Dear Sirs:

This is further to my letter of March 5, 2010, in which I informed you of the appointment of the Honourable Ted Hughes and Mr. John Rooney as mediators to assist you in your negotiations. In accordance with their mandate, the mediators have submitted their report to me concerning BCMEA and the ILWU (Longshoremen). The report is attached for your review.

The mediators’ key recommendations are to extend the recently expired collective agreement from April 1, 2010 until September 30, 2012 with wage adjustments; and to establish an Industrial Inquiry Commission (IIC) to examine the following issues: the parties’ relationship; the parties’ significant bargaining proposals; options put forward by the parties regarding alternative dispute resolution; the appropriateness of the BCMEA as bargaining representative; and the recruitment and retention of women on the waterfront.
Before I determine my next steps, I would like to know whether you are willing to accept the mediators’ recommendations with respect to the collective agreement rollovers with wage adjustments.

Yours sincerely,

Lisa Raitt

The Honourable Lisa Raitt, P.C., M.P.

Enclosure: 1
REPORT

By:

THE HON. TED HUGHES O.C., Q.C.

AND

MEDIATOR JOHN ROONEY
Federal Mediation and Conciliation Service

To:

THE HON. LISA RAITT P.C., M.P., MINISTER OF LABOUR

Prepared pursuant to their appointment on the 5th day of March, 2010, as mediators under Section 105(1) of the Canada Labour Code, in Collective Bargaining Negotiations Between British Columbia Maritime Employers Association (BCMEA) and the International Longshore and Warehouse Union of Canada (Longshoremen).

July 30, 2010
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               2. Laughton Opinion – June 24 2010
I. Appointment of Mediators

The specific terms of our March 5, 2010 appointment provide that:

... the Minister of Labour, pursuant to subsection 105(1) of the Canada Labour Code, hereby appoints the Honourable Ted Hughes, O.C., Q.C. of Victoria, British Columbia and Mr. John Rooney, Mediator of the Labour Program's Federal Mediation and Conciliation Service to confer with the parties to these collective bargaining negotiations:

- to assist them in negotiating a settlement of their differences for the purpose of renewing or revising the collective agreement, which, in the interests of labour stability and the ports' success, should be for the longest possible term agreeable to both parties.
- if there are matters that cannot be resolved through negotiations, to assist the parties in developing and agreeing to a dispute-resolution protocol under which all outstanding differences would be submitted to a person or body for final and binding determination; and
- if the parties cannot resolve their differences through negotiations nor agree to a dispute-resolution protocol, to submit a report to the Minister of Labour within ten (10) days of the conclusion of the mediators' appointment.

This appointment is for a period of ninety days, subject to extension at my discretion, or until the union or the employer files a notice of dispute pursuant to subsection 71 (1) of the Canada Labour Code, whichever comes sooner.
With the agreement of the parties (the BCMEA and the Longshoremen) you extended our appointment, initially until June 30, 2010 and subsequently until today. The need for this Report results from the inability of the parties to either resolve their differences through negotiations or to agree to a dispute-resolution protocol.

II. Preliminaries and the Early Days of Bargaining

Our involvement over the past four months in endeavouring to assist the parties has been two-fold: firstly in negotiating a settlement of their differences for the purpose of renewing or revising the collective agreement between them that expired on March 31, 2010, and secondly in developing and agreeing to a dispute-resolution protocol under which all outstanding differences would be submitted to a person or body for final and binding determination. The results of our participation will be documented in the body of this Report.

The initial step in the collective bargaining process was taken on November 25, 2009 when the Longshoremen (hereafter referred to as the ILWU) delivered a Notice to the BCMEA, prepared pursuant to the requirements of the Canada Labour Code, to commence collective bargaining to renew the existing Collective Agreement between the parties. The BCMEA was quick to respond, firstly through telephone communication and then by letter that provided the following information:

This will confirm our agreement to commence negotiations for the renewal of the BCMEA & the ILWU Canada Collective
Agreement which expires on March 31, 2010 on Monday January 04, 2010. As discussed, the Parties will meet on that date as well as on January 5-6 for the purpose of exchanging bargaining proposals for this round of collective bargaining.

Additionally, both parties have agreed that in the event one party intends to serve the other party with any notice issues for this round of bargaining they will be served in writing in advance on Monday January 04, 2010.

The parties were in immediate communication about location and dates suitable to both, establishing where and when they would bargain with a view to arriving at a new Collective Agreement. They did meet on the agreed dates of January 4, 5, and 6, 2010 and notice letters were served in advance of January 4.

At these early January meetings the parties exchanged their bargaining proposals for this round of collective bargaining. On our arrival on the scene in the month of March copies of those bargaining proposals were made available to us.

In addition to the opening three days in early January the parties met on 11 other occasions before we joined their deliberations. Those sessions were on January 12, 13, 18, 19, 25, February 10, 15, 16, and March 1, 2, 3. It was confirmed for us that little headway had been made in resolving issues that had been placed on the table. On our arrival on March 9th the parties were content with our suggestion that we start with a review of the requests for changes, deletions and additions to the Collective Agreement soon to expire, so we would have a full understanding of the issues and
the position of each party with respect to each of them. While that process was especially beneficial to us it was also apparent that it provided a better understanding to the parties themselves of the extent, scope and depth of the desired goals for change.

III. Proceedings in the Presence of the Mediators

Besides our initial day with the parties we spent an additional 24 days with them (March 10, April 13, 14, 15, 16, 26, 27, May 4, 5, 6, 25, 26, 28, and June 1, 2, 3, 4, 8, 10, 11, 22, 23, 24, 25).

By the time of our sessions on April 26 and 27 we had substantially completed a review of all issues requiring resolution. As the parties worked their way through that exercise there was some agreement between them on some of the more minor or less contentious matters but movement on proposals that would bring substantial change to the Collective Bargaining Agreement and in turn to the longshore industry was non-existent. Matters that we considered to be items of "substantial change" will be identified on following pages. The majority of issues in that category, but certainly not all of them, had been advanced by the BCMEA in its written proposal handed to the ILWU on January 4.

On April 27, sensing a very intransigent and "dug-in" position on the part of both parties we posed the blunt question to them: "What suggestions do each of you have to arrive at a resolution". The BCMEA responded that the nature of the work on the docks and how it had evolved over the years merited necessary improvements and while it had raised some of those issues in the two most recent rounds of bargaining without success, this time it was adamant that
changes had to be made in how the work force is utilized. They said that while they were unsuccessful in convincing the ILWU of the need for change they were nevertheless resolute in their conviction that they had to get there in some way. The ILWU responded that they believed the Agreement just expired gave the employer sufficient flexibility to manage the workplace and that awards of Arbitrators on regular work force issues showed that the system was working quite well the way it is presently structured. They further noted that the requests of the BCMEA for significant change were not accompanied by any benefit for the ILWU in exchange for what they were being asked to give up.

As mediators, we took time to consider what suggestions we might advance to move the process forward, notwithstanding the adamant stance with which each party clung to the position taken. At that point, we recognized two factors that appeared to make meaningful dialogue between the parties extremely difficult, if not near to impossible. The first problem was the relationship between the parties which was anything but amicable and showed signs of a basic mistrust between them. We will have more to say later in this Report about that unsatisfactory state of affairs.

Additionally, the scope and extent of the changes to what had been agreed upon in previous rounds of bargaining led us to question whether the collective bargaining process was the proper forum for resolution of such significant change.

With the foregoing in mind and given the state of the negotiations, we met with the parties separately to explore the possibility of what we thought to be a sensible proposition. It was our view that what
we proposed could lead to a resolution of the factors that we have identified as blocking a meaningful dialogue between the parties. We were mindful that our proposal could only be advanced if our inquiries of the parties met with unanimity in their response. We proposed the possibility of:

(a) An extension (rollover) of the recently expired Collective Bargaining Agreement with monetary adjustments; and
(b) The establishment by the Minister of Labour of an Industrial Inquiry Commission under Section 108 of the Canada Labour Code to investigate and report on issues pertaining to the functioning of the collective bargaining relationship between the parties with the objective of making improvements in that relationship that will in turn lead to both the creation of a harmonious working environment and the enhancement of productivity in the longshore industry that is within the current jurisdiction of the parties at Canada’s West Coast ports.

The unanimity with our proposal, for which we had hoped, did not materialize. The result was that we were back at the bargaining table in the week following April 27th and bargaining continued off and on for 17 more days.

Progress over those 17 days was minimal. There were some agreements and withdrawals but serious engagement on the substantial issues never materialized. When discussion moved in the direction of those issues no consensus resulted. We will have more to say later in this report about the scope of the proposed substantial changes and whether the collective bargaining process is the most appropriate place for resolution of them.
Over this period of time the two impeding factors that we previously identified were joined by two others. We identify the first of the two additional factors by posing an initial question that came to occupy our minds:

Were the employers represented at the bargaining table by senior industry personnel empowered with decision-making authority who were conversant with the day to day operations on the docks and possessed of the knowledge to both present their case for change and have an appreciation for the reasoning of the ILWU representatives in responding to their requests?

The answer of the ILWU to that question is clearly "No". Their frustration during the bargaining process by what they describe as the absence of knowledgeable and empowered management representatives was expressed to us on a number of occasions. We understand the position of the employers that they are entitled to be represented by people of their choosing. If however, the current situation is as the ILWU representatives say it is, a realistic question that follows is whether representation through the BCMEA is the most effective method of representation for the industry as it bargains from time to time with the ILWU for a Collective Bargaining Agreement.

Of assistance in considering the issue posed by our initial question above is a look at the employment positions and responsibilities carried by the BCMEA’s representative at the table during the last round of bargaining (2006-2008) and the positions held by the BCMEA’s team during the current set of talks.
During the previous round of bargaining both the Chair of the BCMEA’s Board and its President and CEO were present. Besides other staff members of the BCMEA in attendance, the following also attended:

From the Direct Employers Class
- the President of Neptune Terminals (who also held the above referred to position of Chair of the Association’s Board)
- the President of Western Stevedoring
- the President and CEO of D.P. World, Vancouver
- the Vice President of Operations – D.P. World, Vancouver

From the Shipowners Class
- the Executive Vice President – COSCO
- the Marine Operations Manager of Weyerhaeuser Canada

In the 2010 round of bargaining neither the President and CEO of the BCMEA nor the Chair of its Board attended the negotiation sessions. That occurred notwithstanding that the Bylaws of the BCMEA provide that in a “bargaining year” a Director representing the Direct Employer Class shall be elected as Chair of the Executive Committee and Chair of the Board. The BCMEA’s delegation was led by its Vice President Labour Relations and besides the presence of other staff members of the BCMEA, the following attended:

From the Direct Employers Class
- the Manager of Operations, Squamish Terminals Ltd.
- the Director of Terminal Operations, Terminal Systems Inc.
- the Manager, Human Resources, D.P. World, Vancouver

There were no representatives from the Shipowners Class.
John Rooney, co-author of this Report, was present at both sets of negotiations. In the 2006-2008 set of talks the representatives from the Direct Employers Class and from the Shipowners Class were active participants in the negotiations and were of considerable assistance because of their background, knowledge and experience. They truly engaged with the ILWU’s negotiating team. During the current round of negotiations the BCMEA’s Vice President of Labour Relations did almost all of the negotiating for the BCMEA with the three representatives from the Direct Employers Class playing a very minimum role but discussions never reached a stage where their participation likely would have been helpful.

Two observations are worthy of note. The first is the senior level of the personnel that the BCMEA and the Direct Employers Class sent to the table on the previous occasion as well as representation from the Shipowners Class. That is in sharp contrast to the make-up of the BCMEA’s delegation in 2010. The second is that a negotiated settlement was arrived at on the prior occasion which did not occur in 2010.

We will return later in this report to give further consideration to this question of representation.

This leads to a discussion of the second of the additional two factors we identified as impeding meaningful dialogue between the parties. Considerable background is required leading to the identification of this factor. With the arrival of the month of June we advised the parties that with little progress achieved and the period of our mandate running out, time had to be devoted to a discussion of the
second prong of the terms of our appointment. This meant setting aside a period for us to assist the parties in developing and agreeing to a dispute-resolution protocol under which all outstanding differences would be submitted to a person or body for final and binding determination. This matter was discussed with the parties, separately, on June 9th. The ILWU acknowledged the need for such discussion but expressed a concern that the BCMEA representatives at the table were really “surface” bargaining while senior executives of the BCMEA were advancing the BCMEA’s real agenda in Ottawa and elsewhere which called for the enactment of legislation mandating the settlement of all outstanding issues by a mediation/arbitration process.

We met with Mr. Andy Smith, President and CEO of the BCMEA, on the afternoon of June 9th. This was his first appearance at the locale of our meetings. He was accompanied by the BCMEA’s Counsel and also by the Vice President of Labour Relations for the BCMEA who, as we have indicated, was the lead spokesperson for the BCMEA team. We were told that the BCMEA, while sincere in wanting to see the current process succeed in arriving at a Collective Bargaining Agreement, had a firm position on how ultimate resolution should occur. The three representatives welcomed an invitation to return on June 23rd to place before us their proposal for settlement of all outstanding differences by the submission of them to a mediation/arbitration process for final and binding determination. We acquainted the ILWU with the proposed agenda for June 23rd and invited their submissions on that day with participation by counsel if that be their choice.
Mr. Smith, Counsel Donald R. Munroe Q.C. and other members of the BCMEA team met with us in separate session on June 23rd. Mr. Munroe took us through a careful and thoughtful presentation of the views held by his client as to what an appropriate dispute resolution process should be, not only in the current instance but one that, through legislation, would apply to the BCMEA and the ILWU on all future occasions. In summary, Mr. Munroe advocated a system for settling outstanding issues by reference of them to a criteria based mediation/arbitration process in which, whoever is charged with that responsibility, would make his or her determination in accordance with legislatively defined criteria if mediation fails and arbitration becomes necessary. The proposal would, through legislation, preclude strikes and lockouts on the West Coast ports with the alternative being the mediation/arbitration solution as above described. Mr. Munroe indicated that in his presentation to us, he was following the content of a written opinion prepared for his client on June 15th. He agreed to make that document available to us and to Counsel for the ILWU.

