on the evidence of which he was aware from 2003, namely, the recognition by the employer at that time that the closure was permanent, and what difference the later information made to the result, if any.

That ambiguity is, I conclude, removed when the rest of the Award is examined. That is because in coming to his conclusions with respect to the outcome in the *Hayes* decision, Arbitrator Hope relied extensively on Arbitrator Munroe's award in *Downie Street Sawmills* and on the Lysyk Award. About the *Downie Street Sawmills* case, Arbitrator Hope said the following:

> **39** The circumstances that triggered the claim for severance pay and the grievance were summarized on pp. 6-7 as follows:
>
> > Later in May, 1988, the mill was re-opened. It continues to operate to this date. Of course, by the time the mill was re-opened (some 28-29 months after the cessation of operations), all the employees in the bargaining unit had lost their "seniority retention" (that loss having occurred for the most senior employees in or about June, 1987). Nevertheless, as best I can gather from the evidence, all were offered the opportunity to return. Some accepted the offer; some did not. ... The case for the trade union can be simply stated: severance pay is due and owing under the terms of Article XXIX of the Master Agreement where a suspension of operations has extended to the point that all employees have lost their "seniority retention". Here, that occurred in early June, 1987, at which time the mill was still for sale and there was no word from the company as to a possible resumption of operations. Hence, says the trade union, I must find that at that point, the employees were "... terminated ... because of [a] planned permanent closure" of the mill.
>
> **40** Arbitrator Munroe went on to reject the grievance on the basis that the objective facts compelled the conclusion that there was no permanent closure of the mill and that the loss of seniority retention rights during a temporary closure did not create an entitlement to severance pay. On pp. 14-15 Arbitrator Munroe wrote as follows:
>
> > Of course, unless one is governed by an automatic criterion like "seniority retention", the conclusion is inescapable that the company's mill was not permanently closed. The plain fact is that it re-opened in May, 1988, with many of the same employees working at their former jobs, using the same machinery and equipment, for essentially the same manufacturing purpose. The only real difference was that the shares of the company had been sold to someone new.

> However, Article XXIX of the Master Agreement is not concerned with new ownership. It is concerned solely with whether the plant has been permanently closed. ... The company's witnesses testified that the intention was never one of permanent closure; that it was always the intention that the mill would be re-opened, either by the company itself when market conditions permitted, or by a new owner if a sale could be consummated. No doubt, such unilateral statements of intention, whether of future intention as in Island Shake and Shingle or of past intention as in this case, must be examined with care. But here, the objective facts do appear to be consistent with the more subjective testimony. (emphasis added)
>
> **41** That decision stands for the proposition that the objective facts govern the question of whether a closure is to be seen as permanent for purposes of a claim for severance pay and that the loss of the seniority retention benefit, contrary to this Employer's interpretation, does not determine whether a closure is temporary or permanent. Arbitrator Munroe concluded in particular that expiration of seniority retention benefits does not serve to convert a closure which, as a matter of fact, is temporary, to a permanent closure. On that reasoning, it follows that loss of seniority will not convert a permanent closure to a temporary one, even where the question of permanence is postponed to await events.
>
> **42** I note in the context of that question that there is no interpretive distinction to be made between the permanent closure of a manufacturing plant and the permanent closure of a logging camp. In both cases the issue raised is whether the objective facts, viewed prospectively or retrospectively, support the conclusion that the closure is permanent. As stated, subjective facts relating to the intention of one or both parties will only be persuasive to the extent that they are consistent with the objective facts.

I have underscored the passage: "the issue raised is whether the objective facts, viewed prospectively or retrospectively, support the conclusion that the closure is permanent." In *Downie Street Sawmills*, the evidence might have had to be viewed prospectively if the Union had brought its case earlier. As it turned out, it was viewed by Arbitrator Munroe retrospectively as, by the time of the hearing, the fact of the re-opening of the mill was indisputable.

