IN RE THE MATTER OF AN ARBITRATION
UNDER THE B.C. LABOUR RELATIONS CODE

BETWEEN:

BRITISH COLUMBIA PUBLIC SERVICE AGENCY

(the "Employer")

AND:

BRITISH COLUMBIA GOVERNMENT AND SERVICE EMPLOYEES UNION

(the "Union")

AWARD

(Slater Grievance)
(Chan Grievance)

Board of Arbitration	Robert Diebolt, Q.C.
Counsel for the Employer	Denise Pritchard
Counsel for the Union	Patrick Dickie and Michael Shapiro
Place of Hearing	Vancouver, B.C.
Dates of Hearing	December 7, 8 and 15, 2015
Date of Award	January 2, 2016

I. INTRODUCTION

This arbitration concerns two grievances filed by the Employer. The parties agreed to consolidate the Slater grievance and the Chan grievance into one hearing. They further agreed that I am properly constituted as a board of arbitration with jurisdiction to hear and determine the matters in issue.

Ms. Theresa Slater was disabled in a motor vehicle accident March 4, 2003. Pursuant to the Collective Agreement she received Short Term Illness and Injury Plan ("STIIP") benefits until they expired and then began to receive Long Term Disability ("LTD") benefits, which will continue until her retirement. Subsequent to the accident Slater commenced an action seeking damages arising from the accident. The claim settled prior to trial and the Insurance Corporation of British Columbia ("ICBC") paid the settlement amount to Slater's counsel who, after deducting agreed legal fees and certain other amounts, paid the balance to Slater.

Ms. Lisa Chan was also involved in a motor vehicle accident November 19, 2006. Pursuant to the Collective Agreement she received STIIP benefits for a period and then returned to and continues in full-time employment. She also commenced an action seeking damages that settled prior to trial. ICBC paid the settlement to her counsel who, after deducting certain amounts, paid the balance to Chan.

Some years later the Employer initiated the Slater and Chan grievances, seeking monetary awards against these employees. They did so relying on the integration and subrogation provisions in Appendix 4 of the Collective Agreement. These provisions, as they relate to STIIP, provide in part in Article 1.5:

> Notwithstanding the above, where an employee makes a successful wage loss claim against a third party for an injury for which the employee received or would receive STIIP benefits, the Employer will be entitled to recover or decrease Plan benefits by an amount equal to the amount that Plan benefits in combination with the wage loss claim paid exceed 100% of pay.

Article 2.6 of the contract language relating to LTD benefits reads in part:

> Notwithstanding the above, where an employee makes a successful wage loss claim against a third party for an injury for which the employee received or would receive LTD benefits, the Employer will be entitled to recover or decrease Plan benefits by an amount equal to the amount that Plan benefits in combination with the wage loss claim paid exceed 100% of pay subject to the following:
>
> (a) The amount of plan benefit recovered or decreased will be reduced limited to the legal fees attributed to the Employer's share of total claim recovery.
>
> (b) The existence of an action commenced by or on behalf of an employee does not preclude the Employer from joining the employee's action or commencing an action on its own behalf respecting the benefits paid.
>
> (c) Where the Employer or the employee intends to commence or join such an action, they shall advise the other in writing of that intention.

There is no counterpart in the STIIP language to that in the above quoted paragraphs (a), (b) and (c) of the LTD language. Article 1.5 is silent respecting the matters addressed in those paragraphs.

The essential underlying principle of the integration and subrogation provisions is to prevent an employee from reaping a windfall by receiving more from STIIP, LTD and a successful wage claim than the employee would have received from total wages had the accident not happened.

II. SLATER GRIEVANCE

A. BACKGROUND

Slater's motor vehicle accident occurred March 4, 2003. She subsequently received STIIP benefits for the duration of the six-month entitlement under the Collective

Agreement. On September 15, 2003 she applied for and subsequently began to receive LTD benefits that will continue until her retirement at age 65. Slater is presently 63 years of age. In addition, Slater retained Ms. Deborah Acheson Q.C. to pursue an action for damages against the driver of the other vehicle.

By letter dated March 30, 2004 the Employer wrote Slater a standard form letter. The letter referenced the integration and subrogation requirements of the Collective Agreement, enclosed a copy of the contract language, and stated "This means that if the wage loss proceeds from your ICBC settlement plus your disability benefits equal more than 100% of your base pay, the Government is entitled to recover this excess (up to a maximum of your disability benefit amount)". Earlier in the text the letter stated that it was "…your duty to proceed in good faith and fully account for any disability income that you receive in relation to your injuries".

By letter dated September 23, 2004 Mr. Tony Raymond, on behalf of the Employer, wrote to Ms. Gail Sykes, then a senior paralegal in Acheson's firm. The letter stated in part:

> This letter is to ensure you are aware of the integration/subrogation under the collective agreement. This means where an employee makes a successful claim for wage loss against a third party for an injury for which the employee received or would receive benefits, the BC Provincial Government shall be entitled to recover or decrease benefits by an amount equal to the amount that benefits in combination with the wage loss claim paid exceed 100% of pay.
>
> We trust that, in good faith, you will ensure that our subrogation rights are considered when settling this claim. We would point out that, according to the collective agreement and arbitral jurisprudence, the Province is under no obligation to pay legal fees on our subrogated interest; however, it is our practice to exercise discretion with regard to this issue. As per your request I have included pages from the collective agreement and highlighted the articles that apply. I also included the GST sheet that I spoke of.

Pausing here, the second of the above quoted paragraphs is facially incorrect in one respect. It incorrectly asserts the Province is under no obligation to pay legal fees,

whereas the LTD component of the integration and subrogation language does take into account legal fees as set out in paragraph (a) quoted in the Introduction of this Award.

By letter dated December 13, 2004 Acheson wrote the Employer, addressed to the attention of Raymond. The body of the letter stated:

> Thank you for your correspondence of September 23, 2004 which I have reviewed with my client.
>
> My client is prepared to agree to instruct me to protect her subrogated interest so long as you recognize that any recovery I make on her behalf will be subject to legal fees in accordance with the fee agreement attached herewith, and so long as the application of the appropriate provisions which you provided with your letter are done in such a way as to take into account the fact that the "net in her pocket" will reflect the payment of legal fees.
>
> I assume this is agreeable to you and will conduct myself accordingly.
>
> If you have any issue with this letter, or require clarification, please do not hesitate to contact me.

The attached fee agreement set out a fee of 33 1/3 % of all money recovered. Acheson's letter proposed treatment of legal fees according to common law principles, not the more limited contractual fee structure set out in Article 2.6 (a). Acheson testified that her treatment of legal fees in her December 13 letter was consistent with her past practice, including past dealings with the Government of British Columbia respecting government employees.

At this time, another Employer representative, Ms. Brenda Johnson, had assumed primary responsibility for the Slater file and was aware of Acheson's letter. In cross-examination Johnson acknowledged that she understood it was addressing legal fees pursuant to the common law doctrine of subrogation (under which the entire amount of legal fees paid by an insured are deducted before determining the subrogated interest), not the more limited formula in Article 2.6 (a). She also acknowledged that she knew Acheson was pursuing Slater's claim on the common law basis.