On the same day we met with the ILWU's negotiating team and their Counsel, Bruce Laughton, Q.C. Mr. Laughton also took us through a careful and thoughtful presentation of the dispute resolution model that his client thought appropriate for us to apply. It would restrict or limit mandatory dispute resolution by an arbitrator to only specified terms and conditions of the Collective Bargaining Agreement. Mr. Laughton's proposal was that the limitations, in this instance, should be to general wage increases and existing benefits and that the parties be free to agree on any other issues to be referred to the arbitrator and failing agreement the terms and conditions of the recently expired Collective
Bargaining Agreement would apply. The proposal would require legislation to put it into place if not accepted by both parties but would have application to the current round of bargaining only.

Mr. Laughton also agreed to give us a written record of his submission and to provide a copy to Mr. Munroe. Subsequently, the parties prepared rebuttal statements and made them available to us.

The positions of the parties are starkly different. They address an extremely important issue insofar as the stability of West Coast shipping operations are concerned. This is an issue that has had public attention on previous occasions but has always been left substantially unresolved and without a definitive solution. There is no doubt in our minds that the stark differences of which we speak have, throughout these negotiations, been looming in the background and constantly occupying the minds and time of the participants, knowing that the second prong of the terms of our appointment would eventually require our attention to this issue.

It will be obvious why we identified this issue, with the widely divergent viewpoints held by the parties, as the additional one that we see as having had a negative effect on a meaningful dialogue. Like the other three contributing factors, we will return later in our Report to say more on this subject but we believe it important that the content of the two submissions be known to the you and accordingly we have attached to our Report Mr. Munroe’s letter to his client of June 15th and Mr. Laughton’s letter to us June 24th.
Late on June 23rd the parties returned to the bargaining table but there was no significant engagement. With many of the major issues lacking any serious dialogue it was clear to everyone that success was unachievable. Nevertheless we thought it necessary that there be some discussion on wages and benefits because up to that time there had been little or no consideration of those issues.

The January proposal of the ILWU for a wage increase of 5% per year remained on the table along with requests for considerable improvements in benefits and related matters. Prior to concluding the joint sessions the BCMEA made a presentation with respect to its view of the economic environment presently existing, together with its assessment of the current level of business activity at the West Coast ports. The presentation concluded with the BCMEA indicating that it could see no rational reason for any increase in wages and proposed that, for the term of the new Collective Bargaining Agreement, there be no provision for an increase in either wages or benefits.

In light of the extent of outstanding issues left unsettled, the parties never did discuss duration. The negotiations concluded early in the afternoon of June 25th.

IV. Next Steps to Achieve a Collective Bargaining Agreement

The remaining responsibility under the terms of our appointment is the preparation of this Report for you. With the background of what has occurred over the preceding 6 months recorded on previous pages we now turn our attention to outlining what, in our considered opinion, the next steps ought to be in order to achieve a
Collective Bargaining Agreement between the parties. What follows represents our best judgment in that regard, expressed through a limited number but highly significant recommendations.

It would be a disservice for us to move to a consideration of what ought to be the content and duration of a new Collective Bargaining Agreement without first giving further attention to the four factors that we found to be impediments to a meaningful dialogue between the parties. We believe them to have been very significant obstacles that contributed in a major way to the inability of the parties to reach agreement. Whether they are matters systemic in nature or particular to the content of a Collective Bargaining Agreement between the parties, a method of resolution of them must be found or they will linger and reappear to the substantial detriment of everyone involved. As mediators we do not possess a mandate to either impose solutions or dictate remedial terms and conditions binding on the parties. We will now outline the next steps:

A. The Appointment of an Industrial Inquiry Commission and the Reference of Five Issues to It.

The first of our recommendations is that you establish an Industrial Inquiry Commission under Section 108 of the Canada Labour Code to address the four issues we have identified as being very significant obstacles contributing in a major way to the failure of the parties to reach an agreement. In addition we will identify a fifth issue we believe warrants consideration by such a Commission and you may wish to add to the list. We are mindful that Industrial Inquiry Commissions have been
appointed on previous occasions inquiring into labour relations problems directly pertaining to the West Coast ports. We will make reference to the results of some of those Inquiries. While some of the issues we suggest for referral may well have been the subject of previous reviews and recommendations, the fact remains these reoccurring problems have still not been solved. We are adamant in the view that this time that must change and that there be an acceptance of responsibility by those involved to achieve such a result.

We now turn our attention to address five issues we see for reference to the Industrial Inquiry Commission:

1. The **Existing Unsatisfactory Relationship Between the Parties and a Search for Substantial Improvement in that Relationship.**

As noted above a measure of mistrust existing between the two teams at the table was obvious to us. It does not have to be this way and should not be this way. We accept that the participants are opponents and that tough lengthy bargaining is to be expected. However some measure of respect is also to be expected. Rather what we saw from time to time, sometimes through what was said, sometimes by inference and sometimes by actions, was a complete absence of respect which in turn communicated to us the mutual lack of trust to which we have referred.

The time has come to thoroughly talk this through, getting the strained relationship out in the open, in the presence of
the neutrality of the Commission, and exploring avenues for improvements. This may seem an unlikely role for an Industrial Inquiry Commission but given the input we anticipate the parties will make to the Commission on other matters referred to it, we see the search for improvements in the relationship as being quite complimentary to the other tasks with which the Commission will grapple.

2. The Appropriateness of the BCMEA, Comprising of 62 Members, as the Exclusive Bargaining Representative on behalf of the 19 Direct Employers of the ILWU Members on the Docks. (The remaining of the 62 members are 40 belonging to the Shipowner Class and 3 Associates).

Uncertainty of whether the BCMEA is the appropriate bargaining representative was clearly raised in our minds by occurrences that came to our attention during the negotiating process and to which we have made mention above. Those concerns were magnified for us during the first week of July, following the close of the negotiating sessions. The BCMEA wrote to us on July 6 advising that two of their members, who are Direct Employers of the ILWU members and collectively represent close to $150 million in annual payroll or about 46% of the industry, wanted to each send their respective Presidents to meet with us alone. We were told that the request was being made by the two companies because they see this mediation process as the most important in the history of the industry and our Report is anticipated to have a long-
term effect on the commercial interests of all the BCMEA members. They wanted to communicate their concerns directly to us, to reiterate the BCMEA position from their individual corporate perspectives.

In response we outlined the basis on which we were prepared to receive the delegation but they subsequently decided to abandon their request.

That occurrence confirmed our uncertainty of the appropriateness of the BCMEA’s bargaining role in these negotiations. Others who have preceded us have had similar concerns. Hugh R. Jamieson and Bruce M. Greyell in their Industrial Inquiry Commission Report, Into Industrial Relations at West Coast Ports, delivered to the Government of Canada on November 30th, 1995 expressed their assessment of the problem at pages 147 – 148 in the following way:

In reality, the BCMEA is a mixture of employers and non-employers which is probably not what the scheme of the Code contemplates vis-à-vis an employers’ organization. It appears to the Commission that at the very least, the Code anticipates that each member of such an organization would employ one or more employees who are included in the bargaining unit affected by a collective agreement.

Admittedly, all of the present membership of the BCMEA probably do have a common interest in the operations of the West Coast ports. However, some of them obviously have competing interests in the outcome of collective bargaining. According to the submissions from some members of the BCMEA such a mix of competing interests creates internal stresses within the organization. This is clear from some of the submissions that complain that issues important to
various of the sectors tend to be subjugated to the expediency of multi-interest employer bargaining. Also, Bulk Terminal Operators expressed a desire to the Commission to depart from the traditional longshore hiring hall supply of labour and to employ their own permanent full-time work force. This is of course contrary to the interests of the Stevedore Companies who draw their labour from the ILWU hiring hall. It was pointed out to the Commission that these Bulk Operators are presently forced to absorb rising labour costs, as they can no longer pass them on to the Ship Owners or Ships’ Agents and remain competitive. The Stevedore Companies on the other hand, profit from higher labour costs. Clearly, all of these stresses are driven primarily by economic pressures and they will surely increase over time. Therefore, in the long run, the present structure of the BCMEA hardly seems to be a recipe for stable industrial relations.

It is our assessment that the identified “stresses” have increased over the last 15 years and likewise the validity of the forecast questioning the structure of the BCMEA as a recipe for stable industrial relations in the longshore industry on the West Coast. It is our view that the time has arrived to seek a resolution of this issue once and for all through the opportunity afforded by reference to an Industrial Inquiry Commission.

3. Significant Proposals for Change to the Recently Expired Collective Bargaining Agreement

Aside from the difficulty that the relationship between the parties to which we have referred posed for progress on these issues at the bargaining table, we concluded as the sessions progressed, that there were a group of proposed changes that encompassed issues of such significance that
an in-depth consideration of them away from the confines of the bargaining table would lead to a far better understanding and possible resolution of them. It is our view that consideration of them by an Industrial Inquiry Commission will provide the opportunity for reasoned solutions that we believe will be beneficial to the industry as a whole, employers and employees alike. It will be equally beneficial to the public interest which has a major stake in the continuance and enhancement of the viability of West Coast ports and their key role in the ever expanding Asia Pacific Gateway.

The majority of the changes that we recommend for referral to the Commission were put forward by the BCMEA. While fewer in number, the ILWU tabled some proposals that also warrant consideration. We will first address the former and then the later.

The BCMEA told us that various changes to the Collective Agreement which they proposed were aimed at achieving three goals:

1) Improving productivity and customer service
2) Increasing flexibility
3) Containing costs

All the BCMEA proposals that we suggest for referral to an Industrial Inquiry Commission fall into one of the above three categories, and therefore, these reasons will generally not be repeated. The ILWU argued consistently that the Collective Agreement already enables the
achievement of the BCMEA’s goals and cited existing contract language to that end.

Generally, it is safe to say that several of the BCMEA proposals, if implemented, would have the effect of increasing the number of Regular Work Force Employees employed at member companies compared to those who are dispatched on a daily basis.

- Proposals advanced by the BCMEA for consideration by the Commission:

(i) Distribution of Employment Opportunities Between Regular Work Force and Daily Despatch Hall. (It should be noted that Bulk, Break Bulk, and Container Operations have differing needs vis-à-vis the Despatch Hall and Regular Work Force). It is our view that this should be examined for the purpose of determining what arrangement best provides for the long term needs of the West Coast ports. The BCMEA has put forward several proposals that fall into this category:

(a) Despatch and Control of the Work Force – Article 9 (7) - The BCMEA proposes an amendment to allow employers to cancel Regular Work Force employees by phone and not be obliged to pay them for this shift.

(b) Regular Work Force – Article 21.03 (1) - The BCMEA proposes amending this provision to include non-rated employees (labourers) in the Regular Work Force. The current agreement allows only rated classifications or tradespersons and rated Longshoring trades i.e. Crane Operators and RTG Operators to be in the Regular Work force.

(c) Black Book #52- The BCMEA also proposes deletion of Black Book Document #52. This document deals with Regular Work Force annual rotation. It includes an attached 2 page Letter of Understanding which outlines how this rotation will take place.
Generally speaking it describes an annual posting process for these positions and limits the amount of employees that may be rotated to approximately 20 percent of a company’s Regular Work Force. This is essentially an industry-wide job posting and bumping system that spreads the work among the membership and allows a member who is unemployed and waiting in the Despatch Hall to get into a Regular Work Force position.

(d) Regular Work Force – Article 21.03 (2) - The BCMEA proposes amending this provision such that an employee would be provided an equivalent of 5 days per 7 day period averaged over 13 weeks. The current agreement requires that Regular Workforce Employees be given 5 consecutive days employment out of 7. The ILWU argues that this change would wreak havoc on their personal and family lives. They further argue that this would be a breach of the Canada Labour Code.

(e) Black Book #51 - The BCMEA proposes to delete Black Book #51 so as to conform with their proposal on Article 21.03(2). Black Book #51, in the main, adds that the 5 consecutive days begin on Sunday, Monday or Tuesday and deals with the effect holidays have on Article 21.03.

(f) Regular Work Force – Article 21.03 (8) (i) - The BCMEA proposes amending this provision to allow the Association to take more control over the actual administration, selection and hiring process of Regular Work Force Employees. This proposed amendment also conforms with their proposed deletion of Black Book 52. They said that the existing process in which applications are originally received at the ILWU offices does not allow them to know which candidates were being forwarded to the BCMEA and that they were not forwarded on a timely basis. Therefore, the BCMEA proposed that all applications be received by them. The BCMEA also proposed that the employer should be allowed to play a role in the selection of candidates for the Regular Work Force.

