LABOUR RELATIONS CODE
(Section 84 Appointment)
ARBITRATION DECISION

UNIFOR LOCAL 1115

UNION

CARIBOO PULP & PAPER COMPANY

EMPLOYER

(Re: Failure to Notify Intention to Contract Out)

Arbitrator:	James E. Dorsey, Q.C.
Representing the Union:	Rebecca Kantwerg
Representing the Employer:	Stephanie Vellins
Hearing Dates:	January 24, 2019
Decision Date:	February 15, 2019

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Article XXV – Contracting

(a) **The Company will notify the Union of their intention to have work performed by contractors in the mill and will,** emergencies excepted, **afford the Union the opportunity to review it with the Company prior to a final decision being made.** For this purpose, a Joint Contracting Committee will be established and it will be used as a forum to discuss the Company's contracting decisions.

In keeping with a joint commitment of the Company and the Union to provide as much maintenance and repair work as possible to the regular maintenance work force, the Committee will also meet quarterly to make recommendations regarding the utilization of the mill maintenance work force to minimize the use of contractors, both inside and out of the mill.

(b) The Company will not bring a contractor into the mill:

(i) which directly results in the layoff of employees, or

(ii) to do the job of employees on layoff, or

(iii) to do the job of a displaced employee working outside their job category.

(d) It is not the intent of the Company to replace its regular work force through the use of contract firms.

For greater clarity it is agreed that:

(i) The changes which provide that it is not the intent of the Company to replace its regular work force through the use of contract firms will not set aside existing external work arrangements and practices.

(ii) Working under the flexible work practice provisions does not mean that an employee has been displaced and is working outside their job category. (emphasis added)

1. Grievances, Dispute and Jurisdiction

[1] The employer agrees it did not give notice required in Article XXV(a) of the 2017-21 collective agreement of its intention to have a contractor clean the Powerhouse Basement floor. Employees of the contractor used a bobcat to perform the work on December 29, 2017 and January 2, 2018. The union filed two grievances on January 24, 2018 that a contractor's crew was running a bobcat and cleaning on each date.

[2] Was the employer's failure to give notice one or two contraventions of the collective agreement? What remedial damages should the employer pay the union?

[3] The union and employer agree I am properly appointed as an arbitrator under their collective agreement and the *Labour Relations Code* with jurisdiction to finally decide the merits of the grievances. There is an agreed statement of the facts.

2. No Notice Given: Contractor in Mill December 29 and January 2

[4] The work performed by the contractor is work normally performed by bargaining unit operations employees. Different employees could operate the employer's bobcat to clean the Basement floor each day. A steam plant operations employee on regular days off was available on December 29 and January 2 to work overtime if called. No employee was asked to perform the work on either day.

[5] The employer's bobcat was not functioning at the time. The mill superintendent asked the contractor in one discussion to clean the Powerhouse Basement floor.

[6] The Contracting Committee established pursuant to Article XXV(a) discusses employer notices at its meetings. This discussion gives the union an opportunity to persuade the employer to assign to bargaining unit employees the work it intends to contract out. The union is particularly concerned about work the employer intends to give to a contractor that is within the capabilities of bargaining unit employees.

3. Collective Bargaining and Interpretation of Contracting Article

[7] There has been extensive arbitration about the mutual intention of the contracting provision negotiated into this and other collective agreements.

[8] Contracting out was a central issue in province-wide collective bargaining in 1988 between a predecessor union (Communications, Energy & Paperworkers Union of Canada (CEP) formerly Canadian Paperworkers Union (CPU)) and the Pulp and Paper Industrial Relations Bureau on behalf of primary pulp and paper industry employers. Rudimentary notice and review language negotiated in 1986 was expanded in 1988 to add sub-articles (b) and (c). The language was revised in the 1994-97 collective agreement when individual employers bargained on their own behalf and there was an approximately nine-month strike at the union's target employer, Norske Canada Ltd.[1]

[1] See summaries in *Northwood Pulp and Timber Ltd.*, [1991] B.C.C.A.A.A. No. 42 (Munroe), ¶ 7-8 and 14-17; *Norske Canada Ltd.*, [2001] B.C.C.A.A.A. No. 322 (Munroe), ¶ 32-46

[9] A reason for the intense attention contracting out was receiving in collective bargaining at the time was summarized in a 1987 decision by Arbitrator Hope.