Johnson did not respond in writing to Acheson's December 13, 2004 letter. On March 30, 2005 she left a telephone message for Acheson concerning legal fees. Her note of that message is set out in the Employer's DDMA electronic journal. Her note makes no mention of the treatment of legal fees on a common law basis. The note reads:

> I called and left a message for Deborah Acheson, lawyer, 384-6262, regarding dec 13/04 letter advising clientslegal fees are 33 1/3 %. (Need to negotiate due to STIIP language).

As she acknowledged in cross-examination, Johnson did not follow up after this message. She did not telephone or write Acheson respecting the treatment of legal fees. Johnson testified that she expected Acheson to call, given the letters sent to her firm in 2005 and 2006.

The Employer subsequently sent a number of standard form letters to Acheson's firm. Two such letters, one dated August 26, 2005 and the other dated August 30, 2005, were marked to the attention of Sykes, Acheson's paralegal. The third, dated September 25, 2006 was addressed directly to Acheson. These letters provided and updated data respecting wage loss and the amounts of STIIP and LTD benefits. Each of these letters contained the following paragraph:

> Please be advised that the Province is not obligated to pay legal fees on its share of the short-term disability settlement proceeds, according to the collective agreement and arbitral jurisprudence. However, discretion on this issue has been applied in the past and, in view of my assumption that you are proceeding in good faith, I would be pleased to discuss the issue with you.

Johnson agreed this passage did not address the difference between the common law scheme and the contractual scheme in the Collective Agreement.

Acheson continued to pursue Slater's claim. The initial claim was for $794,000. Of that total $323,000 was for loss of future income and $188,000 was for cost of future

care. The parties subsequently engaged in mediation and settled the claim March 26, 2007. For part of the mediation the parties exchanged proposals on the basis of numerical values attached to individual heads of damage. Acheson's mediation notes which were introduced into evidence indicate that at one point Slater was proposing $101,300 for past wage loss, $290,000 for loss of future income and $125,000 for cost of future care. In contrast the defendant's proposals were $101,300 for past wage loss, $125,000 for loss of future income and $50,000 for cost of future care. Acheson testified that past wage losses were agreed early in the mediation. Later, the notes indicate the plaintiff proposed $250,000 for future wage loss and $100,000 for future care, while the defendant proposed $150,000 for future wage loss and $50,000 for future care. The notes end at that point.

At some point the parties moved from negotiating on the basis of numbers attached to individual heads of damage to a global negotiation. Acheson said that often happens when the parties cannot agree. Ultimately they settled on the basis of a global settlement that did not allocate values to individual heads of damage. The minutes of settlement were adduced at the hearing. They were signed by Slater, Acheson, defence counsel, an ICBC representative and the mediator. The printed form of minutes set out heads of damage and corresponding fields for monetary amounts respecting: Special Damages; Past Income Loss; Future Income Loss; General Damages; Interest, and Other. None of the monetary fields was completed. Only the field opposite Total Payment was filled in. The sum of $485,000 appears accompanied by a notation "all inclusive new money".

Acheson testified that $150,000 should be attributed to loss of future income. She said her mediation numbers were proportionate and that, because Slater's

disabilities were significant, in mediation she had been arguing for an increase in the defendant's $50,000 proposal for cost of future care.

An ICBC electronic file note adduced at the hearing recorded a different allocation. It reads in part:

> SETTLED AT MEDIATION, WE HAVE A FINAL RELEASE FOR TORT AND PART 7 ON FILE
>
$ 90,000.00	NON PECS
$101,300.00	PAST NET WAGE LOSS
$ 13, 000.00	PAST SPECIALS, DISCOUNTED MAIR EDWARDS
$195,700.00	FUTURE INCOME LOSS
$ 50.000.00	FUTURE CARE COSTS
$ 10,000.00	COSTS
$ 25,000.00	DISBURSEMENTS
$ 485,000.00	TOTAL ALL INCLUSIVE

Acheson disagreed with the above allocation. She testified that once the parties leave the table, ICBC attributes funds as it wishes and that the attribution doesn't necessarily bear any relation to the discussions at the mediation table. Further, her evidence was that ICBC would not move on future wage loss at the mediation. In her words, ICBC's allocation was not "what happened" at the table.

Returning to the chronology, by letter to the Employer dated March 26, 2007 and marked to the attention of Johnson, Sykes informed the Employer of the settlement and advised Johnson she would not be required as a witness at trial. By letter dated March 28, 2007 to Great West Life, the Employer's benefits administrator, Acheson described the settlement in the following terms:

> This is to advise you that this matter was mediated on March 26, 2007 and the matter has now settled.
>
> Ms. Slater recovered the amount of $101,311.77 with regard to her past income loss. In deducting fees at 33 1/3%, ($33,736.82) and taxes of 13% ($13,170.53) her net recovery for past income loss amounted to $54,404.32. Long term disability benefits amounted to $65,041.74, representing a total amount recovered

> of $119,446.06. Total income lost was $124,409.61. Accordingly, she has not recovered more than her wage loss, and nothing is owed to you.
>
> With respect to future loss of capacity, Ms. Slater recovered $150,000. After fees and disbursements as set out above, the net amount recovered under this head of damage is $80,550.00.
>
> The total settlement amount was $485,000.00. A copy of the Minutes of Settlement is enclosed. This amount was calculated as follows:
>
> | | |
> |---|---|
> | Pain and Suffering: | 90,000.00 |
> | Cost of Future Care: | 95,688.23 |
> | Past Wage Loss: | 101,311.77 |
> | Past Special Damages: | 13,000.00 |
> | Costs and Disbursements: | 35,000.00 |
> | TOTAL: | $485.000.00 |
>
> I trust this is satisfactory.

Acheson paid out the net settlement March 29, 2007. Her Statement and Account for services rendered was adduced at the hearing. It recorded a total settlement of $485,000. Following a number of deductions including fees, taxes and disbursements, the statement recorded a net total of $268,350.33, that $267,545.61 was paid out and that a balance of $805.06 was payable.

On March 29, 2007Johnson made an entry in the DDMA log which stated:

> Letter rec'd from Gail Sykes advising this matter settled and asking if I have any additional bills. I called Gail and asked her to fax settlement information (she says she faxed to GWL). Rec'd fax advising matter settled for $485,000 broken down $90,000 pain & suff, $95,688.23 cost of future care, $101,311.77 past wage loss, $150,000 future loss of capacity, past special damages $13,000, $35,000 costs and disbursements. Legal fees are 33 1/3%. Their position is that she had not recovered more than wage loss; therefore nothing is owed. Minutes of settlement show "All inclusive New Money" signed March 26/07. I left a message on Gail's voicemail that we require a copy of the statement of claim in order to determine our subrogated interest and that I couldn't agree to Deborah's position that we had no subrogated interest until I have reviewed all of this information. I also asked if there was any position ICBC took with regards to the wage loss.

By letter dated April 5, 2007 Johnson wrote Acheson. The body of the letter reads:

Thank you for your letter of March 26, 2007 advising that the above claim settled past wage loss for $101,311.77. As you know the employer has a subrogated interest in past wage loss settlement proceeds pursuant to the plan language.