The ILWU argued that the current system worked well, that there was no delay and that the BCMEA had equal
participation in the hiring process given the role of the Port Labour Relations Committee in the process and the BCMEA's equal participation on that Committee. They also referred to Black Book #52 subsection 7 which provides a method to deal with an unsuitable candidate.

(g) Regular Work Force - Article 21.03 (9) - The BCMEA proposes amending this provision to allow not only skill rated but all employees to be trained to do, not only skill rated work, but any work on the site. Currently only skill rated employees can be trained to do skill rated work and, once trained, may only be used if such skilled employees are not available through Despatch or transferable through Despatch.

In response to this and other the BCMEA's proposals reviewed above, the ILWU argued that the current system of joint cooperation and mutual agreement as prescribed in Article 9 (Despatch and Control of the Work Force) and the Manning Rules outlined in Article 23 should determine the distribution of employment opportunities between Regular Work Force and Casual Despatch. They say the BCMEA's proposals for change are therefore quite unnecessary in order to achieve its goals. Further, the ILWU tabled a proposal to negotiate minimum manning documents on a terminal by terminal basis for container vessels.

(ii) Deepsea Ship Gangs

(a) Article 19.01 - The BCMEA proposes to delete from the Agreement all reference to "Registered" gang and replace with "Basic" gang. This amendment would allow them to reduce the size of a registered Deepsea Gang from a minimum of 6 persons to a minimum of 4 persons.

(b) Black Book #63 - The BCMEA proposed deletion of Black Book #63 which makes reference to the ramifications of ordering a Special gang instead of a Registered gang. This document would become redundant if they were successful in eliminating the Registered gang.
(c) Black Book #84 - This document is intended to facilitate the dispatch and callback of both Registered and Special gangs. Again, if successful in their proposed amendment to Article 19.01 the BCMEA would seek to eliminate Registered gangs and thus delete all reference to the term “Registered” in the Black Book Document.

(iii) Automation Protection Provisions – Article 14 - In this Article of the current Collective Agreement the ILWU agrees to waive their rights under Sections 52, 54 and 55, the technological change provisions of Part 1 of the Canada Labour Code. In exchange for this waiver the Association agrees to provide certain “protection”. The protections provided are intended to address the impact of technological change on the ILWU members. These protective measures include training and re-training, relocation to other work, early retirement and Supplementary Pension Arrangements as set forth in the Retirement Allowance Agreement. The existing Retirement Allowance Agreement provides for a payment in the amount of $68,750 per eligible member and is payable upon retirement. It is also referred to as the Mechanization and Modernization Retirement Allowance or “M&M” agreement.

The BCMEA claims that when technological change is required the ILWU is uncooperative with implementing it and by so doing is contravening the intent of the Agreement. In the BCMEA opinion this refusal to cooperate eliminates their obligation to continue to pay the $68,750 Supplementary Pension payment in future collective agreements. The BCMEA agreed to continue to honor the other protections provided for in the Article such as training, retraining and relocation. As a result the BCMEA made the following proposal:

In the event of a technological change, the Association, Employer or Union, may request a consultation to review the appropriateness of existing Manning levels. Any disagreement resulting from a proposed change in composition or size of the workforce, which cannot be resolved by the parties, will be decided by the Arbitrator. In determining such matters the Arbitrator will apply the rules
contained in Article 23, Section 23.01 – Manning Rules; maintenance of safety, avoidance of undue individual work burden, prohibition of individual speed-up, all the employees’ necessary and no unnecessary employees. This process is intended to cover any technological change proposed on any operation covered by the Agreement including those for which a formal manning agreement exists between the Parties.

NB – Delete the Retirement Allowance Agreement (Modernization and Mechanization Document) and the associated payments.

The ILWU argues that it is not true that they do not cooperate with technological change. They say they do cooperate and that the Collective Agreement already provides for ways to deal with these issues. The ILWU also defines the Supplementary Pension payment as a retirement benefit to assist members in early retirement once they have completed 25 years of service. As will be seen later, the ILWU have also proposed changes to this Article.

Below is a brief chronology of the changes that have been agreed upon in previous rounds of bargaining.

Retirement Allowance:
The 1960 Collective Agreement between the B.C. Shipping Federation and the ILWU included a Guaranteed Work Programme which provided for a 1,820 hour annual guarantee. The Parties also agreed to a “Joint Mechanization Committee” to negotiate the details of a mechanization plan incorporating greater flexibility for the employer in the use of the workforce and work guarantees for the employees. The Employers and the ILWU agreed that union members would not be laid off due to technological change. The Guarantee Work Programmes of which there were a few iterations in collective agreements between these parties over the decades were designed to guarantee compensation of 1,820 hours a year to all union members. In exchange for this the Employers benefited from the Unions cooperation with the implementation of technological change and the resulting increased productivity.
The 1963 Collective Agreement between B.C. Wharf Owners Association and B.C. Shipping Federation and the ILWU provided for an Automation Protection Plan which included a $7,200 Supplementary Pension payment upon retirement. The Basic Gang size was also reduced from 13 to 8.

In 1966 the BCMEA signed on to the Automation Protection Plan of 1963 for the first time.

In 1970 the ILWU and the BCMEA agree to another Guaranteed Work Opportunity plan of 910 hours guaranteed per 26 weeks.

The Parties also agreed to a “Memorandum of Understanding Referred to in Article 14 – Automation Protection Plan – January 31, 1970” and increase the amount payable at retirement from $7,200 to $13,000.

In 1974 Parliament enacted the West Coast Ports Operations Act. The subsequent Arbitration Award respecting a Collective Bargaining Agreement 1975-76 included the current Article 14 language regarding the CLC tech change waiver.

It also included an Appendix C, entitled “Guaranteed Work Opportunity” which guaranteed 910 hours per 26 weeks.

The 1979 - 81 Collective Agreement includes a MOA that amends Article 14 and increases the Supplementary Pension Agreement from $13,000 to $16,000. Subsequent negotiated increases between the ILWU and the BCMEA are as follows:

- 1982 To $17,000
- 1986 To $15,450
- (depending on length of service) 2003 To $56,000
- 1993 To $20,000
- (effective 1995) 2007 To $66,000
- 1998 To $27,000
- 1999 To $47,500
- 2003 To $56,000
- 2007 To $66,000
- 2010 To $68,750

(iv) Discipline - Article 4 - Both the BCMEA and the ILWU requested change to this Article. What was proposed underwent considerable alterations during negotiations.
The BCMEA sought changes in the provision relating to Automatic Penalties to be imposed on employees and a deletion in the Definition section. Among other proposals, the BCMEA sought changes on the right of an employee, who had been dismissed outright by one employer, to work for other employers during disposition of a dispute about the dismissal or the grievance of a penalty imposed.

The Unions called for the removal from an employee’s personnel file any record of discipline that dates back two years or more.

Eventually, a verbal agreement was reached between the parities as to what the changes would be to the Discipline Article in the Agreement. When the document recording the changes was available and presented for “Sign-off” the agreement verbally arrived at a few days earlier was no longer there.

(v) Arbitration - Article 6 - The current Collective Bargaining Agreement provides for the appointment of both a Job Arbitrator and an Industry Arbitrator to settle disputes that arise on the job as well as differences in interpretation of the Agreement and other related matters. The jurisdiction of both the Arbitrators, as well as their powers and procedure, are set out in the applicable Article.

The Job Arbitrator is empowered to make a summary disposition of a matter that has been referred to him/her by either side, often delivered orally at the job site where the dispute has arisen. An appeal provision is provided which allows for subsequent consideration of the matter to the Industry Arbitrator.

The BCMEA requests changes in the Arbitration Article of the Agreement that would significantly restrict the role of the Job Arbitrator. The ILWU does not see the need for the proposal but rather sees the present role of the Job Arbitrator as being critical to the efficient operations of the Ports.
The BCMEA also proposes that there be 4 Industry Arbitrators. The BCMEA suggests each party to the Agreement select two of the four and that their services be available on a rotational basis.

(vi) Union Meeting Night – Article 15 - The current and previous Collective Bargaining Agreements provide for work ceasing at the ports at the end of the applicable day shift on the day of the regular monthly Union Meeting. Employees working in their home port (Vancouver, New Westminster, Port Alberni, Victoria, Prince Rupert and Port Simpson) continue to work if required for one additional hour to finish a ship to sail, except at Chemainus. There is no night shift on regular monthly Union Meeting nights nor are Meetings held during a week within which a holiday occurs. Employees carry out necessary duties such as those performed by watchpersons, maintenance employees, lines employees or employees servicing regularly scheduled coastwise vessels.

The BCMEA wants to terminate the mandatory monthly shutdown of work on that shift at the ports and substitute an alternative accommodation for monthly union meetings.

The ILWU oppose any interruption in the pattern of Union Night meetings that has been in place for many years.

• Proposals advanced by the ILWU that we recommend for consideration are these:

(i) Scope & Recognition/Jurisdiction - The following maintain and expand their jurisdiction under the Collective Agreement. It is their position that the work generated under these proposals creates well paid jobs that should go to longshoreworkers. The BCMEA proposals were made by the ILWU and are intended to opposes this expansion of the scope of the agreement. These proposals made by the ILWU are:

(a) - New Article – That all Foremen positions be filled from the ILWU Canada Longshore Locals. The
BCMEA is not in agreement because it wants to retain the ability to hire outside Longshore Locals.

(b) Scope & Recognition – Article 1 - The ILWU proposes to amend this article to remove language that currently prevents "office or clerical personnel" from being covered by the Agreement. The BCMEA is not in agreement.

(c) Dock Work "Checking" – Article 26.01 6 - Checking of goods is a function performed by the ILWU members. There is a concern that some of this work is done off-dock and unbeknown to the ILWU. The ILWU asks for an acknowledgement that all Checking of Goods is work to be done by its members whether on or off dock. It also asks that the BCMEA’s responsibility to train checkers, when changes occur in the method in which checking is carried out, include training for work performed both on and off the dock.

(d) Dock Work – Article 26.01 9 - Regular Maintenance Work as defined is to be performed by Union members. The ILWU proposes that the definition be enlarged to included "...all maintenance to computer, audio and/or visual equipment" and they seek to have the Agreement require that employers provide training to their members to perform that work. Warranty work is not included as Regular Maintenance Work. The ILWU wants to limit the period of work under warranty to one year. The ILWU also proposes that the Agreement provide that only its members be hired to clean and maintain the lunchrooms and washrooms on all docks.

(ii) Two Proposals for Change to Article 14 (Automation Protection Provisions)
Firstly, that all members who retire between December 1st, 2007 to February 28th, 2009 receive the retroactive M&M increase. Secondly, that the minimum number of years to qualify for M&M be lowered to ten from fifteen years.
(iii) Hours of Work – Article 21.03 (1) - The ILWU proposed to amend this article to ensure that the Employer would not be able to change the size and composition of their Regular Work Force without the Agreement of the ILWU. They say that this would ensure an equitable distribution between Regular Work force employees and Daily Despatch Hall employees. The BCMEA says that this places a restriction on the Employers ability to manage their operations.

4. What The Resolution Should Be When Collective Bargaining Has Reached an Impasse

This is the fourth issue we suggest for referral to the Industrial Inquiry Commission. Earlier we referred to it as one “that has had public attention on previous occasions but has always been left substantially unresolved and without a definitive solution.” It is not realistic that in reporting out to you in a thirty-five day period (June 25 – July 30) on the results of 6 months of collective bargaining (4 months in our presence), that we could confidently advise you on the best solution to this problem. Hence, the suggested referral.

What we believe to be the underlying impetus for action on this problem was well expressed by the Task Force chaired by Andrew C.L. Sims Q.C. appointed by the Minister of Labour under Section 106 of the Canada Labour Code in 1995 to review Part 1 of the Code. In its Report, entitled “Seeking a Balance” the following
appears at pages 155 – 156 under the heading “Public
Interest Disputes”:

Some disputes, because of their nature and duration, can have such a tremendous impact, that a special public interest develops in their resolution. Disputes in the transportation and grain industries are frequently cited as having this potential. Recent experience has shown that governments have been prepared to intervene rapidly in some of these disputes, in order to lessen or eliminate the impact on third parties or the public at large.

Unfortunately, however, the decision to intervene in collective bargaining appears to increase the chance that intervention will be needed again. Why is this the case? First, the issues that make finding a settlement difficult and which prompted the industrial work stoppage often remain unresolved and fester when a strike or lockout is terminated by an external force. This is frequently the case when the issues on the bargaining table involve reorganization or restructuring initiatives, or where major wage inequities have developed within an industry.

Further, Parliament’s willingness to intervene quickly in certain types of disputes has fostered an expectation or culture that assumes that no strike or lockout will be allowed to go on for any significant period of time. Unions members lose their fear about being on picket lines for extended periods, and employers lose their fear of long term loss of revenue or market share. Strikes or lockouts then lose their influence or incentive to induce a settlement.

Both labour and management candidly acknowledge that because of this situation, they withhold compromise until after government intervention. Their true strategy becomes to position themselves for the inevitable interest arbitration process that will be imposed. In other words, in sectors where Parliamentary intervention is expected, little real collective bargaining occurs. This process is not conducive to settlement.
The opinions of Messers Laughton and Munroe will undoubtedly be very helpful to the Commission as it looks carefully into this problem. A reading of the other parts of the Sims Task Force Report and of the Jamieson and Greyell Report will reveal that there are also other points of view to be taken into account.