> One can say that the issue of contracting out has become one of the most controversial aspects of the collective bargaining relationship as employers are driven by economic pressures to reduce benefits and trim operating costs to achieve or retain a competitive position in increasingly competitive domestic and world markets and unions are pressed to preserve the *status quo*.[2]

[10] His approach to interpreting a union and employer's mutual intention in contracting out language was:

> In the contemporary context, one can say that unions must continue to accept the reality that they must negotiate any limitation on contracting out in collective bargaining and have the limitation set out in specific terms in the collective agreement. But the backlash of union response to the contracting out of work is a factor to consider in interpreting any language in which an employer has in fact agreed to limit its right to contract out. The result is that neither side can expect to have their intentions arise by implication as opposed to expressing those intentions in clear language.
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> Where an employer agrees to restrict its right to contract out, it will be accountable for the full scope of limitation consistent with the language to which it has agreed. That is, while unions must bargain to achieve limitations on contracting out, employers must ensure that where they have agreed to limitations in clear language, any exceptions upon which the employer intends to rely must be expressed in language that accurately defines the exception. Where the parties have expressed a general restriction on contracting out in clear language, an employer cannot expect that an arbitrator will invoke a strict approach to the interpretation of the language to favour any exceptions relied on by the employer.[3]

Arbitrator Munroe captured this approach in the phrase "astute even-handedness."[4]

[11] The many arbitration decisions relevant to the interpretation of Article XXV originally negotiated into a master industry agreement have set a path to be followed in current interpretation disputes.[5]

[12] Why is there a notice requirement? In 2006, Arbitrator Ready identified:

> It is through the notice of contracting out that the Union is provided with information on the type and nature of the work to be contracted out. Even more important, it triggers the opportunity for the Union to attempt to persuade the Company to keep all or part of the work in-house. Indeed, the evidence establishes that the Union has, in a number of instances, succeeded in doing so.[6]

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[2] *Alcan Smelters & Chemicals Ltd.*, [1987] B.C.C.A.A.A. No. 112 (Hope), ¶ 37
[3] *Alcan Smelters & Chemicals Ltd.*, [1987] B.C.C.A.A.A. No. 112 (Hope), ¶ 39-40
[4] *Northwood Pulp and Timber Ltd.*, [1991] B.C.C.A.A.A. No. 42 (Munroe), ¶ 18. See also *Howe Sound Pulp and Paper Ltd.* [2014] B.C.C.A.A.A. No. 23 (Hall), ¶ 7
[5] See *Pope & Talbot*, [2006] B.C.C.A.A.A. No. 224 (Hope), ¶ 106 and 135; *School District No. 57 (Prince George) and I.U.O.E., Local 858*, [1977] 1 C.L.R.B.R. 45 (BC)
[6] *Eurocan Pulp and Paper Co., Local 298*, [2006] B.C.C.A.A.A. No. 248 (Ready), ¶ 18

[13] The discussion process after employer notice and the accompanying employer commitments were relied on by Arbitrator Hall to conclude the notice obligation in Article XXV(a) should be construed broadly without implying limitations.

> The provision contains a vital (and joint) commitment "to provide as much maintenance and repair work as possible to the regular maintenance work force". To this end, the Joint Contracting Committee meets quarterly "to make recommendations regarding utilization of the mill maintenance work force *to minimize the use of contractors, both inside and out of the mill*" (italics added). ….
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> I accordingly find that the Employer's notice obligations under Article XXV(a) should be construed broadly, in keeping with the ordinary meaning of the language and the stated intent of the parties. At the same time, it is important to observe that notice does not provide any assurance to the Union that the work in question will be assigned to its members. Its counsel properly concedes that the character of the services to be provided by a contractor, and the ability or availability of bargaining unit members to provide the services, are subjects for the discussion which follows notice. And, at the end of the discussion, the Collective Agreement does not prohibit contracting out except as proscribed by Article XXX(b) and (c): ….
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> *********
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> The provision refers only to "contractors" with no express limitation in terms of factors such as: the nature of the work to be performed; ownership of equipment, machinery or tools; whether the contractor is consulting or doing "hands on" work; or some other qualification. For instance, there is no restriction in the language based on "historical work" or "work normally done by employees". Nor does the wording indicate the opportunity for discussion should be confined to circumstances where work can be "clawed back" for assignment to mill crews as the Employer posits. Such a conclusion would be inconsistent with the outcome in *Eurocan*, where the employer was obliged to provide notice even though it did not have various pieces of equipment to do the work in-house. [7]