The following calculations outline a satisfactory settlement consistent with your client's obligations (see attached calculation sheet):

Past Wage Loss	$101,311.77
Employer paid STIIP/LTD (net)	$73,901.23
Total Recovery	$175,213.00
Actual wage loss (net)	$107,999.17
Difference between Actual wage loss and recovery	$68,013.83
Less legal fees	$22,669.01
PST	$1,586.83
Employer's Interest	$43,757.99

At this time, I confirm that a cheque in the amount of $43,757.99 payable to the BC Public Service LTD fund, and sent to this office, will fully discharge the Province's interest in this matter.

Thank you for your advice regarding the amount of the futures: We will advise you of the employer's interest shortly.

I look forward to a speedy resolution of this matter.

By letter dated May 16, 2007 Acheson replied to Johnson. The body of this letter reads:

Thank you for your correspondence of April 5, 2007. Unfortunately, our initial letter to you was incorrect, and there are grave errors in your calculations.

Allow me to re-state them correctly:

Past Wage Loss Claim	$143,000.00
Past Wage Claim net of taxes	$101,311.77
Recovery at 50%	$ 50,655.89
Less legal fees at 33 1/3%	$ 16,868.41
Less GST/PST	$ 2,192.89
Net Past Wage Loss	$ 31,594.59
Employer Paid STIIP (per your last communication to us)	$65,041.74
Total amount recovered therefore	$96,636.33
Claim for loss of income	$144,721.10

On the basis of this analysis a total recovery is less than total loss.

You are not entitled to work from the client's net wage loss. In your calculation, your formula does not permit this as I understand it, nor should it. It would be entirely unfair to the client. You have to allow legal fees on the whole amount recovered and in addition to that, you have also to allow for the costs and disbursements incurred by the client with respect to those headings not covered. I have not taken the time to isolate this factor to you as it appears to me it is unnecessary to do so.

Given the position you are taking I think I should further elucidate you with respect to this client's claim. Her overall claim was as follows:

Pain and suffering	$125,000.00
Income loss	$101,311.77
Loss of opportunity	$323,000.00
Cost of Future Care	$188,000.00
Special Damages	$ 17,287.75
Costs of Disbursements (at the point of mediation)	$ 40,300.00
TOTAL	$794,899.52

Because of significant issues relating to her pre-accident health and issues about her inability to work; the fact that this was a jury trial, and the fact that there was an intervening work injury, in the final analysis the claim was settled for a total of $485,000.00, or for approximately a 50% reduction in the overall value of her claim. So actually her recovery on wage loss was around $50,000 before legal fees.

When I wrote you initially I did not bother to get into all this detail because it seemed to me that she was well below the level at which she would owe you any money in any event, but if you are going to try and advance the position that you are entitled to work from a net income loss rather than a gross income loss, I will point out to you that given her recovery on all heads of damages was approximately 50% then you should treat her as only having recovered $50,000 with respect to the wage loss.

You provide an insurance which this client pays for through her benefits and is entitled to access. I hope when you have had an opportunity to reflect on this further information you will revise you position.

I would be happy to discuss this matter further with you as over many years I have had a good relationship with the various British Columbia Government Agencies with respect to analysis of this type of claim and have frequently been involved in significant paybacks in those cases where significant recoveries have been made.

I look forward to hearing from you.

The Employer did not write a reply to this letter. Johnson did not have responsibility for the Slater file at that juncture. It had been transferred to another employee named Rob, a senior labour relations employee trained as a lawyer. Johnson could provide no explanation for the lack of a response. In cross-examination she

agreed the letter communicated the position that no monies were owed. She also acknowledged that, had she then had responsibility for the file, she would have replied to it at some point.

Slater testified about a number of matters. She was present at the mediation but Acheson conducted the negotiation. Following the settlement, Slater said she attended Acheson's office where the two reviewed and discussed Acheson's previously quoted March 28, 2007 and May 16, 2007 letters. Her evidence was that Acheson said that after doing the calculations she believed there would be no monies owing or that it "may come to a couple of thousand dollars or so if anything came of it". She said she followed up with calls and emails to Sykes shortly after the settlement and again a year later. Sykes, she said, advised her there was no indication that she owed any money.

Asked what happened with the settlement monies, Slater testified it was all spent by 2009. Bank records, adduced at the hearing, supported her evidence that the settlement monies were exhausted by 2009. The bank entries and her testimony established the monies were expended for a variety of purposes. They included: payments of existing debts; necessary house repairs; discretionary house expenditures, family holidays; an automobile purchase for her; an automobile purchase for a child; and a gift to an adult child.

Slater's evidence was that she had not believed she owed the Employer any money. Asked whether she would have done anything differently had she known the Employer was asserting a claim, her answer was yes. She said she would not have gone on trips, would not have made some of the home expenditures and would have bought a cheaper car for her daughter than the one for which she paid $53,000.

The Employer did not challenge the evidence that the settlement money was exhausted by 2009 or the evidence respecting the types of expenditure. It did however contest its relevancy, as noted later in the Award.

Turning to the couple's financial circumstances, Slater said her 62 year old husband works for a bus company at the hourly rate of $21. She has an RRSP account in the approximate amount of $48,000. The couple own a house with an assessed value of $702,000, against which there is mortgage on which was owed $597,308.99 as of November 27, 2015.

Moving forward in time, the Employer filed a grievance dated October 10, 2010. It states in part:

> The Employer has attempted but was unable to determine and recover any of the wage loss money to date.
>
> It is the Employer position that the Employee owes to the Employer repayment of already paid and/or to be paid:
>
> 1. Past wage loss:
> 2. Past wage loss from the date of settlement until the date of the grievance:
> 3. Future wage loss:

Subsequently a series of letters was exchanged between counsel for the parties concerning the extent of the Employer's claim. By letter dated May 21, 2015 Employer's counsel modified the Employer's claim. The letter stated in part:

> Withdrawal
>
> I write to advise you that the Employer does not intend to pursue its previous claim to past loss on the *R* (name anonymized) and *Slater* grievances, and that the Employer intends to withdraw the *P* (name anonymized) grievance on a without prejudice basis.

By letter dated July 10, 2015 Union counsel replied, stating in part:

> Withdrawal
>
> You advise that the Employer intends to withdraw the P (name anonymized) grievance on a without prejudice basis. Please confirm the withdrawal.

> You also advise that the Employer does not intend to pursue its previous claim to past wage loss on the R and Slater grievances. Please clarify whether you are referring to the claim for recovery of benefits paid prior to the date of civil settlement, or to the recovery of benefits paid prior to the grievance, or to some other date.

By letter dated July 29, 2015, Employer counsel replied, writing in part:

> Withdrawal
>
> With regards to the *R* (name anonymized) and *Slater* grievances, the Employer confirms that it will not pursue past the wage loss claim. Therefore, the date on which we will pursue the claim is 30 days before the filing of the grievances on October 6, 2010.