Arbitrator Hope went on to reject the argument by the employer that even if the closure was in fact permanent, the employees had lost their employment due to the expiry of their seniority rights and not the permanent closure. In doing so, he made it plain that when the evidence before arbitrators answers the question of whether a previous closure was only temporary (because the plant re-opened) or was permanent (because it did not and is now unequivocally closed) the arbitrator simply cannot ignore that evidence and its implications. Said Arbitrator Hope:

> **48** … In addition to Downie Street Sawmills and the interpretive decision of Mr. Justice Lysyk, the authorities recognize a continuing right to claim severance pay after the loss of seniority retention rights which matures when the fact that the closure is permanent is determined. That continuing right, for example, was recognized by Arbitrator McKee in his sequential decisions in Island Shake and his later decision in Stave Lake Cedar. In

short, the interpretation reached by Mr. Justice Lysyk is consistent with the position of the Union and inconsistent with the position of the Employer.

49 Conversely, I do not agree that the authorities relied on by the Employer distinguish the reasoning of Mr. Justice Lysyk in terms of the particular facts or the interpretive principles that apply. The express issue differed but the assertion of the Employer that an entitlement to severance pay that arises when a closure is permanent in fact is extinguished by operation of the seniority retention provision cannot be reconciled with the language of the agreement or the authorities that apply to its interpretation.

50 The closure was permanent in fact. Its permanence was recognized in express terms by the Employer approximately three years after the fact. Viewed objectively, the decision of the Employer to pursue a reopening of the Camp did not change the objective fact that the closure was permanent, thus triggering an entitlement to severance pay on all employees regardless of their loss of their seniority retention rights. On that understanding, the grievance initiated on behalf of the 12 Grievors is allowed.

The *Hayes* decision does not support the proposition advanced by the Employer that the question of whether a particular closure is permanent must be measured on the basis of the facts and circumstances present at or before the time at which employees lost their seniority rights. Clearly, the Award does not say that this is an inappropriate time at which to consider the issue. However, when the evidence before the arbitrator confirms the permanency of the closure, the arbitrator will not ignore that evidence.

That concludes my review of the most relevant of the cases which have addressed the issue of severance pay because of an alleged permanent plant closure.

VI CONCLUSIONS ON THE SUBSTANTIVE ISSUE

The underlying facts of the case can be simply re-stated.

On May 24, 2006, the mill, while being operated by Northwest, ceased operations and employees were laid off.

The discontinuance of operations was not a short-term plant shut-down; as it turned out, it was a closure of operations which continued for almost three years before the Employer's final announcement was made in 2009. The Employer argued that a cessation of operations and a closure are not the same. Whether or not that is so, it is my finding that the mill was in a state of closure, as that word is commonly understood and used in the cases, as of May 24.

I find that until it made its decision to announce permanent closure, the Employer always had the intention of re-opening if the "pieces of the puzzle", which included economic conditions, came together. It took constructive steps toward that objective.

The announcement of permanent closure came about because the pieces of the puzzle did not all come together. Specifically, the economics of the industry worsened and caused the Employer to abandon its plans of re-opening.

During the lengthy period of closure from May 14, 2006 to March 2, 2009, employees were terminated from employment as they lost their seniority retention rights. At the time, it was known that while in a technical sense the loss of seniority rights had lead to termination, the real and substantive cause of the terminations was the plant closure: see *Re Uniroyal Ltd. and United Rubber, Cork, Linoleum And Plastic Workers, Local 67* [1979] O.L.A.A. No. 81; 23 L.A.C. (2d) 386 (Weatherill). What was not known was whether or not the closure was "permanent", thus entitling the employees to severance pay.

It is my task as arbitrator to assess the subjective and objective evidence of the case and determine whether employees of the plant were terminated as a result of a permanent plant closure, thereby triggering the application of Article XXVIII.

The Employer agrees that the mill is permanently closed; there is no evidence that would permit it to argue otherwise. But it says that the fact of permanent closure is, in effect, irrelevant because the permanent closure was recognized and acknowledged too late in the day to ground an entitlement to severance pay for employees who had been terminated long before. It does not say that this is a result of the fact that no declaration had been previously made. It says that if an employee had sought to prove at the point at which he or she was terminated that this occurred because of a permanent plant closure, the employee could not have done that. That is because, based on the evidence available as at that time, it could not be said that the termination resulted from a permanent plant closure. Both the subjective and objective facts that existed at the time of the terminations were strongly weighted in favour of the conclusion that the mill was not permanently closed. Accordingly, this means that the necessary direct causal link between the triggering event (permanent plant closure) and the consequence (termination) cannot be drawn.