The Sims Task Force made a recommendation to the Federal Government when it reported on January 31, 1996 which we believe to be worthy of consideration. It advocated that there be available to the Minister of Labour, the opportunity to appoint a Public Interest Panel on an ad hoc basis for any dispute involving significant public interest or impact. The Task Force Report explained the purpose of this proposal on page 158 as follows:

The appointment of Public Interest Panels for some disputes will give the Minister the benefit of considered advice and satisfy the legitimate and important objective of being seen to balance the public interest with the Code's stated purpose of fostering collective bargaining. This should also reduce the appearance of unjustified interference in free collective bargaining.

No steps towards implementation were ever taken by those to whom the authors of these publications reported and that is a significant reason why the problem is still with us today.

The reality is that parties resist compromise bargaining because they expect government intervention and/or
legislation if there is a strike or lock-out. This causes them to stand pat on their respective positions until that happens. This way neither party gains but neither loses. The result of this stand-off is that little if anything changes. While we are firm in the view that change has to occur we do not underestimate the difficulty in arriving at a solution but that is not a reason for it being left unresolved. The opportunity of a full review and report to you by the Industrial Inquiry Commission is, we believe, the best way to get there.

5. Participation of Women in the Longshore Industry

This is the additional matter we recommend for referral to the Industrial Inquiry Commission. It involves the recruitment and retention of women in the longshore industry and breaking down the barriers that exist there today given the long, well-entrenched and overwhelming male majority working in the industry.

This issue arose from time to time during the negotiation sessions. In its proposals the ILWU set forth a detailed Anti-Harassment statement for inclusion in the Black Book. Its inclusion would appear to enable a grievance to be filed if an alleged breach of the statement were to occur. It also tabled what it described as a Family Agenda as one of its bargaining proposals which addresses, among other matters, maternity and paternity leave and provision for child care.
What really attracted our attention however was when we were asked to adjourn negotiations for a day so representatives of the ILWU and the BCMEA could attend in Ottawa, in response to invitations they had received to a meeting of a Parliamentary Standing Committee on the Status of Women. The agenda was a discussion on “Ways to increase the participation of women in non-traditional occupations”.

We obtained a transcript of the April 12th meeting. The President of International Longshore and Warehouse Union of Canada, the same person who led the ILWU’s delegation at the 2010 collective bargaining negotiations, was the chief spokesperson for the ILWU.

He acknowledged that there are serious barriers to overcome in order to create the right conditions to increase the participation of women in “our workplaces”. He went on to say:

“There’s been a public outcry, and justifiably so, about barriers that prevent women from working on the waterfront.”

He drew attention to proposals from the ILWU to overcome the barriers that he said were keeping women from working in the industry and remaining there once they joined the workforce. In doing so he referenced the matters mentioned above, that ILWU brought to the current round of negotiations.
During the discussion of April 12th mention was made of a report prepared by Vincent R. Ready dated January 21, 2009 prepared for the ILWU Local 500 (Vancouver) that gave consideration to matters and practices of the ILWU membership employed on the Vancouver waterfront. It addressed and made several recommendations relating to the employment of women in the industry and the problems associated with it.

A member of the BCMEA’s delegation before the Standing Committee was its Vice President, Human Resources. She said to the Parliamentary Committee

"Two years ago, under Andy Smith’s regime, I was brought in as a labour practitioner and was appalled with what I saw on the waterfront. I can honestly say with labour practices that are in existence and the way women were treated, I felt I was transported back in time to the 1960s. I knew it did not have to be this way."

It is our assessment that answers must be found to the unacceptable current state of affairs that both the representative of the ILWU and those from the BCMEA emphasized in their presentations.

Another member of the BCMEA’s delegation was the Association’s Vice President, Marketing & Information Systems. He made reference to a yet unresolved compliant that the BCMEA brought against the ILWU in February 2010 to the Canadian Human Rights Commission. The existence of this complaint was referred to a number of times at the negotiation
sessions. It remains unresolved and the ILWU has filed documentation in opposition to it and has moved for its dismissal. The complaint alleges systemic discrimination by the ILWU in their hiring policies and practices governing access to work and access to training on the ground of sex against:
(a) the class of potential female longshore workers;
and;
(b) the class of current female longshore workers.

BCMEA’s Vice-President, Marketing and Information Systems said, in addressing the Parliamentary Committee:

"We need to put this issue before a body with the authority and the knowledge to give us a solution because clearly, as you are pointing out, the parties seem unable to do that on their own. It is a well entrenched issue and it needs to change."

We are in total agreement with the BCMEA’s Vice-President that this issue needs to be put before a body with the knowledge to provide a solution. It is our view that what is required is a much more broadly based look at all aspects of the problem than is possible by the single reference to the Canadian Human Rights Commission. We therefore believe that reference by you of this issue to the Industrial Inquiry Commission would be most timely and of valuable assistance in seeking a solution to a state of affairs that everyone acknowledges must undergo substantial change. The reference would include a consideration of the two proposals made by the ILWU during the bargaining sessions to which we have referred.
Minister, if you accept our advice to appoint an Industrial Inquiry Commission and refer the above 5 matters and any others you may add for investigation and report, it is reasonable to assume that you will receive recommendations that have been well thought out and which contain practical and sensible solutions. They will presumably have been formulated after wide public consultation, including participation by the parties to this collective bargaining process. There is widespread public interest in bringing resolution to these matters. Leaving them to drift is no longer a viable option when the importance of the shipping and transportation industries, to a vibrant Canadian economy, are taken into account.

You will note that in our Report to you of this date in the BCMEA/Foremen (Local 514) matter we have also recommended reference to an Industrial Inquiry Commission. It is our view that both references should be made at the same time to one and the same Industrial Inquiry Commission.

Our most earnest plea to you is that you not let the Commission’s Report languish unresolved and gathering dust on a shelf. Rather it will rest with you to give committed leadership to bring ultimate resolution to the issues referred to the Commission. If you are in accord with the solutions you receive and you or your government possess the authority to act on them and you then proceed to do so, the public interest as well as the private interests of the BCMEA, the ILWU and the members of each of them will be the beneficiaries of the action taken. If there are any of those recommendations on which you or your government are not prepared to act then we encourage you to be explicit in saying why that is so and advise publicly of alternatives you propose to follow.
If there are recommendations that require action by parties other than your government, we would expect reference out by you, with encouragement for implementation where you are in accord.

We have given thought to a reasonable time frame for the work of the Commission to be completed and for action to be taken on the solutions it recommends. We consider twenty-six months to be reasonable. We break this down as follows: two months (August and September 2010) for you to consider our Report and to put an Industrial Inquiry Commission in place; three months (October, November and December 2010) for the Commission to carry out organizational requirements; fifteen months (all of 2011 and January, February and March 2012) for public hearings and consultations and then the preparation of the Report for submission to you by March 31, 2012; six months (April 01 – September 30, 2012) for action to be taken on solutions proposed by the Commission.


We now move to the second recommendation that we will make to you. With significant issues for change presently unresolved and recommended for study and report by an Industrial Inquiry Commission, the question arises as to the status of collective bargaining and the need for a Collective Bargaining Agreement to be in place while the referral process, and the action that results from it, run their course.
Other than wages, we recommend that all provisions of the Collective Bargaining Agreement that expired on March 31, 2010 be extended from the following day (April 1, 2010) until September 30, 2012. That will include all issues presented for change by both parties in their January proposals other than the wages exclusion and the few items that were signed-off and agreed upon during negotiations. Wages in the extended Agreement will accord with the recommendations we hereafter make in that regard. The services of Mediator John Rooney would be available to coordinate the preparation and signing of the extension Agreement.

We see this is the only practical solution. The parties found agreement on only minor matters. The vitality of the industry requires some resolution of the issues we suggest you send for study to an Industrial Inquiry Commission. It would be most regrettable if either party were to do other than await the results of that study. A resolution of those issues will, we believe, substantially move the longshoring industry towards a state of good health, to the benefit of all involved – the members of the BCMEA and their customers, the members of the ILWU who earn their living in the longshore industry and without question to the public interest that has a great stake in the achievement of a positive outcome.

Compared to the results we believe will come from the adoption and fulfillment of our first recommendation, we see inconveniences that will arise from the adoption of our second recommendation to be minor in nature. Most of the provisions in the Collective Agreement have been there for years and to wait
for the next 26 months to pass should not be a major inconvenience to anyone.

C. Wages from April 1, 2010 until September 30, 2012

1. Introduction

The foregoing said, wages must be addressed and what follows is our recommendation pertaining to these matters. Business will continue during this interim period and it is reasonable to assume that it will be a profitable time although we are mindful of the cautions outlined by the BCMEA on the last day of the negotiations with respect to the earning expectations of those who employ ILWU members. With that in mind and quite aware that we are not arbitrators, we nevertheless approached this task as those with such a responsibility might have done. That is to say, through application of the principle of replication, well expressed in the decision of Arbitrator James Dorsey in his 1982 decision in RE: Board of School Trustees, School District 1 (Fernie, BC) and Fernie District Teachers Association (1982 L.A.C. (3d) 157 where at page 159 he said:

"...the task of an interest arbitrator is to simulate or attempt to replicate what might have been agreed to by the parties in a free collective bargaining environment where there may be the threat and the resort to a work stoppage in an effort to obtain demands... and arbitrator's notions of social justice or fairness are not to be substituted for market and economic realities."

We gave consideration to factors that could have affected the outcome had the parties successfully arrived at an agreement through free collective bargaining. Consideration of relevant comparators was also of assistance in arriving at such an
outcome as we reached our recommendations of a suitable replication in accordance with the reasoning of Mr. Dorsey.

In following the foregoing process we made an assessment of prevailing economic factors available to us through statistical information compiled and released by reliable sources both within and without the Government of Canada. We will outline those factors and the sources drawn on for their compilation before moving to a consideration of comparatives that we thought relevant to our task.

2. Economic Factors and their Sources
   i) From Workplace Information Directorate, Labour Program, HRSDC – April 2010

Major collective bargaining settlements reached in April 2010 provided base rate wage increases averaging 1.8% annually over the term of the contracts. These results are based on a review of 31 settlements covering 90,540 employees.

When the parties to these settlements previously negotiated, the resulting wage adjustments averaged 4.2%, a higher average than in their current settlements. Contract duration in April 2010 averaged 22.0 months, compared to 30.7 months in the previous round of settlements.

Wage increases in the first 4 months of 2010 (January through April) averaged 2.0% for 255,780 employees in 96 major settlements.

The vast majority of agreements and the largest concentration of employees were in the public sector. Public sector wage adjustments averaged 1.8% for 80,730 employees in 25 settlements. Private sector wage adjustments averaged 2.2% for 9,810 employees in 6 agreements.
There were 18 public-sector agreements in Alberta alone providing 34,370 employees with wage adjustments averaging 3.1%: 16 agreements in the education sector provided 26,080 employees with wage adjustments averaging 2.9%; 1 University of Alberta agreement with 6,700 employees averaged 3.1%; and 1 City of Edmonton agreement provided 1,590 police officers with a wage increase of 5.9%. These wage figures in Alberta were largely offset by an agreement between the Government of British Columbia and 29,000 public servants subject to a wage freeze. The Government of Saskatchewan also settled with 10,000 public-sector employees for wage gains averaging 1.8%.

In the private sector, 4 construction agreements, all in Ontario, provided 8,270 employees with wage gains averaging 2.4% (including 6,000 sheet metal workers across the province with a wage adjustment of 2.4%).

On a jurisdictional basis, the largest average annual wage increase was in Quebec at 3.8% (a single agreement at the Université de Montréal). The smallest adjustment was recorded in British Columbia (2 agreements with a wage freeze, Government of British Columbia mentioned above and BC Hydro).

On an industry basis, the lowest average annual wage increase was recorded in utilities at 0.0% (a single agreement with a wage freeze at BC Hydro); the highest adjustment was in the education sector at 3.0% (18 agreements covering 35,530 employees).

- A series of tables then displayed in the April 2010 report disclose the following:
  - The average annual wage percentage adjustment from February to April 2010 is approximately 2.3%;
  - The average annual percentage wage adjustments by Quarter is 2.2% over the last 4 Quarters.
  - In British Columbia increases averaged 2.1%.
  - The Average Annual Percentage Wage Adjustments by year (from 2002 – April 2010) are:
    - all industries averaged 2.7%
    - average in British Columbia 2.1%
    - average in transportation industry 2.6%
    - average of the above three, 2.5%
• The Average Annual Percentage Wage Adjustments Combined from 1990 to 2010 averaged 2.68% over the last 5 years and 2.6% over the last 10 years.

ii) From Statistics Canada to May 2010
• Consumer prices rose 1.4% in the 12 months to May.
• Employment rose by 93,000 in June, pushing the unemployment rate down 0.2 percentage points to 7.9%. This is the first time the rate has been below the 8% mark since January 2009.
• Employment has been on an upward trend since July 2009, increasing by 403,000 (+2.4%). These gains offset nearly all the employment losses observed during the labour market downturn which began in the fall of 2008.

iii) From the Bank of Canada – July 20th, 2010
This was the date the Bank announced that it was raising its target for the overnight rate by 1/4 of one percentage point to 3/4%.