Employer counsel again wrote Union counsel. In a letter dated September 14, 2010 she wrote:

> I am writing further to our telephone call today advising that the Employer is providing an amendment to the particulars provided on the Slater Grievance on July 29, 2015.
>
> The Employer's position is that as Ms. Slater is in receipt of LTD Benefits, this is a continuing grievance. The Employer and the Union agreed on December 23, 2009, to hold a number of potential grievances, including this one, in abeyance. Those grievances were subsequently filed on October 5, 2010. Therefore, the date from which the Employer will pursue our claim for future wage loss is 30 days before the date of the abeyance, namely November 23, 2009.
>
> I have enclosed the documents that reference the abeyance agreed to by the parties.

Counsel for the Union replied by letter dated September 22, 2015, stating:

> I write further to your letter dated September 14, 2015 regarding the above-noted matter.
>
> I confirm the Union's position that the Employer's claim for the period prior to September 6, 2010 has been withdrawn. The Employer cannot now seek to extend the period of the wage loss claimed to November 23, 2009.

The foregoing narrative is not an exhaustive account of the evidence and further references are made to it later in this Award, but sufficient has been recounted to permit me to move to the next section of the Award.

B. THE PARTIES' POSITIONS

Both parties cited and relied on principles and rulings in a series of three arbitral awards interpreting and applying Articles 1.5 and 2.6 of the Collective Agreement. The first is *British Columbia Public Service Agency v. British Columbia Government and Service Employees' Union (Heinrich Grievance)*, [2009] B.C.C.A.A.A. No. 174 (McConchie). This award (referred to herein as *Heinrich #1*) addresses the principles of interpretation of the Collective Agreement language. The second is *British Columbia Public Service Agency v. British Columbia Government and Service Employees' Union (Heinrich Grievance)*, [2010] B.C.C.A.A.A. No. 107 (McConchie). This award (referred to herein as *Heinrich #2*) settled the method, or formula, for calculating amounts owing or to be owed under the contract language. The third is *British Columbia Public Service Agency v. British Columbia Government and Service Employees' Union (Heinrich Grievance)*, [2010] B.C.C.A.A.A. No. 120 (McConchie). This award (referred to herein as *Heinrich #3*), addresses timeliness issues.

Commencing with the Employer's essential position, it submitted that STIIP benefits paid and LTD benefits paid and payable under the Collective Agreement, combined with Slater's wage loss settlement in her civil claim, exceed the wages she would have earned had there been no accident. Accordingly, absent timeliness issues addressed below, the Employer submitted Articles 1.5 and 2.6 would entitle it to recover STIIP benefits paid, LTD benefits paid, and to deduct monthly amounts from LTD benefits payable in the future.

The Employer did not seek to recover the STIIP benefits paid or LTD benefits that were paid prior to November 23, 2009. It conceded timeliness issues, addressed in *Heinrich #3*, precluded recovery of these benefits. It limited its claim, therefore, to

recovery of LTD benefits paid from November 23, 2009 to December 1, 2015 and to the right to deduct monthly amounts from LTD benefits payable from December 1, 2015 to August 31, 2017.

The Employer calculated its entitlement by inserting numerical values into the formula prescribed in *Heinrich* #2. In particular, it assigned $197,500 to future wage loss, asserting that amount is properly attributable to wage loss in the global settlement of the civil action. Two other aspects of its calculation require notation. With respect to legal fees, the Employer applied Article 2.6 (a), deducting them from only the Employer's portion of the wage loss settlement. Second, it included a claim for recovery of LTD benefits paid in the period from September 23, 2009 to September 6, 2010. As the factual background recounts, these aspects of the calculations are disputed. It is not necessary at this juncture to identify other disputed areas.

The result of the Employer's calculations, partially summarized, yielded the following claims. For the period from November 23, 2009 to December 1, 2015, the Employer submitted it was entitled to the sum of $31,185.16 respecting LTD benefits paid. With respect to the period from December 1, 2015 to August 31, 2017, it seeks to deduct the monthly sum of $431.51 from LTD benefits paid or to be paid.

Turning to the Union, it advanced a number of positions. Its primary position was that the Employer was estopped by its conduct from advancing any part of its claim against Slater. The Union submitted Acheson's May 16, 2007 letter communicated that Slater owed no monies to the Employer and generated an obligation to respond, an obligation the Employer did not fulfill. That failure to respond, it submitted, coupled with the Employer's failure to advance a claim for three and one-half years thereafter, constituted a representation that no monies were owing or, alternatively, that the

Employer would make no claim. The Union submitted Slater detrimentally relied on that representation by spending settlement monies she would not have spent had she known the Employer disputed Acheson's communication that no money was owed.

The Union also advanced a second estoppel position. It submitted the Employer was estopped by its conduct from relying on the contractual method of deducting legal fees in Article 2.6 (a). It relied on Acheson's December 13, 2004 letter proposing to deduct legal fees from the entire wage loss settlement in accordance with common law principles, submitting the Employer was obliged to respond. The Employer's failure to respond to the letter, submitted the Union, constituted a representation that its subrogated interest would be net of legal fees. It asserted Acheson and Slater relied on that representation to Slater's detriment: by agreeing to protect the Employer's subrogated interest; by negotiating a settlement of the civil suit on the basis that the Employer's interest would be net of legal fees, and by Slater arranging her finances and life on the basis that there would be no monies owing. Accordingly, the Union asserted that the Employer was estopped from asserting that legal fees should be deducted on the contractual basis in Article 2.6 (a).

As a variant of the second estoppel position, the Union's submitted the Employer contracted with Acheson and with Slater, as represented by Acheson, that its subrogated interest would be net of legal fees as set out in Acheson's December 13, 2004 letter. More specifically, it submitted they agreed legal fees would be deducted from the entire wage loss settlement on the basis of common law principles, not the contractual principle set out in Article 2.6 (a). The Union reasoned that the contract was formed in the following way. It said Acheson's letter constituted an offer to protect the Employer's subrogation interest provided it agreed to deduct legal fees according to

common law principles and that the Employer's silence thereafter and with knowledge that Acheson was performing services on that basis constitute acceptance of her offer.

In addition to the foregoing positions, the Union made a number of submissions, grouping and characterizing them as calculation issues. Summarized they were that: (1) the portion of the $485,000 settlement attributable to future wage loss is $150,000, not $195,700 as asserted by the Employer; (2) Slater's appropriate salary figure should be the one in effect as of the date of the Employer's calculations, not the date of the settlement as asserted by the Employer; (3) the appropriate tax rate on the wage loss should 15.6 % (based on Slater's tax rate in her last full year of employment), not the 25% rate the Employer used; (4) the percentage applicable to legal fees should be 33 1/3%, not the 33% rate the Employer used, and (5) a proportionate amount of the GST paid on legal fees and disbursements should be deducted from any amounts that might be found to be payable.

Finally, the Union asserted that the Employer withdrew a portion of its claim and cannot now re-instate it. In this connection, the Union relies on the previously quoted 2015 correspondence between counsel for the parties and, in particular, the Employer's July 29, 2015 letter stating that the date from which it would pursue its claim would be 30 days before the filing of the grievance on October 6, 2010.