[14] What is the nature of the notice, which arbitrators have decided must be in writing? In deciding an employer notice was inadequate, Arbitrator Ready wrote:

> The case law is clear and establishes what constitutes proper notice or notification under this Collective Agreement. The Employer is required, at a minimum, by the operation of Article XXV to provide written notice to the Union, through the Joint Contracting Review Committee. Such notice must be "timely" (i.e., during the decision-making process, prior to the work being done) and "sufficiently complete" (i.e., the information includes the type and nature of work to the extent that the Union will be able to "express its views" and "attempt to persuade" the company).[8]

In summary, the notice must provide the union with an opportunity to “have meaningful discussion and informed input via the Joint Contracting Committee.”[9]

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[7] *Howe Sound Pulp and Paper Ltd. (Contracting Out Grievance)*, [2014] B.C.C.A.A.A. No. 23 (Hall), ¶ 19-20; 16

[8] *Eurocan Pulp and Paper Co. (Contracting Out Grievance)*, [2009] B.C.C.A.A.A. No. 62 (Ready), ¶ 37

[9] *Eurocan Pulp and Paper Co., Local 298*, [2006] B.C.C.A.A.A. No. 248 (Ready), ¶ 21

[15] Arbitrators Ready and Korbin have decided an employer may give an annual or general notice for repetitive work provided the notice gives the union adequate information.[10]

4. Union and Employer Submissions

[16] The union submits the work on the two days could have been performed by different employees of the employer and should be treated as two instances of contracting even if it is one job performed over two days. It submits this approach is consistent with the purpose of agreed notice.

[17] The union submits under a permitted annual or general notice of repetitive work intended to be performed by contractors each work instance is separate and not aggregated as one instance. The practical purpose is to avoid a proliferation of notices. This was the approach of Arbitrator Korbin in 2006 awarding $500 damages, not the $5,000 the union sought, for each of fourteen instances when the employer had not given general or any notice.

[18] The union submits this should be the starting point for this failure to give notice because it best recognizes the importance of contracting out for the union and protects the value and purpose of employer notice. It prevents aggregation of notice failure for separate instances into a single instance of failure to give a general notice. It recognizes the union lost the opportunity to persuade to have all or part of the work done by bargaining unit employees.

[19] This approach will construe the notice requirement broadly and not imply an exception. Without notice the union lost the opportunity to persuade the employer to lease a bobcat to be operated by a bargaining unit employee on both or either days.

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[10] *Eurocan Pulp and Paper Co., Local 298*, [2006] B.C.C.A.A.A. No. 248 (Ready). Among other things, Arbitrator Ready decided it can be implied the language is to be given a practical and common sense meaning that allows the employer to "… provide annual or general notice of contracting out of work that is repetitive in nature without violating Article XXV provided that the scope and details of the work are sufficient for the Union to have meaningful discussion and informed input via the Joint Contracting Committee. Further, I agree with the Union that the Employer is required to provide additional or subsequent notice to the Union should the nature or scope of the contract or work change in any material way." (¶ 21) In *Eurocan Pulp and Paper Company (Contracting Out Notice (Stores))*, unreported, June 22, 2006 Arbitrator Korbin wrote: "The function of general notice is clearly to provide a practical solution to what would otherwise be a requirement to issue a proliferation of notices identifying the same (or very similar) contracting out that continues over a period of time." (p. 8)

This is a principled approach that does not permit an employer failure to give notice to be minimized by treating instances of contracting as fewer than the occasions the contractor performed work. It does not assume what the notice might have contained and give the employer the benefit of a self-serving characterization of the nature and content of notice it did not give.