The Bank of Canada report went on to say:

The global economic recovery is proceeding but is not yet self-sustaining. Greater emphasis on balance sheet repair by households, banks, and governments in a number of advanced economies is expected to temper the pace of global growth relative to the Bank's outlook in its April Monetary Policy Report (MPR). While the policy response to the European sovereign debt crisis has reduced the risk of an adverse outcome and increased the prospect of sustainable long term growth, it is expected to slow the global recovery over the projection horizon. In the United States, private demand is picking up but remains uneven."

Economic activity in Canada is unfolding largely as expected, led by government and consumer spending. Housing activity is declining markedly from high levels, consistent with the Bank's view that policy stimulus resulted in household
expenditures being brought forward into late 2009 and early 2010. While employment growth has resumed, business investment appears to be held back by global uncertainties and has yet to recover from its sharp contraction during the recession.

The Bank expects the economic recovery in Canada to be more gradual than it had projected in its April MPR, with growth of 3.5 per cent in 2010, 2.9 per cent in 2011, and 2.2 per cent in 2012. This revision reflects a slightly weaker profile for global economic growth and more modest consumption growth in Canada. The Bank anticipates that business investment and net exports will make a relatively larger contribution to growth.

Inflation in Canada has been broadly in line with the Bank's April projection. While the Bank now expects the economy to return to full capacity at the end of 2011, two quarters later than had been anticipated in April, the underlying dynamics for inflation are little changed. Both total CPI and core inflation are expected to remain near 2 per cent throughout the projection period. The Bank will look through the transitory effects on inflation of changes to provincial indirect taxes.

Reflecting all of these factors, the Bank has decided to raise the target for the overnight rate to 3/4 per cent. This decision leaves considerable monetary stimulus in place, consistent with achieving the 2 per cent inflation target in light of the significant excess supply in Canada, the strength of domestic spending, and the uneven global recovery.

iv) From the Conference Board of Canada – Summary 2010

Forecasters surveyed by the Conference Board in April are significantly more optimistic about Canada's
economic prospects in 2010. In this latest survey, forecasters expect the economy to expand by 3.2 per cent in 2010. That compares with growth of 2.6 per cent anticipated in the winter survey. Respondents expect the Canadian economy to expand by 3.1 per cent in 2011. The Summary included the following passages:

Momentum in Canada’s economic recovery continued into the first quarter—propped up by strong consumer and government spending, and by businesses restocking inventories. Fiscal stimulus—especially infrastructure spending—will continue to contribute to economic growth this year. But next year and beyond, federal and provincial governments will pull back hard on the reins of spending.

The U.S. economy is also forging ahead, but stronger job growth and a recovery in consumer confidence will be key to sustaining growth into 2011.

The European debt crisis and mixed signs among recent economic indicators have added to market jitters and volatility. The Bank of Canada will keep to its path of monetary tightening.

Consumer confidence dropped 5.7 points this month. The drop cancels out all the gains realized in May, and leaves the index 13 points below where it began the year.

Following a turbulent year, signs of life in the economy are leading to cautious optimism among pay planners. Planned increases for 2010 are expected to come in slightly higher than actual increases in 2009.

According to survey respondents, the average non-union pay increase is projected to be 2.7 per cent in 2010, up from 2.4 per cent in 2009. The public sector can expect higher salary increases—3.2 per cent overall, compared with 2.5 per cent in the private sector. Wage settlements for unionized employees are
expected to average 2.1 per cent in 2010—2.3 per cent in the public sector and 2 per cent in the private sector.

Recruitment and retention pressures have eased. Just over half of survey respondents (54 per cent) report challenges with recruiting and/or retaining employees, down from nearly three-quarters (74 per cent) of organizations in 2008.

In 2009, actual salary increases fell short of projected increases. Due to lingering economic uncertainty, there is risk of downward revisions to 2010 salary increase projections.

One year after the collapse in global equity and financial markets, compensation planners are showing signs of cautious optimism for 2010. Employers reined in salary increases significantly in 2009. Increases averaged 2.4 per cent for non-unionized employees, down from an average of 4.2 per cent in 2008. Looking ahead, employers are planning slightly higher salary increases for 2010.

The majority of Canadian workers can expect modest real wage gains in 2010. The average non-union pay increase for 2010 is expected to be 2.7 per cent nationally, according to information provided by 435 respondents to this year’s Compensation Planning Outlook survey. This increase is 0.5 percentage points higher than the 2.2 per cent inflation rate forecast for 2010. Salary increases are expected to vary by industry, sector, and region.

Moreover, consumer price inflation in British Columbia and Ontario will be significantly greater in 2010 than for other provinces.

According to the Conference Board of Canada, Canada’s labour market continued to improve in June, posting 93,000 new jobs.
3. Comparators to be Taken Into Account

i) Recent Longshore Settlements

a) Rio Tinto Alcan, Port-Alfred, Quebec
National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW Canada) (CLC) 160 longshoremen and tradesmen

A 24-month agreement from January 1, 2010 to December 31, 2011, negotiated following a review of wages and concluded in December 2009 at the bargaining stage. Duration of negotiations - 2 months.

Wages:
General Adj 2.3% Wage reopener*

b) St. John’s Shipping Association Limited, St. John’s, Newfoundland and Labrador
International Longshoremen’s Association, Local 1953 (AFL-CIO/CLC) 120 longshoremen Note: Summary reflects the information received at time of ratification.
A 72-month renewal agreement effective from January 1, 2007 to December 31, 2012, settled in July 2008 at the conciliation stage.
Duration of negotiations - 19 months.

Wages:
Effective: Jan/1/07 Jan/1/08 Jan/1/09
General Adj. 3.0% 2.7% 2.82%
Effective: Jan/1/10 Jan/1/11 Jan/1/12
General Adj. 2.56% 2.5% 2.61%

c) Maritimes Employer’s Association, Montreal, Quebec
Canadian Union of Public Employees, Local 375 (CLC) (830 longshoremen)
A 60-month renewal agreement effective from January 1, 2004 to December 31, 2008, settled in June 2005 at the bargaining stage. Duration of negotiations - 21 months.
Wages:
Effective: Jan/1/04 Jan/1/05 Jan/1/06
General Adj 3.0% 2.5% 2.5%
d) **Montreal Longshore – July 2010**
Currently in bargaining. Had settlement been reached the results would have been of interest to us but likely with limitations as significant issues unrelated to wages, that would not have application to the longshore in British Columbia, are included in the negotiations along with wage adjustments.

ii) **March 18th 2010 Arbitration Award by Andrew C.L. Simms Q.C. re: Canadian National Railway Company and Teamsters Canada Rail Conference**

The wage settlement made by arbitrator Simms provided the following:

a) A three year renewal agreement retroactive to January 1, 2009 and expiring on December 31, 2011.

b) Effective January 1, 2009 a wage increase of 1.8% on all basic hourly, daily, weekly, bi-weekly, monthly, mileage and flat rates of pay in effect on December 31, 2008.

c) Effective January 1, 2010 a wage increase of 2.4% on all basic hourly, daily, weekly, bi-weekly, monthly, mileage and flat rates of pay in effect on December 31, 2009.

d) Effective January 1, 2011 a wage increase of 2.6% on all basic hourly, daily, weekly, bi-weekly, monthly, mileage and flat rates of pay in effect on December 31, 2010.

e) The increases in (b) and (d) above shall be fully pensionable and retroactive for employees of CN Rail employed on or after December 31, 2008. Appropriate payments should be made to the employees as stated above for wages, overtime, leave entitlements, and premiums. Employees who retire subsequent to December 31, 2008, will be paid their back time but such payments will not trigger a recalculation of their pension benefit.

iii) **Likely outcome based on past rounds of bargaining**

Past bargaining outcomes between the parties has, in some cases, been the result of third party intervention and at other times based upon free collective
bargaining. There is however a definite belief held by both of these parties that the threat of government intervention is highly probable. It is appropriate and necessary to take this history and these conditions into consideration in attempting to determine what a settlement might have been achieved under past circumstances.

4. Our Wage Recommendation – April 1, 2010 to September 30, 2012

We have already commented on the initial wage increase proposals made by the ILWU and the responses made by the BCMEA on the last day of negotiations.

The BCMEA took the position that the Western world economy including Canada and its longshoring industry had been through the worst recession since the great depression. They also said they felt that we still might not yet be actually in recovery and cited the situation in Greece, Spain, Portugal and Italy.

ILWU countered that if the economy was down then fewer Longshore workers would be hired thus resulting in the necessary savings for the employers commensurate with the slowdown in activity. They also added that currently many experts are quoted as saying that the economy is in recovery. They also said that as of June 2010 the volume of work on the docks was creating a very busy work environment for everyone involved.
When Arbitrator Simms made the award just referred to he said

"In awarding graduated amounts I am influenced by the projections for CPI, the forecasts of modest growth and the fact that some comparable agreements award higher increases for the 2011 year."

We agree with Sims on the above point and we think his general analysis was quite applicable to the situation here. We also note that there are similarities in the economics between rail and shipping in that both transport the same products for the same customers for a fee between destinations. Both are affected by the economy in the same way.

It is also noteworthy that graphs supplied to us by BCMEA demonstrate that BCMEA and ILWU have a history of consistently agreeing to higher hourly wage increases compared to other highly paid industries including railway. These same documents indicate that the average annual increase to BCMEA/ILWU Collective Agreements over the last ten years is approximately 33 % over the past 10 years.

Insofar as cargo volume through Canada's West Coast Ports, there is no doubt that it decreased significantly in some sectors in 2009. Although the parties also told us that it has bounced back quite significantly since then. It is probably still not at the peak it reached in 2008. This upward trend does however bode well for the employers and the longshore workers and is likely a motivating factor for the ILWU making the proposal it did with respect to wage increases.
Some caution must however come into the equation given the forecasts of several experts that recovery is both fragile and slow.

All of the foregoing has been taken into consideration in the recommendation we make with respect to wage and pension adjustments. They are as follows:

i) A 30 month renewal agreement retroactive to April 1, 2010 and expiring on September 30, 2012.
ii) Effective April 1, 2010 a wage increase of 2.3% on all basic hourly rates of pay in effect on March 31, 2010.
iii) Effective April 1, 2011 a wage increase of 2.4% on all basic hourly rates of pay in effect on March 31, 2011.
iv) Effective April 1, 2012 a wage increase of 2.5% on all basic rates of pay in effect on March 31, 2012.
v) The increases in (ii) and (iii) and (iv) above shall be fully pensionable and retroactive for all employees employed under the terms and conditions of the collective agreement between BCMEA and the ILWU on or after April 1, 2010. Appropriate payments should be made to the employees as stated above for wages, overtime, leave entitlements, and premiums. Employees who retire subsequent to March 31, 2010 will be paid their back time but such payments will not trigger a recalculation of their pension benefit.

V. The Road Ahead

If you accept the advice that we have offered on preceding pages and make a public commitment to it, the road ahead should be
clear. At the time of the expiration of the extended Collective Bargaining Agreement on September 30, 2012 there should be substantial improvement in issues such as relationships and participation of women as well as an acceptable solution to the question of the appropriate bargaining representative on behalf of the employers. A process to be followed if negotiations reach an impasse will hopefully be identified.

The results of the consideration given by the Commission to unresolved proposals for change to Articles and related documents of the recently expired Collective Bargaining Agreement should be available for placement on the table at the commencement of bargaining for the next Collective Bargaining Agreement to be effective on October 1, 2012. With the opportunity for an indepth study of all those proposals by the Commission and with its guidance and advice with respect to them, their resolution at the next round of bargaining should be possible without the contention and stand-off that we experienced when mention was made of them during the 2010 negotiations. The Vancouver office of your Department’s Federal Mediation and Conciliation Service could give valuable assistance at that time given its considerable involvement in the 2010 negotiations.

It is our expectation that the two parties who sat together at the bargaining table for close to 40 days and resolved so little will see our Report in a positive light. We say that because they will know there has to be a resolution and that they could not achieve it themselves.
The meeting request dated July 6, mentioned earlier in this Report, certainly underscores the significance that the BCMEA attaches to our Report and that gives us cause for optimism. If the anticipated long term impact on the commercial interests of all the BCMEA members is to be a positive one then the BCMEA’s cooperation with you, following the release of your response to our Report, is surely to be expected.

We cannot be other than optimistic that cooperation with you by the ILWU will also be there because they gave every signal during negotiations that they welcomed our participation and assistance throughout the process.

Besides the parties directly involved, the Canadian public and particularly those residing in British Columbia and the rest of Western Canada have a significant stake in a successful resolution of the subject matter of this Report. A reading of the 2008 Port Metro Vancouver Economic Impact Study shows the very major and positive impact that the successful ongoing operation of the Port has on jobs, wages, gross domestic product, and economic output. To appreciate the enormity of what is involved, add to that the anticipated growth in the importance of Canada’s bi-lateral trade and investment with Asian countries and the resulting increase in cargo traffic with those countries, occurring under the leadership provided by the Asia-Pacific Gateway and Corridor Initiative. To follow the path we have proposed will be to preserve, honour and respect the immense public interest component that is involved here, of which the parties, BCMEA and ILWU alike, have a responsibility to be ever mindful.
If our optimism is misplaced and either party elects to move in accordance with Section 71 of the *Canada Labour Code* and a course is thereby followed that could result in a lockout by the employer or the declaration or authorization of a strike by the ILWU then you, the Government of which you are a part and Parliament itself must, in our judgment, be prepared to act. Legislation consistent with the content of this Report and which prevents a lockout or strike until after September 30, 2012 would, for the many reasons we have expressed, be imperative. If it comes to that, the public interest will be best served by such a legislative response.