I turn now to the Employer's responses to the Union's two estoppel positions and its alternative contractual variant to the second estoppel submission. Commencing with the first estoppel position, the Employer submitted the Union failed to make out an estoppel, asserting that there was not an unequivocal representation or, if there was, there was no detrimental reliance.

The Employer submitted silence does not automatically constitute unequivocal conduct. It asserted there must be a duty to speak up and that the Employer bore no such duty. In this connection the Employer relied on Johnson's March 29, 2007 DDMA journal entry, referring to Acheson's March 28, 2007 letter to Great West life and recording she had left a voicemail with Sykes saying the Employer could not agree it had no subrogation interest until Johnson had reviewed all the information. The Employer also relied on two aspects of Johnson's April 5, 2007 letter to Acheson. First, it noted the letter disputed Acheson's calculations respecting past wage loss and asserted a claim of $43,757.99 in respect thereof. Second, it relied on the letter's statement respecting future wage loss, namely, "We will advise you of the employer's interest shortly". In these circumstances, submitted the Employer, Acheson and Slater could not reasonably rely on the Employer's silence following Acheson's May 16, 2007 letter. The Employer acknowledged an unfortunate delay thereafter but submitted that delay does equate to estoppel.

Alternatively, the Employer submitted that if there were unequivocal conduct amounting to a representation, there was no detrimental reliance. It noted several of the expenditures were payments of existing indebtedness or necessary house maintenance. Accordingly, the Employer submitted the requisite causation was lacking to merit a finding of detrimental reliance.

With respect to the Union's second estoppel position, the Employer submitted the Union had failed to make out an estoppel by conduct. It relied on Johnson's direct examination in which she testified that although it was common for lawyers to attempt to use the common law method of deducting legal fees it was her practice to explain to them the contractual method applied. The Employer also relied on Johnson's March 30, 2005 DDMA journal entry recording the voice mail she left Sykes respecting legal fees

and on the standard form letters sent to Acheson's firm conveying wage loss data that also contained the previously quoted passage respecting legal fees. As in its submission respecting the Union's first estoppel position, the Employer submitted there was no detrimental reliance.

Finally, with respect to the Union's contractual position, the Employer submitted there can be no contract between the Employer and an individual Union member.

C. ANALYSIS AND DECISION

I note at the outset there was no real dispute between the parties respecting the formula for calculating the Employer's integration and subrogation interest. Both employed the formula in *Heinrich #1*. Their essential differences were about: (1) the appropriate numerical values to insert in the formula; (2) the method of deducting legal fees; (3) whether certain items, such as GST and a tax credit, should or should not be factored into the formula, and (4) whether the Employer had withdrawn a portion of its claim following the filing of its grievance. In addition of course the parties disagreed about the Union's estoppel positions and its alternative contractual position.

I will first address the Union's primary estoppel position that the Employer was estopped by its conduct from advancing any claim against Slater. To repeat, the Union reasoned as follows. It submitted Acheson's May 16, 2007 letter communicated that Slater owed no monies to the Employer and generated an obligation to respond, an obligation the Employer did not fulfill. That failure to respond, it submitted, coupled with its failure to advance a claim for three and one-half years thereafter, constituted a representation that no monies were owing or, alternatively, that the Employer would make no claim. The Union submitted Slater detrimentally relied on that representation

by spending settlement monies she would not have spent had she known the Employer disputed Acheson's communication that no money was owed.

I have reflected on the parties' positions in light of the applicable legal principles and the facts of this case. Ultimately, I am unable to accept the Union's position. My reasons follow.

There is initial appeal in the Union's position. As noted later in this Award, it is settled law that an estoppel may arise from conduct. In this case, the Employer was silent for nearly 3 1/2 years following Acheson's May 16, 2007 letter expressing the position that no monies were owing. However, in my view, the surrounding circumstances prevented that silence from rising to the level of a representation that no monies were owed or that no claim would be made.

The Employer clearly signaled to Acheson prior to May 16, 2007 that it had not accepted her position respecting past wage loss, and that it had made no decision respecting future wage loss. More specifically, responding to the contents of Acheson's previously quoted March 28, 2007 letter to Great West Life, Johnson left Sykes, Acheson's senior paralegal, a voicemail saying the Employer could not agree with Acheson's position the Employer had no subrogated interest until it had reviewed all of the information. Further, by letter dated April 5, 2007, quoted earlier in this Award, Johnson responded to Acheson's March 26, 2007 letter. In it she addressed both past wage loss and future wage loss. Johnson effectively disputed Acheson's position respecting past wage loss and asserted a subrogation interest amounting to $43,757.99. With respect to future wage loss, Johnson's letter stated, "Thank you for your advice regarding the amount of futures. We will advise you of the employer's interest shortly."

The central fact is that Johnson's March 29 voicemail and, more importantly, her April 5 letter, clearly informed Acheson the Employer did not accept her position respecting past wage loss and, further, that the Employer was withholding assent to Acheson's comments respecting future wage loss. In my view these are fundamentally important elements of the factual matrix. Absent those elements the Union would have a strong argument. But taking them into consideration they have a significant impact on the effect attributable to Acheson's May 16 letter and the Employer's ensuing silence. They prevent Acheson's May 16 letter and the Employer's ensuing silence from rising to the level of a representation that Slater owed no monies or, alternatively, that no claim would be made. The evidence, in my view, falls short of establishing the requisite representation and reasonable reliance on it.

The Union's primary estoppel submission, therefore, fails on the facts. Accordingly, it is not necessary to consider the factor of detrimental reliance with respect to the first estoppel submission.

Turning to the Union's second estoppel submission, was the Employer estopped by its conduct from relying on the contractual method of deducting legal fees set out in Article 2.6 (b)? To repeat, it reasoned as follows. It relied on Acheson's December 13, 2004 letter proposing to deduct legal fees from the entire wage loss settlement in accordance with common law principles, submitting the Employer was obliged to respond. The Employer's failure to respond to the letter, submitted the Union, constituted a representation that its subrogated interest would be net of legal fees. It asserted Acheson and Slater relied on that representation to Slater's detriment: by agreeing to protect the Employer's subrogated interest; by negotiating a settlement of the civil suit on the basis that the Employer's interest would be net of legal fees, and by Slater arranging her finances and life on the basis that there would be no monies owing.

Accordingly, the Union submitted the Employer was estopped from asserting that legal fees should be deducted on the contractual basis in Article 2.6 (a). I have concluded that this second submission of estoppel by conduct should succeed. My reasons follow.

As a matter of principle, it is well settled that silence can found an estoppel in appropriate circumstances: Brown & Beatty, *Canadian Labour Arbitration*, 4th ed. (Toronto: Canada Law Book, 2015) at para 2:2211; *Ewing v. Dominion Bank,* [1904] S.C.J. No. 42; *Corporation of the City of Penticton (Employer) and Canadian Union of Public Employees, Local 608 (Union)* (1978), 18 L.A.C. (2d) 307; *Vancouver Police Board and Vancouver Police Union, Re* (1987), 32 L.A.C. (3d) 214 (Hope); *Doman-Western Lumber Ltd. (Re)*, [2001] B.C.L.R.B. No. B36/2000 (Hickling), and *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals,* [2011] 3 S.C.R. 616.