After the lengthy review of all the relevant cases, I conclude that the Employer's position is not supported by those cases. There are no cases, regardless of their scenario type, in which the arbitrator found it to be necessary to decide with any precision when the plant closed or re-opened vis-à-vis the loss of the employees' seniority retention (with the exception of *Marine Carriers*, which its arbitrator himself distinguished from plant closure situations).

Returning briefly to a discussion of the "scenarios" presented at the outset, it can be seen from the review that the cases which fall within them have certain unmistakable characteristics.

In Scenario "A" the over-riding question (apart from any issues with respect to whether employees have been "terminated") is whether the plant is permanently closed. It is the over-riding question because the answer is uncertain. There has been no declaration of

closure or an actual re-opening. Once the arbitrator's decision has been made, a remedy may be declared. In none of these cases has the arbitrator asked the question of whether a given employee, having been terminated at a given time, qualified for the severance pay because by the time of termination, the plant had already permanently closed.

In Scenario B, where there is a fixed future date for resumption of operations, the over-riding issue is not whether the plant is permanently closed. The Lysyk Award stands for the proposition that in these circumstances the plant is not permanently closed. The over-riding question in these cases is whether or not the Employer actually meets its commitment(s).

The decisions of arbitrator McKee in *Island Shake and Shingle* and *Stave Lake* demonstrate that once the answer to that question is known, (an answer which will become apparent at that future date), everything flows from it. If the Employer's arguments in the instant case held sway, then none of the employees in arbitrator McKee's decisions would have become entitled to severance pay, even when the closure became a certainty. This is because at all material times up to the date at which the arbitrator finally determined that the closure was permanent, the state of the evidence supported the conclusion that a declaration of permanency could not be made. Indeed, in the *Island Shake and Shingle* case, Arbitrator McKee initially declared that the plant was not closed. On the Employer's argument, that declaration would have made it impossible for any employee to obtain severance, regardless of the final outcome, because the closure was not permanent at the time of the employees' termination and, in fact, had even subsequent to termination been arbitrally declared not to be permanent. Arbitrator McKee's continued interest in whether the Employer met its commitment to re-open would have been futile unless the reason why the proceeding was continuing was to determine whether the plant was permanently closed and severance was therefore payable. On the Employer's argument, by that point, the question would have been moot.

In Scenario C cases, such as the cases before the arbitrators in *Downie Street Sawmills*, *Hayes* and the instant case, there is no issue at all about whether the plant is permanently closed. It has either re-opened, as it did in *Downie Street Sawmills*, or it has unequivocally permanently closed, as in the *Hayes* case and the instant case.

In neither *Downie Street Sawmills* nor *Hayes* was any effort to relate the employees' termination date with the date at which it become known that the plant had re-opened or permanently closed, as the case may be. In *Downie Street Sawmills*, the Union sought to have Arbitrator Munroe focus on the facts as they were known at the time that the employees had lost their seniority retention, arguing that such a lengthy closure was a permanent one. Arbitrator Munroe disagreed that there was any obvious linkage between the loss of seniority retention and the permanent plant closure article. He expressly stated that the fact before him – that the plant had been re-opened – could not be denied or ignored. The fact was that the closure was not a permanent closure. The employees thus did not get severance pay.

It will be recalled that one of the key conclusions of the Lysyk Award was that there was no obvious linkage between the seniority retention article and the permanent plant closure article. The Employer's argument in the instant case, if correct, would establish a direct linkage between them. Any employee who could not point to an existing permanent plant closure under Article XXVIII at the time he or she lost seniority retention rights would not qualify for severance pay.

The *Downie Street Sawmills* and *Hayes* cases are very similar in their approach (not surprisingly, as Arbitrator Hope relied on *Downie Street Sawmills* for its important principles). It is perhaps for that reason that I do not see the *Hayes* cases as breaking new ground. In both cases, after a lengthy "emergence", "all the facts were in", as it was said in *Marine Carriers*. Both Arbitrator Munroe and Arbitrator Hope had "the real facts", as Arbitrator Munroe described them in *Downie Street Sawmills*.