SIGNED AT VANCOUVER, BRITISH COLUMBIA ON JULY 30, 2010

Ted Hughes

John Rooney
ATTACHMENT 1
OPINION

prepared by:

DONALD R. MUNROE, Q.C.

June 15, 2010
June 15, 2010

British Columbia Maritime Employers Association
500 – 349 Railway Street
Vancouver, BC V6A 1A4

Attention: Mike Leonard

Dear Sirs and Mesdames:

Re: Mediators’ Terms of Reference: ADR

Introduction

You have provided me with copies of the terms of reference given by the Minister of Labour to Messrs. Hughes and Rooney, as co-mediators appointed under s. 105(1) of the Canada Labour Code, in respect of the collective bargaining now in progress between the BCMEA and the ILWU Canada, and between the BCMEA and Local 514; and you have asked for my commentary and assistance on certain aspects of the terms of reference.

The terms of reference, which are identical for both sets of negotiations, describe the mandate of the co-mediators as follows:

- to assist [the parties] in negotiating a settlement of their differences for the purpose of renewing or revising the collective agreement, which, in the interests of labour stability and the ports’ success, should be for the longest possible term agreeable to both parties;
• if there are matters that cannot be resolved through negotiations, to assist the parties in developing and agreeing to a dispute-resolution protocol under which all outstanding differences would be submitted to a person or body for final and binding determination; and

• if the parties cannot resolve their differences through negotiations nor agree to a dispute-resolution protocol, to submit a report to the Minister of Labour within ten (10) days of the conclusion of the mediators’ appointment.

Your request to me for commentary and assistance is specifically with respect to the second “bullet” of the terms of reference (i.e., the “...develop[ment of]...a dispute-resolution protocol under which all outstanding differences would be submitted to a person or body for final and binding determination”), against the possibility that a voluntary settlement is not possible in either or both sets of negotiations.

Preliminary Observations

I begin with some preliminary observations. First of all, the appointment by the Minister of Labour of the co-mediators under s. 105(1) of the Code was unusual (by which I certainly do not mean unwelcome), especially at the point in the collective bargaining that the appointment occurred. On the date of the appointment, the collective agreements were still nearly a month away from their expiry. None of the parties had filed a Notice of Dispute under s. 71(1) of the Code; and neither, then, had the usual conciliation process (by which I mean, in particular, the appointment of a conciliation officer under s. 72(i) of the Code) been applied to either set of negotiations. I was once appointed as a mediator under s. 105(1) of the Code (along with a co-mediator, Vince Ready). That was in relation to the notorious Giant Mine dispute at Yellowknife. But that only occurred after the conclusion of the usual conciliation process; after a strike-lockout had been in progress for some weeks; and after the general public interest had clearly been engaged -- including by the murders of eight “replacement workers”; by several other violent acts; and by growing community instability generally. And while no doubt there had been appointments in past years under s. 105(1) in circumstances less dramatic than those of the Giant Mine
dispute, I am unaware of any instance prior to the appointment of Messrs. Hughes and Rooney where s. 105(1) has been used so preemptively.

Additional to the preemptive timing of the present appointment under s. 105(1), the terms of reference themselves include some unusual features. For the most part, the content of the first “bullet” in the terms of reference is unremarkable. What is unusual, however, is the statement in the first “bullet” that the collective agreements “...should be for the longest possible term agreeable to [the] parties”. One rarely sees that kind of Ministerial direction to mediators, conciliation commissioners, etc.1 The Minister’s rationale for that direction to the co-mediators, and implicitly to the parties, is succinctly embedded in the first “bullet” in the following terms: “...in the interests of labour stability and the ports’ success”. In context, that is a public-interest rationale.

The second “bullet” in the terms of reference is unusual in its entirety. It clearly signals that in the federal government’s view, work stoppages at Canada’s west coast ports arising from collective bargaining disputes are intolerable in the public interest. That should not be surprising to anyone. Over the years, successive federal governments of all political stripes have rapidly intervened to bring an end to strikes or lockouts in the west coast ports: see, for example, the West Coast Ports Operations Acts of 1972, 1975, 1982, 1994 and 1995; the Maintenance of Ports Operations Act, 1986; the West Coast Grain Handling Operations Act, 1974; the Prince Rupert Grain Handling Operations Act, 1988; and the British Columbia Grain Handling Operations Act, 1991. However, what is different in the present circumstances, and it is an important difference, is that by the timing of this appointment under s. 105(1), coupled with the inclusion of the second “bullet” in the terms of reference, the Minister of Labour has signaled the federal government’s view not just that work stoppages at the west coast ports arising from collective bargaining disputes run counter to the overriding public interest, but as well, that even the threat or apprehension of such work stoppages can bring great public harm.

The third “bullet” in the terms of reference, on its face, is not unusual or surprising. Where the Minister takes the step of making an appointment under s. 105(1) of the Code, particularly where, as here, it is apparent that the Minister

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1There is one rough analogy of which I am aware. It is found in the West Coast Ports Operations Act, 1995. That statute ended a strike by Local 514 and put the underlying collective bargaining dispute to mediation-arbitration. The statute instructed the mediator-arbitrator that the term of the renewal collective agreement must be for a period not less than 4 years; and went further by making it impermissible for the parties to agree to a term of less than 4 years, even if they both would have preferred a shorter term.
regards these two private-sector disputes as engaging important public interests, it cannot be surprising that if the dispute is not resolved during the mediation processes, the Minister will want a report from the mediators. But what is different in this instance is that, presumably, the report to the Minister, if one is necessary, will be in relation not only to the first “bullet” in the terms of reference but in relation as well to the second “bullet”. That is to say, the report from the mediator to the Minister, if a report is necessary, will presumably include recommendations not only for the content of renewal collective agreements, but also recommendations for the content of a binding dispute-resolution mechanism if the recommendations for the content of the renewal collective agreements are not accepted by one or more of the parties.

Free collective bargaining is defined as collective bargaining, including the right to strike or to lock out, with a minimum of third party – i.e., governmental – intervention. Free collective bargaining is an important value in modern democracies. But neither can it be doubted that in some enterprises, both public and private, the right to engage fully and freely in labour warfare must yield to the broader community interest. Hospitals are one example in the public sector. And based on the consistent behaviour of federal governments over the years, Canada’s west coast ports, including both longshore and grain handling operations, are one example in the private sector. Neither at our hospitals nor at the west coast ports does free collective bargaining, defined as aforesaid, truly exist. While the reasons for that fact are obviously different as between each of those two settings, the fact itself cannot be denied as the historical and present reality. As I will be reiterating later in this commentary, the development of a binding dispute-resolution mechanism for the west coast ports ought to acknowledge that reality, just as it should be properly responsive to the critical public interests, including “labour stability” and “the ports’ success”, that have generated the need for such mechanism in the first place.

The Options – The Various Alternative Dispute Resolution (ADR) Models

I will begin my discussion of the options for a binding dispute-resolution mechanism by assuming that the mechanism is intended to apply not just to the present disputes, if they are not resolved voluntarily in mediation, but as well to all future collective bargaining disputes between the BCMEA and either the ILWU Canada or the ILWU Local 514. Later in this discussion, I will comment on potentially different approaches as between the present disputes and any future disputes.
(a) Final Offer Selection (FOS)

One of the ADR models commonly put forward for consideration is FOS -- which requires the arbitrator to select either the employer’s position in its entirety or the union’s position in its entirety. No middle ground is permitted. Put another way, the arbitrator is not permitted to publish an award representing his or her own independent judgment of the appropriate outcome, but rather is stuck with selecting one party’s position over the other.

The theory of FOS is that a risk-benefit analysis will nudge both parties to reasonable positions, so that regardless of which position is selected by the arbitrator, it will be seen as an appropriate outcome.

However, at least in the labour relations context, that has not been the real-life experience. Rather, the more common occurrence is that the arbitrator is faced with choosing between two very unsatisfactory positions, with no room to maneuver according to his or her assessment of the right result.

Collective agreements cover a wide range of employment conditions, and are binding on the parties for lengthy periods of time (recall the Ministerial desire in this instance, as expressed in terms of reference, for “...the longest possible term agreeable to the parties”). It is therefore important that to the extent possible, collective agreements comprise the appropriate balance between the parties’ respective interests, and that they acknowledge the interdependence that underlies the relationship between employer and employee. Whatever the theoretical attraction of the FOS system, it carries the risk of a bad outcome to a much greater degree than other ADR models. And where the bad outcome represents the wholesale acceptance of one party’s position, and therefore the wholesale rejection of the other party’s position, it can be a source of simmering discontent which can be very harmful to the parties’ ongoing labour-management relationship.

The FOS model is also entirely party-centric. As with other ADR models, the parties to an FOS arbitration are free to fashion their respective positions focusing solely on their own private interests. They are free to disregard altogether the public interest. And given that an FOS arbitrator must choose between the parties’ two competing positions, and cannot exercise his or her own judgment independent of those two positions, the arbitral outcome will likewise
be one that has regard only to private interests and not also to the public interest. That is what I mean by party-centric.

But here, the public interest in "labour stability" and "the ports’ success" is precisely the reason why the Minister has mandated the mediators, to the extent necessary, to work toward a final and binding dispute-resolution mechanism. The ADR model that is chosen for these parties ought to reflect that fact. The model ought to be one that in the public interest, as well as in the parties’ private interests, is likely to produce the “right” outcome; not one that is hit or miss in that regard, or one that will produce just the least unsatisfactory outcome. In the circumstances at hand, the FOS model misses the mark.

(b) Formal General Arbitration

The phrase “formal general arbitration” is used, firstly, to distinguish this model from mediation-arbitration (which is discussed below), and secondly, to signify that this model is one by which the outstanding issues are referred to arbitration without the judgmental limitations of the FOS model, but also without the arbitrator being given any criteria for his or her decision.

This formal ADR model requires the arbitrator to be procedurally detached from the parties, and to adhere carefully to the rules of natural justice that govern administrative tribunals generally. While that seems unobjectionable on its face, the procedural detachment and unqualified quasi-judicial behaviour required of arbitrators under this model can often prevent the arbitrator from learning the parties’ real needs, interests and priorities. It must be remembered that arbitrations of collective bargaining disputes are arbitrations about “interests”, not about “rights”. It is important for the effective adjudication of “interests” that the fullest possible candour is encouraged; and that can be much more difficult in the formal arbitration setting than, for example, in the mediation-arbitration setting.

Also, where an arbitrator is not given any criteria for his her decision, the norm is for the arbitrator to adopt the “replication theory” of arbitration: which holds that the arbitrator should strive to replicate the agreement that the parties themselves would have ultimately reached had they been left to the usual devices of collective bargaining including a strike or a lockout. But logically, the “replication theory” can only be applied in employment settings where free collective bargaining, as defined above, usually holds sway. As noted earlier in this commentary, free collective bargaining has never been the order of the day at

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Canada’s west coast ports. In one way or another, successive federal governments have injected themselves in the public interest into collective bargaining disputes at the ports; and arising from that fact, in one way or another the hands of third parties have been instrumental over the years in shaping these parties’ collective agreements. Accordingly, in historical terms, an application of the “replication theory” to this employment setting has no solid foundation, and would be the application of an illusion.

And finally, just like the FOS model, albeit in a different way, a general model of arbitration, without any stipulated criteria engaging public-interest considerations, and which therefore implicitly adopts the “replication theory” of arbitration, is an entirely party-centric model. It looks only to the parties and their supposed behaviour as being influential in the ultimate award; it does not also look to the public interest. Reiterating what I said above regarding FOS, if the public interest is what is driving the need for a binding dispute-resolution mechanism for Canada’s west coast ports, then clearly the public interest ought to be a factor that the decision-maker must consider.

(c) Mediation-Arbitration

Mediation-Arbitration is the ADR model that is the most consistent with the values of collective bargaining, by allowing the third party full scope to work with the two parties to the dispute, separately and together in the ordinary manner of a mediator, making every effort to bring the parties to a voluntary settlement of the dispute -- while at the same time holding the “velvet hammer” of arbitral power as a backstop.

Mediation-arbitration truly is a system, more than others, in which the third party can become fully acquainted with the parties’ needs, interests and priorities; which presents the greatest scope for arbitral maneuverability; and in which the third party can most effectively be conditioning the parties toward reasonable behaviour, positions and expectations.

Because of its relative informality, and its close connection with ordinary collective bargaining processes, mediation-arbitration has the additional advantage of being an ADR system with which employers and unions are the most comfortable -- making it less likely than with more formal processes that either party will think it necessary to retain outside assistance in the person of consultants or lawyers. Doing it themselves is not only a cost-saving, but is also

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better for the union-management relationship than doing it through the prism of outsiders to the relationship.

But just as with the ADR model of formal general arbitration, the mediation-arbitration model would require stipulated criteria to ensure that the public interest, as identified in the mediators' terms of reference, is taken into account in any arbitral disposition. I will outline later the trend toward criteria to ensure a proper consideration of the public interest; as well, I will outline certain suggested criteria. But first, I should briefly sketch how a mediation-arbitration system would operate in lieu of certain provisions of the Canada Labour Code, insofar as the collective bargaining relationships between the BCMEA and both the ILWU Canada and the ILWU Local 514 are concerned.