In this case, the essential issue is whether there are facts warranting the conclusion that the Employer's silence constituted a representation by conduct that legal fees would be deducted on the common law basis rather than the contractual basis set out in Article 2.6 (a) of the Collective Agreement. Mere silence, as contended by the Employer, may not be sufficient to warrant a representation. But that is not this case. The facts of this case disclose more than mere silence.

In her December 13, 2004 letter Acheson clearly indicated she would protect the subrogated interest provided the Employer recognized that any recovery she made would be subject to legal fees deducted on a common law basis. Johnson clearly understood that was the meaning of the letter. Moreover, she also understood that Acheson was conducting herself on that basis in the pursuit of the civil claim. In my view, in these circumstances the Employer bore a duty to speak up if its intention was to

insist on the deduction of legal fees pursuant to Article 2.6 (a) of the Collective Agreement. But it did not do so. It remained silent for several years. By the time it asserted its position, the settlement money had been dispersed and Slater had spent it.

The Employer submitted it did in fact make known its intention to rely on Article 2.6 (a). It relied on the letters to Acheson's firm advising and updating data respecting Slater's wage loss which included the previously quoted passage referring to legal fees. I am unable to conclude those letters should have the contended effect. They were standard form letters the essential purpose of which was to communicate and update wage loss data. They were not replies to Acheson's December 13 letter; nor were they responsive to the substance of her letter.

The Employer also relied on Johnson's evidence that it was her practice to explain to lawyers that the Employer deducted legal fees on the contractual basis in the Collective Agreement, not the common law basis. In this connection, the Employer relied on Johnson's entry in her DDMA journal recording a March 30, 2005 voicemail left with Acheson's firm. For convenience the entry is quoted again:

> I called and left a message for Deborah Acheson, lawyer, 384-6262, regarding dec 13/04 letter advising clientslegal fees are 33 1/3 %. (Need to negotiate due to STIIP language).

In cross-examination, Johnson agreed she had no specific recollection of this call and that she was "working off the note". She testified she "would have said" she had gotten the letter and that she wanted to discuss how legal fees applied, saying that was her practice.

My difficulties with this aspect of Johnson's evidence and her journal entry are these. With respect to her practice respecting lawyers, there was no evidence that she ever actually contacted Acheson and explained to her that legal fees would be deducted

on the Collective Agreement basis, not the common law basis. Further, as noted, Johnson had no specific recollection of what she had said in her voicemail message; she was only working off the note. Importantly, there is no reference in the entry to the method of deducting legal fees. The reference was to the STIIP language, which is entirely silent respecting legal fees. For these reasons I am unable to conclude that Johnson's evidence about her practice or her DDMA journal entry advance the Employer's position.

On all of the evidence, I am unable to conclude the Employer responded to Acheson's December 13 letter or that it otherwise communicated to her that legal fees would be deducted on the contractual basis in Article 2.6 (a). It should have but it did not. Accordingly, I am satisfied the Union has shown the Employer's silence in the face of Acheson's letter constituted a representation, reasonably relied upon, that legal fees would be deducted on the common law basis.

Turning to the next issue, has the Union shown detrimental reliance? In my view, it has also satisfied this element of estoppel. On her evidence, Slater expended monies in reliance on her belief no monies were owed and would not have done so had she known the Employer's position.

It is necessary, however, to address the Employer's objection that a significant portion of the settlement money was used to repay existing debts, for everyday expenditures and for necessary household repairs and maintenance. Accordingly, it submitted there was no causation or nexus to establish detrimental reliance: *Cronan Estate v. Hughes*, [2000] O.J. No. 4491.

It is true Slater spent a substantial portion of the settlement monies to retire existing indebtedness and to carry out necessary home repairs and maintenance. But a

considerable portion of the settlement was expended on discretionary items. They included various spousal and family holidays and gifts to family members. In addition, Slater purchased a $56,000 Mercedes Benz motor vehicle. Expenditure on that sort of vehicle, even if a vehicle purchase was necessary, must in part be considered discretionary. In the aggregate, expenditures on those discretionary matters were much more than any amounts the Employer could claim absent the estoppel. Accordingly, I am unable to accept the Employer's submission respecting causation.

In sum, the Union has made out an estoppel by conduct precluding the Employer from asserting that legal fees should be deducted on the limited contractual basis in Article 2.6 (a). Accordingly, I conclude that legal fees should be deducted on the common law basis asserted by the Union. Given these conclusions it is not necessary to address the Union's submission that a binding contract was made to address legal fees on a common law basis.

The next issue that must be determined is the amount of money that should be attributed to future wage loss. The Employer submitted it should be $195,700; the Union submitted it should be $150,000. Should it be one of those numbers or some other number? The answer is not immediately obvious because the parties to the civil suit ultimately reached a global settlement. During one phase of the mediation they negotiated on the basis of values attached to individual heads of damage but they later moved to global negotiation and settled for an unallocated sum of $485,000. As previously recounted, the signed minutes of settlement did not attribute any amounts to the fields reserved for specific heads of damage.

Notwithstanding a global settlement, as previously recounted, an ICBC electronic file note purported to assign dollar values to each head of damage, including $101,300

to past wage loss and $195,700 to future wage loss. This document was entered as a business record. Its author is unknown and no witness was called to explain the numbers used in the note. As a business record, the document is admissible and relevant evidence but it is only some evidence, not proof of its contents.

Acheson's reasons for disagreeing with the attributions in the file note were recounted earlier. To repeat, she testified that once the parties leave the mediation table, ICBC attributes funds as it wishes and the attribution doesn't necessarily bear any relation to the discussions at the mediation table. Further, her evidence was that ICBC would not move on its $150,000 future wage loss figure at the mediation. Testifying more generally, Acheson said that ICBC's allocation was not what happened at the table.

Acheson's view was that $150,000 should be attributed to loss of future income. As previously noted, she based this number in part on her statement that her numbers were proportionate, that the Employer would not move on this item, and the fact she was arguing for an increase in the amount for cost of future care.

The Employer submitted Acheson's evidence about the appropriate amount attributable to future wage loss was not persuasive. It focused on the $101,300 figure allocated to past wage loss in Acheson's mediation notes, in the ICBC file note, and in Acheson's May 16, 2007 letter. That consistency, it submitted, shows the ICBC note is a reliable record respecting future wage loss that should be accepted. The difficulty I have with that position is that a past wage loss claim differs from one for future loss. Past wage loss was readily quantifiable as of the date of the mediation. Unsurprisingly, therefore, ICBC agreed to this amount early in the negotiations. In contrast, future wage loss is inherently more uncertain and therefore more open to negotiation.

The Employer relied on ICBC's allocation of $50,000 to the cost of future care as another indication of the reliability of its allocation. Given the evidence that Slater does not presently have care costs, it submitted Acheson's figure of $95,688.23 in her March 28, 2007 letter could not be considered valid. This submission, however, does not take into account the following two factors. Acheson testified that Slater had significant disabilities as of the date of the mediation, a factor that motivated her to negotiate for a larger sum for cost of future care. Moreover, like future wage loss, cost of future care has an inherently uncertain element. As the Employer candidly acknowledged, Slater might have care costs in the future.