[20] The union submits, in the absence of notice with a detailed scope of work to be performed, each attendance by a contractor at the mill must be treated as a separate performance of work. To do otherwise erodes the scheme of the agreement and the union's opportunity right by attributing an intention for a scope of work when none was identified at the time. Treating separate attendances in the absence of a notice as separate instances reinforces the agreement to notify and the union's lost opportunity for timely persuasion that all or some of the work be done by bargaining unit employees.

[21] It follows, the union submits, that there should be an award of damages for each of the two instances. The amount of damages for the loss of opportunity to persuade for each should be "enough to encourage the employer to honour its commitment" in the future.[11] It must not be assessed from the perspective of the wrongdoer.[12]

[22] The union submits the amount of damages should reflect both the importance of lost opportunities to persuade and a contemporary value, not the amount awarded by arbitrators in bygone decades.[13] Because the employer is well aware of the longstanding requirement to give notice, the damages for each instance should be no less than $2,000 and perhaps as much as $4,000 for each.

[23] The employer submits its failure to give notice is an administrative aberration. It gives approximately 700 notices per year and an active Joint Contracting Committee meets regularly. "During these meetings, the Union attempts to 'pull out' work from the proposed contracts that it considers its own tradespeople have the ability to perform."[14]

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[11] *Eurocan Pulp & Paper Company* [1990] B.C.C.A.A.A. No. 38 (Hope), ¶ 64
[12] *Burrard Yarrows Corporation, Vancouver Division*, [1981] B.C.C.A.A.A. No. 20 (Christie), ¶ 34-36
[13] E.g., *Burrard Yarrows Corporation, Vancouver Division*, [1981] B.C.C.A.A.A. No. 20 (Christie) - $750; *Eurocan Pulp & Paper Company* [1990] B.C.C.A.A.A. No. 38 (Hope) - $500; *Weyerhaeuser Canada Limited*, [1993] B.C.C.A.A.A. No. 388 (Kelleher) - $1,000; *Eurocan Pulp & Paper Company* [2000] B.C.C.A.A.A. No. 140 (Kelleher) - $2,500 for repeated failure; *Eurocan Pulp and Paper Co.*, [2000] B.C.C.A.A.A. No. 226 (Hope) - $3,500; *Coastline Forestry Group Inc.*, 137 C.L.A.S. 18 (Saunders), ¶ 66 - $2,000 as a "meaningful incentive to comply"
[14] *Cariboo Pulp and Paper Co.*, [2014] B.C.C.A.A.A. No. 73 (Lanyon), ¶ 74

[24] The employer does not rely on the proposition that the failed notice was general notice for recurring work. It submits the required notice that was not given was for "work" intended to be performed by a contractor. In this context, the common sense meaning is the work the contractor was asked to do, namely, clean the Powerhouse Basement floor. It is not something else that is parsed from the work, such as each day worked to complete the work. It is the one piece of work or job given to the contractor in one discussion the mill superintendent had with the contractor, which took two consecutive work days to complete.

[25] The employer submits the approach Arbitrator Hope took in 1990 describing the contracted-out work as the "work of fabricating the modified shaft assembly" contracted to a private machine shop.[15]

[26] The employer submits an interpretation of the "work" must be consistent within the collective agreement as a whole and not in insolation.[16] In the 1995 Code of Ethics letter in the collective agreement which is agreed to apply to contractors, "work" has a broad meaning. It is not narrowly defined or parsed into daily or other components. This is the manner in which work was described by an employer in 2001 which contracted out "cleaning of the settling ponds." The union argued it was "operating pumps, loaders and trucks." Arbitrator Kinzie determined the proper factual description that dispute was "cleaning of the settling ponds" which had been treated as "one overall job", namely effluent basin cleaning, not operation of pumps and loader and driving trucks.[17]

[27] Similarly, the employer submits, a dispute over work and the Code of Ethics Letter in 2011 revolved around the description of the work. Arbitrator Brown did not agree with the employer that producing hot water to clean precipitators during a shutdown was a separate component of work from cleaning the precipitator. The employer was seeking to parse out or narrowly define a task within the work.[18] In upholding the grievance, he agreed with Arbitrator Germaine, who considered cleaning the spill basin as a whole when accepting a global approach to defining "work" protected