In *Hayes*, the unmistakable fact was that the logging camp was closed. Clearly, had Arbitrator Hope been of a mind to do so, he had evidence before him on which he could have made a rather precise judgment of the date on which an adjudicator would be inclined to find that the operation had closed (which might have been well before the one that was confirmed by the employer in that case). However, this was not something he needed or was required to do. The fact was that where there was an initial closure, and where the camp was never re-opened and where it was finally confirmed to be closed, the closure had "in that sense" always been permanent. It was just not known to be such until much later in the chronology of events when, as Arbitrator Hope put it, the employees' entitlement to severance pay "matured" as the objective facts revealed the permanent closure.

Based on all of the case law, it is my conclusion that the "sense" of permanency noted by Arbitrator Hope in *Hayes* is the sense that holds sway in the law. The Employer's argument in favour of a more nuanced focus does not pass muster. On day one of the Northwest closure on May 24, 2006, it was simply unknown whether the closure was temporary or permanent. It was still unknown when the Employer purchased the mill shortly after. What was known was that the operations were, at least for now, in a state of closure (to be distinguished from "permanent closure", which was not known then) and the employees were on layoff with rights of recall. Whether or not the mill would re-open was not known to the employees and it was not known even to the Employer because pieces of the puzzle had to fall into place before the mill could re-open. As the employees lost their seniority retention over time, it was still not known whether the closure was temporary or permanent. It was possible and, the Employer would say even likely, that the mill would re-open and the closure would not be permanent. Or it was possible that it would not, in which case the closure would be permanent.

The first occasion on which the answer to the question of whether the mill was in a state of permanent closure became known to all was when the Employer announced it on March 2, 2009 (the Employer, presumably, knew shortly before the announcement, but that is of no consequence here).

What no one knew at the time of the initial closure or the almost three years of closure that followed it was, as of March 2, 2009, known to be a simple unequivocal fact. The mill had not closed temporarily. It had closed permanently. Whether or not at any stage along the way, there was the appearance – even a strong appearance – that the mill would re-open, the reality trumps the appearance.

A way to simply illustrate the "sense" of permanency used in the Hayes case is to ask the question: did the mill close temporarily on May 24? The answer, logically, must be "no". It closed permanently. As was the case in *Marine Carriers*, the Employer's intentions did not govern. What governed was what happened when all the facts were in. When all the facts are in, it is impossible to claim that the mill was, at any time between May 24, 2006 and March 2, 2009 "temporarily" closed.

I thus find that the employees who lost their seniority and were terminated during the closure of the mill were terminated "because of" a permanent plant closure and are entitled to severance pay.

I acknowledge that the Employer may well come away from a reading of this Award feeling like the victim of the maxim "no good deed goes unpunished". The Employer took a closed mill and with energy and purpose went about the business of trying to breathe new life into it. Its efforts failed for reasons beyond its control. If this were a case in which an arbitrator had the duty to strike a balance between the interests of two parties which have legitimate and even compelling interests in a result, then the Employer's efforts to re-open the mill would have stood to its credit. Indeed, they do. But this is not a case in which the arbitrator is asked to balance interests. When the Employer took over the closed mill, it adopted a collective agreement which in plain language provided employees with severance pay when they were terminated because of a permanent plant closure. My task as adjudicator has been to assess the evidence and make a finding of fact as to whether the requirements of Article XXVIII were met. I have found that they are. The consequence of that finding is that the employees are entitled to severance pay, and this is so regardless of the good faith efforts of the Employer along the way.

VII ESTOPPEL

Is the Union estopped from claiming severance pay for its members in this case?

The basic principles of the law of estoppel are set out in the following excerpt from *Harbour Cruises Ltd. and Pulp, Paper and Woodworkers of Canada, Local No.3*, BCLRB Decision No. B181/2004, where the British Columbia Labour Relations Board cited with approval the following statement from *Maverick Coach Lines, BCLRB No. B435/97* (at para. 62):

> ... the elements of estoppel can be simply stated. One party indicates through words or conduct that it will not enforce a legal right it has. The other party relies on that representation and acts accordingly. Then the first party changes its mind, and wants to enforce that strict legal right after the other party has relied on that representation to its

> detriment. The equitable doctrine of estoppel is designed to avoid such an unfair tactic by preventing the party making the representation from later relying on its legal right that it has effectively waived.