On all of the evidence and based on the foregoing considerations, $150,000 may well be a reasonable amount to attribute to future wage loss. It has a foundation in the evidence, a foundation much stronger than the unexplained amount in the ICBC electronic file note. That said, however, in mediation and after having offered $150,000 for future wage loss, ICBC increased its overall settlement offer. Bearing in mind the negotiations had switched to a global basis at that point, it seems reasonable that at least some portion of the increase should be attributable to future wage loss. Ultimately I have concluded that $170,000 should be attributed to future wage loss. That amount is not the result of a precise calculation but in my view it represents a reasonable number in accordance with the direction in *Heinrich #1* to strive for a reasonable allocation.

I turn now to the Union's claim that the Employer irrevocably withdrew a portion of its grievance in its July 29, 2015 letter. That letter stated "… the date on which we will pursue the claim is 30 days before the filing of the grievance on October 6, 2010". In its September 14, 2015 letter the Employer advised that it was amending "particulars" in the July 29 letter, stating, "…the date from which the Employer will pursue our claim for future wage loss is 30 days before the date of abeyance, namely November 23, 2009.

In my view, it was not open to the Employer to treat the statement in its July 29 letter as a particular it was free to amend. Fairly construed it constituted a withdrawal of a portion of the claim. Once withdrawn, the Union could not unilaterally revive it. I therefore agree that the Employer irrevocably withdrew its claim for the period prior to September 6, 2010. I have not endeavored to calculate the numerical effect of this ruling but it has the effect of shrinking the Employer's claim.

I leave it to the parties to apply the *Heinrich #2* formula and make the necessary calculations, based on my determinations to this point. Deducting legal fees on the entire wage loss, assigning $170,000 to future wage loss, and removing the claim period prior to September 6, 2010 (but otherwise using all of the Employer's inputs) may have the effect of erasing the Employer's claim. If that proves to be the effect it would dispose of the grievance. I will, however, retain jurisdiction. In the event a claim remains, I will address and determine the remainder of what the Union grouped and characterized as calculation issues and the Employer's tax credit issue. IT IS SO AWARDED.

III. CHAN GRIEVANCE

A. BACKGROUND

Chan was a passenger in a motor vehicle accident that occurred November 20, 2006. Following the incident she was absent from work for a period. She then returned to work on a graduated basis and subsequently a full-time basis Chan received gross STIIP benefits and holiday pay totaling $3,198.12. Net of tax calculated at the rate of 25%, the amount was $2,398.59. Her gross wage loss totaled $4,264.16. Net of tax calculated at the rate of $25% the total was $2,396.59.

Represented by her lawyer, Mr. Jon Stewart, Chan initiated a civil claim November 13, 2008. On September 28, 2009 Stewart wrote counsel for the defendants, Mr. Jeff Beggs, offering to settle the claim for $20,000 for non-pecuniary damages and $4,264.16 for loss of income. On October 6, 2009 Mr. Brian Wheeler, ICBC's adjuster, telephoned Stewart with a counter-offer of $6,500 for non-pecuniary damages, $1,066.74 for net loss of income, payment of any special damages, and disbursements. An independent medical examiner, Dr. Michael Piper, subsequently examined Chan. On March 11, 2010, following receipt of that report, the defendants withdrew all settlement offers.

On April 20, 2010, 20 days before the scheduled commencement of a three day trial, the parties attended a trial management conference. Prior to the conference the parties engaged in settlement discussions and eventually settled the claim. It was not an unallocated global settlement. The settlement was for $6,000 for non-pecuniary damages plus disbursements.

Stewart made a Statutory Declaration dated December 1, 2015, which was tendered at the hearing. The Union did not examine Stewart. It presented him for cross-examination in the agreed format of a telephone conference call that joined him to the arbitral hearing. The body of the Statutory Declaration states:

> 1. I represented Lisa Chan in a civil claim regarding a motor vehicle accident, *Chan v. Hall et al.* BCSC, Victoria Registry No. 084928 (the "Claim) and accordingly I have direct knowledge of the facts deposed to in this statutory declaration, except where stated to be on information and belief, and where so stated I verily believe them to be true.
> 2. On September 28, 2009, I wrote to Jeff Beggs, counsel for the defendants, and made an offer to settle the Claim for $20,000 for non-pecuniary damages and $4,264.16 for loss of income. Attached as Exhibit "A" to this Statutory Declaration is a true copy of my letter dated September 28, 2009.

3. On October 6, 2009 Brian Wheeler, the ICBC adjuster for the Claim, telephoned me and made a counter-proposal to settle the Claim for $6,500.00 for non-pecuniary damages, $1,066.74 for net loss of income, payment of special damages, and disbursements. Attached as Exhibit "B" to this Statutory Declaration is a true copy of my file note dated October 6,2009 in this regard.

4. On January 12, 2010, Ms. Chan attended an independent medical examination for the defendants with Dr. Michael Piper in Vancouver.

5. On February 22, 2010 the defendants served Dr. Piper's medical report. Attached as Exhibit "C" to this Statutory Declaration is a true copy of Dr. Piper's medical report.

6. On March 11, 2010, the defendants withdrew all settlement offers. Attached as Exhibit "D" to this Statutory Declaration is a true copy of the letter from Mr. Beggs in this regard.

7. On March 15, 2010, the defendants prepared a Statement of Facts and Issues which they delivered to me. Attached as Exhibit "E" to this Statutory Declaration is a true copy of the Statement of Facts and Issues.

8. The Claim was set for trial for three days commencing May 10, 2010. On April 20, 2010, a Trial Management Conference was held (the "Conference"). I attended the Conference with Ms. Chan. Representing the defendants was Mr. Beggs. Prior to the Conference commencing, Mr. Beggs and I engaged in settlement discussions. Mr. Beggs was adamant that the defendants were not going to pay any loss of income for three reasons. The first reason was that he considered this a low velocity impact case and ICBC's policy was not to pay loss of income in low velocity impact cases. The second reason was that he considered that Ms. Chan's medical symptoms pre-existed the motor vehicle accident. The third reason was that there was information that Ms. Chan took a trip outside Canada shortly after the accident. Mr. Beggs also advised that if the Claim proceeded to trial the defendants would seek costs against Ms. Chan. In my view, if Ms. Chan proceeded to trial, there was a significant possibility that she would receive less than she ultimately settled for and a substantial likelihood of costs being awarded against her. Based on all of these considerations, Ms. Chan agreed with the defendants to settle the Claim for $6,000 in non-pecuniary damages plus disbursements.

9. I have reviewed the ICBC file notes that I understand have been produced in these arbitration proceedings and I note that these file notes indicate at page 7 that on April 10, 2010 I first offered $6,500.00 plus "the extras" which was rejected by the defendants, and that I then offered $6,000.00 plus disbursements which was accepted by the defendants. However, my recollection is that there was only one offer, that the offer was $6,000.00 plus disbursements, and that it was made by the defendants and accepted by Ms. Chan.