At present, the parties to these collective bargaining relationships are governed by the general content of Part I of the Code which deals with collective bargaining, conciliation, etc., and with strikes and lockouts.

So, for example, either party may serve notice to bargain on the other within the 4-month period immediately preceding the expiry of the collective agreement (s. 49); the two sides must commence collective bargaining in good faith within 20 days of a notice to bargain, and must make every reasonable effort to conclude a renewal collective agreement (s. 50); where the parties have failed to renew a collective agreement, either party may give notice of such failure to the Minister (s. 71), in which event (or on her or his own motion) the Minister may do one or another (but not more than one) of the following: appoint a conciliation officer; appoint a conciliation commissioner; appoint a conciliation board; or notify the parties of the Minister's intention to do none of those things (s. 72).

Where the Minister appoints a conciliation officer, or a conciliation commissioner or a conciliation board, then certain time lines apply for the work and reporting out of those appointees (s. 73 et seq.).

The right to strike or lock out is conditional upon the parties having bargained in good faith, and upon the passage of 21 days from the date the Minister advises that he or she will not be appointing a conciliation officer (or commissioner or board), or, if an appointment has been made, upon the passage of 21 days from the completion of the conciliation, etc. procedures (s. 89).

However, if mediation-arbitration becomes an option for dispute-resolution at the west coast ports, it would be duplicative, and would not be constructive, to
require the use of the usual conciliation processes plus the prescribed mediation-arbitration procedure for the same dispute. That is to say, if mediation-arbitration is accepted as the appropriate ADR model, the suggestion is that once the parties have bargained in good faith and made every reasonable effort to reach a collective agreement, then in lieu of the conciliation, etc. procedures as summarized above, either party could refer the dispute to the prescribed mediation-arbitration procedure; and by that procedure, the dispute would ultimately be resolved -- either through mediation (which is a synonym for conciliation) or, to the extent necessary, by a binding determination of the mediator-arbitrator.

I should perhaps be more clear about procedures and timelines. Under this proposed ADR model, the collective bargaining would be initiated in the usual manner; that is to say, by a notice to bargain pursuant to s. 49 of the Code. So also would the parties be under the usual obligation, upon a notice to bargain being given, to commence bargaining in good faith and to make every reasonable effort to conclude a renewal collective agreement (s. 50). And if neither party exercises the right to refer any unresolved collective bargaining issues to mediation-arbitration, then the conciliation, etc. provisions of the Code would continue to apply, as would the strike-lockout provisions of the Code. But if one of the parties does refer the matter to mediation-arbitration, then the mediation-arbitration procedure would operate, from that point onward, in lieu of the Code’s conciliation, etc. procedures and in lieu of the strike-lockout option.

So, upon the dispute being referred to mediation-arbitration, the parties would have, say, 10 days to jointly appoint a mediator-arbitrator, failing which an appointment would be made by the Minister. The mediator-arbitrator would have, say, 15 days within which to commence the mediation-arbitration proceeding. The mediator-arbitrator’s first task would be to seek to bring the parties to a voluntary resolution of the renewal collective agreement. In that connection, the mediator-arbitrator should be empowered to use all the usual mediation-arbitration techniques that the mediator-arbitrator considers appropriate. However, the mediator-arbitrator would be required to make an award within, say, 90 days of being appointed (subject to extension by agreement of the parties), unless in the meantime a voluntary agreement has been reached by the processes of mediation or directly between the parties themselves.

The mediator-arbitrator’s fees and expenses would be shared equally by the parties.
Criteria - Based ADR

For some years, when federal or provincial governments found it necessary in the public interest to intervene by legislation to prevent or to end a strike or a lockout, they typically referred the dispute to arbitration or mediation-arbitration without prescribing any criteria to guide the arbitrator or mediator-arbitrator in his or her deliberations. This led to arbitrators developing their own doctrinal approaches.

In both the private and the public sectors, the most common arbitral doctrine is the one identified earlier in this commentary: the so-called “replication theory” of interest arbitration.

In the public sector, another popular arbitral doctrine is one which curtails an employer’s ability to effectively plead an inability to pay, based on that employer’s own particular fiscal situation. This doctrine was initially developed in relatively buoyant economic times, and at a point in our labour relations history when wage settlements in the unionized private sector were something to which public sector employees aspired. The doctrine holds that a public sector employer should not be allowed to claim an inability to pay normative community wage increases -- particularly as established by the unionized private sector. At least in part, the rationale for this doctrine, which has come to be known as the “ability to pay” doctrine, is that governments have an unfettered taxing power; and should exercise that power to the extent necessary to ensure that employees in the public sector are treated fairly in relation to their unionized counterparts in the private sector.

But more recently, in those instances where the public interest has necessitated legislative intervention in labour disputes in either the private or the public sectors, Canadian governments have evidenced a resistance to the artificiality of the “replication theory” as applied to industries that are essential to the broad public good, and resistance as well to the artificiality in modern times of a supposed unlimited taxing power.

This resistance is evidenced by the trend toward providing arbitrators or mediator-arbitrators (the latter being the most frequent policy choice) with criteria which they must consider and apply when arriving at an award.
An example in the combined federal private and public sectors is the Maintenance of Railway Operations Act, 1995. That statute ended work stoppages at both of Canada’s national railways, and referred the underlying collective bargaining disputes to final and binding resolution by a mediation-arbitration commission. Under the statute, the first task of the mediation-arbitration commission was to attempt to bring the parties to a voluntary resolution of their disputes. However, if that was not possible, then the mediation-arbitration commission was empowered to arbitrate the matter. In doing so, the mediation-arbitration commission was required by the statute to apply the following “guiding principle”:

[The] commission shall be guided by the need for terms and conditions of employment that are consistent with the economic viability and competitiveness of a coast-to-coast rail system in both the short and the long term, taking into account the importance of good labour-management relations.

Thus, the public interest which had produced the need for the government intervention in the first place, found expression in the legislation’s arbitral terms of reference; and sensibly so.

The criteria-based model of mediation-arbitration was picked up in British Columbia in the Coastal Forest Industry Dispute Settlement Act, 2004. That statute ended a strike in B.C.’s private-sector coastal forest industry which had reached the point of threatening the provincial public interest. Under the statute, a mediator-arbitrator commissioner was appointed to assist the parties in arriving at a voluntary settlement of the dispute, but if necessary, to provide a final and binding award. Obviously drawing on the federal statute described above, this B.C. statute stated that in arriving at an award, the mediator-arbitrator “must consider” the following:

(a) the need for terms and conditions of employment that are consistent with the economic viability and competitiveness of the coastal forest industry in both the short and the long term;

(b) the importance of good labour-management relations in the coastal forest industry;

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(c) the interests of the employees and [their] trade union.

Again, the public interest which had compelled government intervention in the first place found expression in the terms of reference governing the mediator-arbitrator’s deliberations.

An even more recent example of legislatively-imposed mediation-arbitration with criteria is the York University Labour Disputes Resolution Act, 2009, by which the Ontario legislature brought an end to a strike by York University’s support staff (i.e., non-faculty). The statute put the collective bargaining dispute to a process of mediation-arbitration, requiring the mediator-arbitrator, if it became necessary to exercise arbitral powers, to take into consideration the following “criteria”:

(1) The employer’s ability to pay in light of its fiscal situation;

(2) The extent to which services may have to be reduced in light of the award, if current funding and taxation levels are not increased;

(3) The economic situation in Ontario and the Greater Toronto Area;

(4) A comparison, as between the employees and comparable employees in the public and private sectors, of the nature of the work performed and the terms and conditions of employment;

(5) The employer’s ability to attract and retain qualified employees;

(6) The purposes of the Public Sector Dispute Resolution Act, 1997.

In the public interest, the first three of the above criteria effectively set aside the arbitral doctrine known as “ability to pay”.

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Reiterating what I said above, those three modern examples of ADR legislation reveal a parliamentary preference, in contemporary Canada; for criteria-based mediation-arbitration, rather than for the unbridled operation of arbitral doctrines developed some decades ago; and they provide strong precedents favouring criteria-based mediation-arbitration, in lieu of strikes and lockouts, at Canada's west coast ports.

Obviously, the criteria must be responsive to the public interest; but criteria must also be seen to be balanced if they are to be accepted as legitimate, and if they are to be durable.

To those ends, if mediation-arbitration is the basic policy choice for the west coast ports, I suggest the following as the criteria to be applied by the mediator-arbitrator in the event it is necessary for him or her to exercise arbitral powers:

(a) The public interest in attracting and sustaining the movement of goods through Canadian west coast ports;

(b) the need for terms and conditions of employment that allow the movement of good through Canadian west coast ports to be commercially competitive as against ports in other countries;

(c) the interests of affected employees and the union representing them.

The assumption to this point is that the ADR model developed in accordance with the second "bullet" of the mediators' terms of reference will apply both to the present collective bargaining disputes between the BCMEA-ILWU Canada and the BCMEA-ILWU Local 514, and to all future collective bargaining disputes between those parties.

But of course it is possible, and may well be sensible in the circumstances, to distinguish for present purposes between the current disputes and any future disputes: by saying that a permanent mediation-arbitration model, including criteria as suggested above, would apply to future collective bargaining disputes,
but that the work done by Messrs. Hughes and Rooney, as co-mediators under s. 105(1) of the Code, should effectively form the basis, if necessary, of binding resolutions of the current disputes.

Obviously, if the mediation by Messrs. Hughes and Rooney produces voluntary settlements, it is only the future disputes that one need be concerned about. But if voluntary settlements of the current disputes are not achieved, then the options include the following:

(a) Prior to Messrs. Hughes and Rooney preparing a report and recommendations for settlement, an agreement by all parties that the recommendations for settlement will be accepted as final and binding; or

(b) if recommendations for settlement by Messrs. Hughes and Rooney are published but not accepted by all parties, legislation imposing the recommendations as comprising renewal collective agreements; or

(c) if recommendations for settlement by Messrs. Hughes and Rooney are published but not accepted by all parties, a third-party process, either by agreement or by legislation, reminiscent of the one prescribed by the West Coast Ports Operations Act, 1995. Prior to that Act, a Conciliation Commissioner, who had been appointed by the Minister of Labour under s. 72 of the Code, had made recommendations for settlement of a collective bargaining dispute between a predecessor organization to the BCMEA and the ILWU Local 514. The conciliation commissioner’s recommendations were accepted by the employers but not by Local 514; and a strike ensued. Parliament quickly intervened by passing the just-cited Act which brought the strike to an end; and which referred the dispute to a mediator-arbitrator who, in deciding the matter, was required by the Act to

Heenan Blaikie
“...take cognizance of” the conciliation commissioner’s recommendations. In his award resolving the dispute, the mediator-arbitrator said that the effect of that requirement was that a heavy burden of persuasion rested upon a party seeking a departure from any of the recommendations that had been made by the conciliation commissioner. Here, Messrs. Hughes and Rooney are, and should be seen to be, the functional equivalent of a conciliation commission.

I would be pleased to answer any questions you may have respecting the foregoing, or generally to provide such additional assistance as you may require.

Yours truly,

Heenan Blaikie LLP

Donald R. Munroe, Q.C.

DM/ag
ATTACHMENT 2
OPINION

prepared by:

BRUCE L. LAUGHTON, Q.C.

June 24, 2010
June 24, 2010

Ministry of Labour File: YM2880-0955D.0901

The Honourable Ted Hughes, Q.C.
#619 - 50 Songhees Rd,
Victoria, B.C. V9A 7J4

Mr. John Rooney, Senior Mediator
Federal Mediation and Conciliation Service
Pacific Region
Suite 500 - 890 West Pender Street,
Vancouver, B.C. V6C 1J9

The matter of the Canada Labour Code (Part 1 - Industrial Relations) - Mediation affecting British Columbia Maritime Employers Association, and the International Longshore and Warehouse Union of Canada

We act for ILWU Canada. In response to your request we are providing you with a summary of the position which was advanced on behalf of the ILWU at our meeting on Wednesday June 23, 2010.

The focus of these submissions is on the following aspect of your mandate:

"if there are matters that cannot be resolved through negotiations, to assist the parties in developing and agreeing to a dispute-resolution protocol under which all outstanding differences would be submitted to a person or body for final and binding determination"
Position of the ILWU

1. The ILWU submits that an appropriate dispute resolution protocol is one which would provide limited jurisdiction to an arbitrator to settle certain of the terms and conditions of the parties' Collective Agreement. The specific terms of that protocol are set out in attached Memorandum of Settlement.

2. That Memorandum is modeled on the Memorandum of Agreement which was entered into between the Teamsters Canada Rail Conference and the Canadian National Railway Company following a strike which took place in November and December 2009. It is our understanding that this memorandum was entered into with the assistance of Labour Canada and under the threat of back to work legislation.

3. In our submission such an approach is consistent with a balancing of the interests that arise in this dispute. Those interests will be discussed next.

The Interests to be Taken into Account

4. In our submission there are three interests to be considered. They are the Employers' interest, the Union's interest and the public's interest.

5. In this round of bargaining the Employers' interest is in seeking significant changes to methods and practices of operation which have arisen over a lengthy period of time. They wish to have those changes made but not at the cost of a strike or lockout.

6. The Union's interest is in having the terms and conditions of the parties' Collective Agreement settled through free collective bargaining, rather than simply being forced to accept what an arbitrator chooses to give it.