The cases make it clear that the representation must be "unequivocal":

> ….[I]n order for an estoppel to be established the party against whom it is being established must have made an unequivocal representation, either by statement or by conduct, that it does not intend to rest on its strict legal rights, which is relied upon by the other party to its detriment. *West Fraser Mills Ltd. (100 Mile Lumber Division) and United Steelworkers of America, Local No. 1-425*, BCLRB Decision No. B199/2006 (at para. 20)

Sometimes there is a duty on a party to speak up. But the duty is limited:

> ... Passive acquiescence by one party in the face of a statement of position by the other may constitute implied acceptance and give rise to an estoppel: see Barnard Management, [BCLRB No. 122/87] at p. 3. However, as District of Chilliwack, [BCLRB No. L362/82] pointed out, an obligation to alert the other side that it does not accept a particular interpretation or practice will not necessarily arise every time one side advises the other of a position it intends to take. It will do so where the only reasonable inference that could be drawn is that the advising party's position was accepted and it committed itself on that assumption (District of Chilliwack, supra, at p. 8 and Re Vancouver Police Board [(1987), 32 L.A.C. (3d) 214] at p. 231). *Mainroad Mid-Island Contracting Ltd. and Mainroad North Island Contracting Ltd.*, BCLRB No. B366/2001, approved in *West Fraser Mills Ltd. (100 Mile Lumber Division) and United Steelworkers of America, Local No. 1-425*, BCLRB Decision No. B199/2006 (at para. 25)

The context of discussions said to have raised an estoppel is a critical factor in determining as a matter of fact whether an estoppel has arisen:

> ... it is a question of fact, "judged in context", whether there has been conduct or an express commitment by one party that amounts to an unequivocal representation that led the other party to reasonably believe that an undertaking or commitment was given. *West Fraser*, approved in *City of Vancouver and Canadian Union of Public Employees, Local 1004*, BCLRB No. B12/2008 (at para. 14)

In reviewing the evidence of the discussions between the parties, and the context in which those discussions took place, it is my conclusion that the Union is not estopped from proceeding with its grievance. My reasons are these.

To find an estoppel, I would have to conclude from the evidence that the Union representatives through words or conduct made an unequivocal representation to the Employer that the Union would not be seeking severance pay on behalf of laid off employees of the mill. I would then have to find that the Employer relied on this representation in proceeding to spend monies and carry out its plans over the course of the months and years that followed.

With respect to the first requirement, what does the Employer say is the representation or conduct which generated the estoppel? The Employer points to an exchange between Mr. Oja and Mr. Kordyban during a meeting on August 14, 2006 to support its position. Neither Mr. Oja nor Mr. Kordyban claimed to recall their exchange with any degree of certainty by the time of the hearing. However, I find that their recollections were not, on the whole, very different. They agreed that Mr. Oja asked Mr. Kordyban whether the company was prepared to pay severance pay for a permanent closure. As Mr. Oja recalled it, he asked if severance pay would be paid "down the road". Mr. Kordyban's recollection of his response was that he replied that the Employer would "work towards getting this mill going and severance pay is not something we are prepared to do, it is not on the table, it is not an option, whatever words to convey the message." Mr. Oja made a notation on his Agenda notes at the time of the August 14, 2006 meeting which records the essence of the discussion as being "BK – Severance pay – Option down the road? Plan to run mill not sever people." In Mr. Oja's cross-examination, this phrasing was put to him and he agreed that it was what was said.

After Mr. Kordyban's reply, Mr. Oja said nothing further on the subject. In his testimony, Mr. Kordyban stated that having "put my position" forward on the subject of severance pay, he would have expected that Mr. Oja would have "come back" to him and challenged it. As Mr. Oja did not do so, he felt that the matter was settled and therefore he could carry on with his plans without concern for that particular area of liability.

In effect, it is not what Mr. Oja said but what he did not say that is at the root of the Employer's position. I cannot read this exchange as constituting a statement of position of either the Union or the Employer with respect to the payment of severance pay. Mr. Oja asked a question, he did not state a position. Mr. Kordyban's response amounted to a statement that the Employer planned to run the mill and not sever its employees. The clear implication of the reply is not: 'we will not be paying severance pay if there is a plant closure.' The implication of the reply is that severance pay is irrelevant because the Employer intends to operate the mill. Both Mr. Oja and Mr. Kordyban can be taken to have known that employees only receive severance pay when they are severed.