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[15] *Eurocan Pulp & Paper Company* [1990] B.C.C.A.A.A. No. 38 (Hope), ¶ 2
[16] *Eurocan Pulp and Paper Co.*, [2001] B.C.C.A.A.A. No. 222 (Kinzie), ¶17
[17] *Eurocan Pulp and Paper Co.*, [2001] B.C.C.A.A.A. No. 222 (Kinzie), ¶ 31
[18] *Cariboo Pulp & Paper Co.*, [2011] B.C.C.A.A.A. No. 88 (Brown)

by contracting out language.[19] This was consistent with the approach Arbitrator Munroe took in 1990 that large and small project should be treated as an indivisible piece of work.[20]

[28] The employer submits the Powerhouse Basement cleaning work was an indivisible piece of work requiring a single notice. The fact the union filed two grievances for work on the two consecutive days to complete the work does not make it divisible or make each day a separate contracting instance.

[29] The employer submits for the union to establish the work for which notice was not given is something other than the job given and performed by the contractor, it must establish there was an intention to have work performed on two separate days. The agreed facts support an intention to have work performed on December 29, but not on a separate second occasion on January 2.[21]

[30] The employer submits there is no formulaic method to determine the appropriate amount of damages. There was one piece of work that took two consecutive days to complete, one lost opportunity for the union and one contravention of Article XXV(a). Restraint should be exercised in assessing damage in the facts and circumstances of this failure to give notice, which are the employer's admission; contracting out only two days' work; the employer's bobcat not functioning; no malevolent employer intention; the sophisticated relationship under the collective agreement; and the hundreds of notices the employer gives each year.

5. Discussion, Analysis and Decision

[31] This is a situation of admitted employer failure to notify. It is not a circumstance of alleged untimely or inadequate notification or any employer attempt to elude the obligation to notify or excuse the failure to notify. The employer unreservedly admits its contravention of Article XXV(a).

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[19] *Cariboo Pulp and Paper (Code of Ethics– Spill Basin Cleaning)*, unreported, June 29, 2010 (Germaine)
[20] *Lafarge Canada Inc.*, [1990] B.C.C.A.A.A. No. 298 (Munroe) (rebuild of a kiln was a job, which for practical purposes is indivisible). See also *Cariboo Pulp & Paper Co.*, [2012] B.C.C.A.A.A. No. 49 (McPhillips) (Code of Ethics Letter applied to contractor assisting bargaining unit employees put out a chip pile fire, which was maintenance and repair work); *Toronto Transit Commission*, [2015] O.L.A.A. No. 369 (Slotnick); *Co-Steel Lasco (Contracting Out Grievance)*, [2001] O.L.L.A. No. 114 (Cummings)
[21] See *Boise Cascade Canada Ltd.*, [1989] O.L.A.A. No. 26 (Brown), ¶ 16 (contractor performance of bargaining unit work was not intended by employer: no intention, no breach)

[32] In the face of this admission, the union seeks to multiply the damages payable by multiplying the admitted failure into more than one failure. It looks beyond the employer's obligation to notify of its "intention to have work performed by contractors in the mill" to the number of times the contractor attended at the mill to complete the work.

[33] The union's two grievances identify two calendar days it says required two notifications. This approach seeks to double the employer's admission of a single failure to notify into two failures. The claim is for compensation for two contraventions of the collective agreement. The claim does not escalate the amount of compensation for the second "repeat" contravention. The same approach would triple or quadruple or further multiply the single employer admission if the contractor took three or more days to complete the contracted work.

[34] There is no collective agreement definition of "work" in Article XXV(a). There is no evidence of the nature or content of employer notifications accepted by the union or Joint Contract Committee over the years as appropriate notification contemplated by Article XXV(a). There is no evidence the union previously insisted on or the employer gave multiple notifications when a contract with a contractor to perform work in the mill would take more than one day to complete the work.

[35] The mutual intention of the notification of "work" the employer intends to have performed in the mill by a contractor must be determined using the rules and approach generally applied by arbitrators to interpret collective agreement language[22] and particularly that of arbitrators who have interpreted the language of Article XXV in this and other pulp and paper industry collective agreements.