7. The public interest is represented by Parliament and the Minister of Labour whose concerns include the insulation of third parties from the effects of a strike or lockout and in fostering labour relations stability in the ports. At the same time the public interest is also reflected in the Canada Labour Code, the preamble of which provides that "... Canadian workers trade unions and employers recognize and support freedom of association and free collective bargaining as the basis of effective industrial relations for the determination of good working conditions and sound labour-management relations." That freedom of association has also been protected by Section 2(d) of the Canadian Charter of Rights and Freedoms.

8. These various interests will be considered in the course of this submission.
The Negative Impact of Interest Arbitration on Collective Bargaining

9. It is clear that interest arbitration has its shortcomings. It is often described as having a "chilling" or "narcotic" effect on collective bargaining. The comments of the British Columbia Labour Relations Board in *Yarrow Lodge Ltd. et al and Hospital Employees Union et al* (1993) 21 CLRBR (2d) 1 describe these effects this way at pages 27 and 28:

"The essential ingredient, and indeed the very essence, of free collective bargaining, is the ability of each party to compromise. The "corrosive" or "chilling" effect that compulsory arbitration has on collective bargaining is that the parties become increasingly less willing to compromise. If, at the end of the day, each of the contracting parties knows that a third party will decide the final terms and conditions of employment, one or both will not want to disclose their final position. This is because to move, a party may be giving up ground unnecessarily, when an arbitrator finally decides to "split the difference". Thus compromise is actually seen as prejudicial. Further, by not moving, the party still has something available for the sake of "compromise". Moreover, the negotiators for each side do not have to make the tough compromises which may prove politically difficult within their own constituencies. The tendency therefore will be not to compromise, and instead hand the problem over to the arbitrator who will, of course, be blamed for any adverse decision. Indeed, not to take such a course of action will be painted as politically naive. This is the corrosive or chilling effect of compulsory arbitration on negotiation.

Further, not only do the parties avoid compromise, but their proposals are framed in relation to the position which they intend to take at arbitration and what they perceive to be the arbitrator's past awards. The result is a "narcotic effect" upon negotiations, in which the parties become increasingly reliant upon arbitration to settle their agreements rather than engaging in meaningful collective bargaining. Instead of compromise providing the momentum for the conclusion of a collective agreement, it is, once again, seen as only prejudicial.

The "catalyst" effect is simply this: the economic losses imposed on both parties by strikes or lockouts provide the best catalyst to resolve the differences between them. The proverbial eleventh hour settlement is the result of the parties' serious efforts to avoid strikes and lockouts. The removal of the right to strike or lockout removes this pressure on the parties to compromise.

The "cathartic effect" is defined as follows: a strike or lockout provides the parties with the opportunity to "clear the air" or "blow off steam": It
further tests the strength and seriousness of the collective bargaining positions of the parties, although the impact of this private dispute has a public cost.

The Woods Task Force came to the conclusion that strikes and lockouts are the best method for resolving disputes. Although this system may seem costly, it may well be more "healthy and less expensive in resolving labour management disputes than any other method" (p. 119).

This Board's own experience affirms the accuracy of these observations and we will attempt to incorporate these experiences into the design of our policy on first collective agreements."

10. In the Federal sphere the use of compulsory arbitrations in disputes that have a public interest nature such as the transportation and grain industries was considered in the report Seeking a Balance: Review of Part I of the Canada Labour Code (1995) Sims, Blouin and Knopf. In this report the task force echoed the concerns about the chilling effect of interest arbitration at page 156 they noted:

"Further, Parliament's willingness to intervene quickly in certain types of disputes has fostered an expectation or culture that assumes that no strike or lockout will be allowed to go on for any significant period of time. Unions' members lose their fear about being on picket lines for extended periods, and employers lose their fear of long term loss of revenue or market share. Strikes or lockouts then lose their influence or incentive to induce a settlement.

Both labour and management candidly acknowledge that because of this situation, they withhold compromise until after government intervention. Their true strategy becomes to position themselves for the inevitable interest arbitration process that will be imposed. In other words, in sectors where Parliamentary intervention is expected, little real collective bargaining occurs. This process is not conducive to settlement."

11. Further at page 160:

"Conventional interest arbitration processes provide the arbitrator or arbitration board with information about the importance of each issue, a clear picture of the differences between the parties, and perhaps a pathway to an award which represents a compromise for each of the parties. This can create protracted hearings and lengthy delays before the award is issued. The award is that of the arbitration board and the parties have no real sense of ownership. The award is a package, fashioned from the submissions and positions of the parties. Often, both sides come
away from the process believing that they lost, or at least, did not win enough. This is particularly true of employees or employers involved in multi-employer bargaining, where they feel they had little say in the end result.

The most serious criticism of conventional interest arbitration is the so called "chilling effect" on collective bargaining. The parties recognize that they can take positions and hold them because there is no advantage to compromise. In effect, they structure the anticipated outcome of the arbitration by refusing to compromise on issues during bargaining. The theory, put crudely, is that, if arbitration is going to come down somewhere in the middle, then they agree to as little as possible so that "the middle" is closer to their position.”

12. The task force further rejected the suggestion made in an earlier study that the Minister be given the direct power to order the suspension of a strike or lockout and impose a method for dispute resolution. This was discussed at pages 157 to 158:

"These concepts were recognized in the Report of the Industrial Inquiry Commission into Industrial Relations at West Coast Ports (pages 171-172). However, the West Coast Ports Inquiry recommended, among other things, that the solution lies in the introduction of standing legislation which would permit the Minister, acting on the advice of his or her professional staff, to order the suspension of a strike or lockout, a resumption of operations, and a method by which the dispute will be solved:

In order to provide protection to the economy and to the interests of the public and third parties all of whom can be affected greatly by a labour dispute at West Coast Ports the Commission recommends an Act of Parliament be passed to provide that when the Minister (Minister of Labour) is of the opinion that a strike or lockout or a threatened strike or lockout poses an immediate and substantial threat to the economy or to the national interest, the Minister may intervene in the dispute by imposing one or more of the following on the parties ...[the options are then listed].

We are concerned that such a solution only substitutes Ministerial for Parliamentary intervention. This will encourage the parties to rely upon an even greater likelihood of intervention. It makes intervention easier and more predictable because Parliament would not have to be recalled, legislation would not have to be prepared, and the Cabinet would not first have to be convinced of the appropriateness of the intervention. Any advantage of public debate would be lost. Despite its apparent efficiency,
we do not see how such a process would foster settlements or ensure the enduring resolution of disputes.

Management and labour both voiced strong opposition to this proposal to allow direct Ministerial action. Both saw the increased level of intervention implicit in the recommendation as counter-productive in the longer term. The consensus group categorically rejected the notion of the Minister having such broad, sweeping interventionist powers."

13. At page 162 the task force specifically considered protection of the public interest and made the following comments:

"What then is our solution for protecting the public interest? There are no magic solutions. We have, throughout our report, particularly with respect to multi-employer bargaining and the reform of the bargaining cycle, suggested ways to increase the percentage of disputes that settle without work stoppages.

Part of the solution is already in place, but through reduced regulation and increased competition. This, more than anything else, is providing third parties with alternate sources of delivery and supply and in turn giving labour and management new incentives to settle. The number and severity of stoppages has come down drastically because of these developments.

We see the imposition of binding arbitration, particularly on multi-employer or broad based bargaining, as a step backwards that will impede change in some industries, rather than encourage parties to work through that change collaboratively.

While we recognize that the public interest sometimes requires intervention, we are not convinced that mandatory or ad hoc Ministerial imposition of either conventional or final offer selection arbitration provides the answer. Instead, we believe ad hoc legislation, with its flexibility to design a dispute resolution mechanism to fit a particular situation, continues to offer the best approach when needed, supplemented by the advice of Public Interest Panels."

14. The recommendations of the task force that the Minister not be given direct power to intervene was accepted by Parliament and the Code was not amended to provide such a power. The only power under the Code to order interest arbitration is found in s. 80 which deals with the settlement of a first collective agreement after certification.

15. In our submission the mediators in this case will have experienced the negative impact of the potential of interest arbitration over the past few
months. There has been little movement or compromise and the bargaining that has occurred could legitimately be described as "surface bargaining". Further, it is clear that the Employers have, since the beginning, sought to have their bargaining demands dealt with through arbitration. They wish to avoid the costs and disruption of a strike or lockout and avoid testing the political will of the various employers that make up the BCMEA to participate in such job action.

16. In our submission if the hope of interest arbitration for all of the issues in dispute is taken away the parties will be forced to engage in true bargaining and make true compromises.

Significant Change is Generally the Result of Significant Pressure

17. The labour relations reality is that parties to a collective agreement rarely achieve significant change in the absence of a strike or lockout which puts economic pressure on both sides.

18. Further, the use of strikes or lockouts even in industries which have a public interest component still remains an option. A good example of this is the dispute between the BC Terminal Elevator Operators Association and the Grain Workers Union Local 333. Those parties represent all of the grain terminals in the Port of Vancouver. In 2002 the Association sought significant changes to a number of provisions in the collective agreement which had expired on December 31, 2000. When bargaining and conciliation failed to resolve the dispute the Association locked out the union members on August 25, 2002. That lockout continued for almost four months until December 13, 2002 when the union and the Association agreed to submit the remaining issues to interest arbitration. This is described in paragraphs 1 to 13 of the arbitrator's decision [2003] CLAD No. 6 (Ready).

19. It is interesting to note that this dispute was resolved without the intervention of Parliament and that the agreement to proceed to interest arbitration did not occur until months after the lockout had been imposed.

20. It is therefore not unrealistic to suggest that some forms of job action could occur in this dispute where true public interest concerns can be addressed. This has already occurred with the amendments to the Canada Labour Code that were made in 1998. Section 87.4 was added to require the maintenance of essential services. Section 87.7 was added to mandate employers and workers in the longshoring industry to maintain services to grain vessels where there was a strike or lockout in the longshore industry.
21. Historically the Employers have sought to avoid having to endure a lengthy strike or lockout. They have not been willing to bear the economic cost. They have taken steps which would enhance the likelihood of government intervention. For example, prior to the addition of s. 87.7 to the Canada Labour Code the Employers would refuse the Union's proposal that any strike or lockout would not apply to grain terminals or cruise ship terminals. The Employers recognized that these were hot button issues that would cause parliament to respond quickly.

22. In this round of bargaining they are again seeking to eliminate the Union's right to bargain collectively while at the same time insulating themselves from any economic pressure that could force them to modify their demands.

23. Given the scope of the changes being sought this is not a fair or reasonable approach.

The Need to Take a Measured Approach

24. Since 1999 there have been three rounds of bargaining between the parties. These resulted in Collective Agreements with the following duration:

- January 1, 1999 - December 31, 2002
- January 1, 2003 – March 31, 2007

25. There has not been a work stoppage involving the parties since November 1999 when the BCMEA implemented a short lockout. There has been no back to work legislation since 1995 when Parliament enacted the West Coast Ports Operation Act, 1995.

26. These circumstances taken together with the submissions set out above support a conclusion that any mandatory form of dispute resolution should be limited.

27. The proposal advanced by the Union accords with such an approach and is consistent with the interest arbitration used in the Canadian National Railway dispute described above. The circumstances surrounding the agreement in that case is described in the award of Arbitrator Sims as having been reached "under the threat of back to work legislation" and as a result of meetings with Federal Mediation/Conciliation Officers. The agreement therefore reflects the views of Labour Canada.
28. In summary it is submitted that a limited form of interest arbitration would be appropriate in this case. It would ease the chilling effect which the negotiations have already experienced and would encourage free collective bargaining as the basis for the determination of working conditions.

Yours truly,

LAUGHTON & COMPANY

[Signature]

BRUCE LAUGHTON, Q.C.

cc File 121

Copy to
- Tom Dufresne, ILWU Canada
- Don Munroe, Heenan Blaikie dmunroe@heenan.ca

Attachment:
- Memorandum of Settlement
MEMORANDUM OF SETTLEMENT BETWEEN THE
BRITISH COLUMBIA MARITIME EMPLOYERS ASSOCIATION AND
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION CANADA

The parties hereby agree to the following terms of settlement in their current labour dispute:

1. Upon execution of this document, collective bargaining will continue for a period of one week with the assistance of mediators from the Federal Mediation and Conciliation Service.

2. At the conclusion of said week, any outstanding issues related to general wage increases and existing benefits will be submitted to binding arbitration, with the arbitrator to be appointed by the Minister of Labour.

3. At the conclusion of said week, any outstanding issues that are not related to general wage increases and existing benefits may be referred to the same arbitrator with the agreement of both parties. The provisions of the collective agreement in force as of March 31, 2010 will apply with respect to any outstanding issues that are not related to general wage increases and existing benefits for which there is no joint agreement for a referral to arbitration.

4. This Memorandum of Settlement will constitute agreement in writing to arbitration as per the terms of Section 79 of the Canada Labour Code.

5. The arbitrator will have 90 days after being appointed to render a decision and report to the Minister. This period may be extended at the Minister's discretion.

6. The arbitrator will have all the powers and duties of an arbitrator under section 60(1)(a), 60(1)(b), and 61 of the Canada Labour Code.

7. The parties may, jointly or individually, recommend names of potential arbitrators to the Minister of Labour prior to the appointment.

8. The arbitrator's fees shall be borne equally by the parties.

Dated: ____________________ 2010

British Columbia Maritime Employers Association

International Longshore and Warehouse Union Canada

Authorized signatory

Authorized signatory