Should Mr. Oja have replied? The law of estoppel provides that silence can constitute a representation. If a party remains silent when it is reasonable for the other party to expect a reply, an arbitration board may properly conclude that the failure to speak amounted to a representation. In my view, it was not reasonable for Mr. Kordyban to expect Mr. Oja to respond with a statement of the Union's position. No one in the discussion had stated a position on the legal rights of employees to severance pay. There was no need for Mr. Oja to do so in response or any expectation that this would be helpful to the discussions.

In argument, the Employer also submitted that it was underhanded for Mr. Oja to, in essence, lie in the weeds with his knowledge of the *Hayes* decision and not state the Union's position to Mr. Kordyban. Again, as I see it, the answer to that is that the subject of the parties' positions on severance pay entitlements on permanent plant closure was not under discussion. The subject matter of severance pay had been broached. But it was not a subject which was "put on the table" as an issue between the parties. I cannot find

that either of the two participants in the discussion could claim to have been misled by the other. Mr. Oja did not represent that the Union would not seek severance pay and Mr. Kordyban did not, through the language he used in the reply, intend to convey any kind of guarantee to the Union with respect to the operation of the mill and the engagement of employees in its operations.

It remains to be said that there was no follow-up to the discussion or any discussion about analogous subjects arising from it. Mr. Oja's silence in the face of Mr. Kordyban's refusal to discuss the subject of severance pay cannot be seen as an unequivocal waiver of the severance pay entitlements of its members.

I have considered the evidence with respect to the Employer's efforts to have the union present a list of all outstanding grievances. The evidence supported the proposition that this had nothing to do with the subject of severance pay. It had to do with the employer's efforts to discover what liabilities it might have remaining over from the Northwest operation of the mill. It was certainly not asking about its liabilities in the event that it failed to open. As Mr. Kordyban's reply to Mr. Oja made clear, the Employer was focused on operating a mill, not severing employees.

Even if there had been an unequivocal representation, the evidence did not persuade me that the Employer met its burden to show reliance. The company had formulated a complex plan to bring the mill back into operation over a period of time. It had done so without any input from the Union in its initial stages. An important part of the plan involved dealing with issues identified by the Company as necessary changes to the collective agreement and work practices. As mentioned, it also included getting a complete listing of outstanding grievances in order that it could assess it liability.

If Mr. Oja had continued his discussion with Mr. Kordyban and told him that it was the Union's position that on permanent plant closure, even if that came much later, employees were entitled to severance pay, what would the Employer have done which it did not do in any event? An option would have been to drop all work and abandon the intention to re-open, but it is not believable that this would have been done. This would simply make the potential of a severance pay liability into a current reality. The Employer's intention was to operate the mill, and the Union's position on severance pay would, if anything, have been an encouragement to continue with that plan. In these circumstances, the evidence does not support the conclusion that, even had the Union taken a position, the Employer would have placed any reliance on it in carrying out its plans.

Accordingly, I conclude that the Union is not estopped from proceeding with its claims for severance pay.

VIII CONCLUSIONS AND RESERVATION OF JURISDICTION

In this proceeding, I have reached the following conclusions:

(1) The employees who are the subject of this Award (who are described at para. 24 (h) of the Statement of Agreed Facts) were terminated "because of" a permanent plant closure and are entitled to severance pay under Article XXVIIII of the Collective Agreement, and

(2) The Union is not estopped from bringing this grievance on behalf of its members.

I am well aware that this Award does not necessarily complete my tasks.

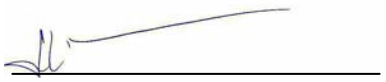
I have answered the main questions asked in these proceedings but I have not yet addressed the separate situations of the employees who are identified at paragraph 24 (a-g) of the Statement of Agreed Facts.

I am hopeful that having this Award in hand may assist the parties to resolve any disputes they may have with respect to these employees, and am therefore asking the parties to take these matters back into their own hands with a view to resolving as many of the remaining disputes as they can.

I retain jurisdiction to resolve any disputes which the parties cannot themselves resolve and with respect to any issues arising from the application and implementation of this Award.

The parties can communicate with me about this at their convenience. If and when this occurs, I will wish to establish a case management conference (whether by telephone or otherwise can be decided) so that I can discuss certain concerns I have regarding the state of the evidence in respect of some of the separate classes of employees and how that can be addressed.

It is so awarded.



John L. McConchie
Arbitrator