[36] The pragmatic, common sense scope of work for which notification must be given is the scope of work the employer is paying the contractor to perform. It is not the task or bundle of tasks that must be performed to complete the contracted work. It is not the number of shifts, hours, days or weeks it will take the contractor to perform the contracted work. It is, as the employer describes it, the overall job the employer intends to have the contractor do in the mill or, in this case, the actual job the employer had the contractor perform.

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[22] See *Pacific Press*, [1995] B.C.C.A.A.A. No. 637 (Bird); *Lakes District Maintenance Ltd.*, [2012] B.C.C.A.A.A. No. 91 (Keras); *Catalyst Paper (Elk Falls Mill)*, [2012] B.C.C.A.A.A. No. 73 (Hall)

[37] In another circumstance, if the employer's notification of the work is for a scope of work that is less than the scope performed by the contractor, the union will grieve the notification was misleading and an inadequate or improper notice. The union did not have the information it required to examine the intended contracted out work and to express an informed view in an effort to persuade the employer to have the work done by bargaining unit employees.

[38] In that circumstance, the fact the contractor took more or fewer days to complete the notified scope of work does not affect the notification because any unforeseen intervening event or an incorrect estimation of the time to complete the job will not be a failure in the adequacy or propriety of the notice.

[39] It follows that what is not a failure in the sufficiency of notice with the benefit of hindsight after the job is completed cannot require additional notices when no notice is given.

[40] Similarly, while tasks may be determined to be discrete work or an integral part of an indivisible piece of work, performing the same tasks on separate days to complete a job has no similar discrete characteristic.

[41] This perspective confirms that notice with a sufficiency of information to fulfill the consultative purpose for which the language was mutually agreed does not require repetitive notices for a single job because it takes a contractor more than one work day to complete the job. It is the notification of the scope of the work, not the time it takes to complete a single job, that it is agreed the employer is obliged to give. With hindsight, after completion of the work, the union's two grievances mistakenly substitute the number of days the contractor performed work in the mill for the "work" the employer intended the contractor to perform and which the contractor performed – cleaning the Powerhouse Basement floor.

[42] I conclude the employer failed to give a single notification for a single job of work, cleaning the Powerhouse Basement floor, which was completed in two consecutive work days. There was one, not two, failures to notify contrary to Article XXV(a). One of the grievances is allowed and one is dismissed.

[43] In the collective agreement, there is no agreed amount of compensation to be paid by the employer to the union for failure to notify. In the absence of agreement, the amount of compensate is for the union's lost opportunity, not to punish the employer.

[44] In the context of an ongoing relationship in the administration of a collective agreement, the public policy and *Labour Relations Code* purpose of fostering harmonious workplace labour relations between employees represented by a trade union and their employer supports a compensation amount that will discourage repetitious employer contraventions of the collective agreement or, as some arbitrators have said, will incentivize compliance with the agreement.[23]

[45] Consistent with this, the amount of compensation for a union's lost opportunity cannot be nominal and must be substantial if it is to provide an incentive to comply. The amount should also have a role in promoting conditions favourable to the resolution of grievances without proceeding to arbitration. The compensation amount should not be disproportionately low compared to the cost of arbitration and discourage unions from advancing grievances to arbitration or disproportionately high so that proceeding to arbitration is a reasonable or defensible financial risk for the employer.

[46] Repeat failures to notify should attract an escalating amount of compensation both as both an incentive for compliance and an incentive to resolve grievances.

[47] In the circumstances of this first employer failure to notify on a single instance with no suggestion of employer bad faith in the administration of the contracting clause and an active Joint Contracting Committee, I determine the appropriate amount of compensation to order under section 89(a) of the *Labour Relations Code* for the employer's failure to comply with Article XXV(a) is $2,000. I order the employer to pay $2,000 to the union within one week of the date of this decision.

FEBRUARY 15, 2019, NORTH VANCOUVER, BRITISH COLUMBIA.

James E. Dorsey

James E. Dorsey

[23] For a recent decision see *Coastline Forestry Group Inc.*, 137 C.L.A.S. 18 (Saunders), ¶ 65