The ICBC file note referred to in Stewart's Statutory Declaration bears the date 20 APR 10 (which I take to mean April 20, 2010) and reads:

> 07394 – CMC TO BE HELD TODAY INFRONT OF JUDGE METZGER. PC & A CLIENT VERY UPSET THAT WE HAD WITHDAWN (sic) OUR OFFER. WE EXPLAINED THAT MORE INFO NEEDED. THEY SUPPLIED THEIR LIST OF DISB & THE TRIAL CERTIFICATE. THEY WANTED US TO PUT OUR OFFER BACK ON THE TABLE. D/C, JEFF BEGGS WAS OF OPINION THAT WE WOULD BE LOOKING AT 5,000 NON PECS, THE SUBROGATED WAGE LOSS OF $4264.16 PLUS SPEC. PLUS DISB. THUS LOOKING AT 9264.14 PLUS DISB TO RESOLVE. IT WAS FELT THAT METZGER WOULD WANT THIS SHUT DOWN AND D/C WAS WORRIED JUDGE WOULD WANT MORE THAN HE FELT WARRANTED. PC WENT AND CONFIRED (sic) WITH HIS CLIENT AND HE CAME BACK WITH AN OFFER OF 6500 PLUS THE EXTRAS. WE SAID NOT POSSIBLE AND THEY THEN MADE OFFER TO SETTLE FOR 6,000 NP'S PLUS DISB. OF $736.27. NO WAGE LOSS, NO COSTS. OFFER EXCEPTED (sic) AS THIS WAS LESS THAN OUR ORIGINAL OFFER. TRIAL WAS TO BEGIN MAY 10 TH 2010.
> CLAIM SETTLED.

In cross-examination Stewart testified the Piper report concerned him because it cast significant doubts on Chan. Asked if he argued for wage loss, Stewart responded that he had done so in conversation with Beggs but that ICBC was adamant there would be no money for wage loss. He noted the vehicular damage was small, amounting to $700, and testified that the defendant's perspective was that Chan's symptoms were pre-accident symptoms not attributable to the accident. Appended to Stewart's Statutory Declaration is a March 15, 2010 Statement of Facts and Issues prepared and filed by the defendants. That document, asserting facts expected to be established at trial, stated in part:

> The Defendants argue that there is no wage loss from the accident as there is no medical evidence explaining why Chan's recovery necessitated an absence from work.

Stewart was taken to paragraph 8 of his Statutory Declaration and asked if he had argued against the defendants' reasons in that paragraph for refusing to pay any loss of income. Stewart responded that he had no independent information respecting

damage. But he testified that he did say that even a $700 incident would cause pain to someone with a pre-existing injury. More generally, asked if he was seeking the best deal he could get, Stewart replied yes, given the parameters he faced.

B. THE PARTIES' POSITIONS

The Employer's essential position was that Chan owed the Employer a fiduciary duty and a duty of good faith that she breached. It relied on *Heinrich #3* which states that recipients of disability benefits are fiduciaries who are obligated to act with good faith.

The Employer's written submission asserted the fiduciary and good faith duties require an employee to "represent the Employer's subrogated interest" and to "pursue the Employer's interest". During argument, however, the Employer clarified that, given the language of the Collective Agreement, an employee is not obliged to initiate a civil claim. But once it does so, it submitted, a duty arises to pursue a wage claim and to keep the Employer informed of its status.

The Employer made the following statements in its written submission:

> The Employer submits that Ms. Chan, through her lawyer Mr. Stewart, deliberately dropped the wage loss portion of the settlement in negotiations with ICBC in order to put the most money in her own pocket. She did this by attributing the settlement monies to general damages, instead of apportioning the settlement to past wage loss and damages. The Employer submits that by putting her own interest before the Employer's interest, she breached her fiduciary duty to the Employer.

In oral argument, the Employer stated it was not arguing that Stewart acted in bad faith. But Chan, it submitted, did because she did not tell the Employer she was settling for no wage loss.

Focusing on Stewart, the Employer submitted his evidence that ICBC adamantly refused to pay for wage loss was not convincing in view of ICBC's previously quoted April 10 file note. It submitted its contents show ICBC was willing to pay a wage loss claim.

The Employer also submitted Chan breached her fiduciary duty by failing to keep the Employer informed of the settlement and by failing to provide timely disclosure of relevant documents, thereby preventing the Employer from ascertaining whether an integration and subrogation claim existed.

Turning to the Union's positions, it submitted the Employer was conflating common law subrogation principles with those in the Collective Agreement. It said the common law scheme obliges an insured to pursue a subrogated claim in good faith, an obligation that might require initiation of a claim. In contrast, the Union submitted, the STIIP and LTD language does not oblige an employee to pursue any sort of wage claim. In advancing this position, the Union relied on the language reading, "…where an employee makes a successful wage loss claim" that appears in Articles 1.5 and 2.6. It asserted that if the parties intended such an obligation clear contractual language would be required because of the financial risk it would create. Relying on Article 2.6 (c) which requires an employee to notify the Employer of an intention to commence an action, the Union submitted the employee is entitled to decide whether or not to sue.

The Union further submitted that even if there were some obligation on Chan to pursue the Employer's interest, which it denied, there was no bad faith on the part of Chan or her counsel, Stewart. It essentially relies on the contents of Stewart's statutory declaration, which it says were not challenged on cross-examination.

C. ANALYSIS AND DECISION

The first questions to be determined are these. Was Chan in a fiduciary relationship with the Employer and did she owe it a duty of good faith? In *Heinrich #3*, following a review of the authorities, Arbitrator McConchie wrote:

> 202 Is there some kind of conflict between the arbitration decisions and the court decisions on this question? I conclude there is not. The courts have been compelled to answer "yes or no" when considering whether a benefit recipient is a "fiduciary". No other word or concept will do. Labour arbitrators have, on the other hand, not been compelled to attach a specific legal moniker to the bundle of obligations which they agree rest on the beneficiary. As can be seen from a reading of this Board's decision in Award No. 1, arbitrators have been cautious regarding the importation of equitable concepts into the principles which apply to contractual subrogation provisions that are the creature of collective bargaining. They have preferred to enumerate the responsibilities of the recipient and the Plan rather than adopting wholesale the terms that encompass those responsibilities in equity.
>
> 203 Consider the similarity between the responsibilities of a beneficiary enumerated in the *Gaudet* case, *supra*, and those enumerated in the *Skelly* court decision*, supra*.
>
> 204 Pursuant to Gaudet*, supra*, the recipient of disability benefits is obligated to act with "good faith and fidelity" in his or her dealings with the employer (this also applies, I conclude, to the Employer in its dealings with the recipient). This goes beyond advising the employer of an intention to commence an action and includes, in view of the recipient's presumed better knowledge of the facts, an obligation to make timely disclosure of the relevant information so that the matter can be resolved and any recoverable amount factored into the calculation of future benefits. Not to be overlooked is the parenthetical statement in the *Gaudet* case, *supra*, that amounts in excess of 100% of pay are "effectively received for the Employer's account."
>
> 205 In the *Skelly* case, *supra*, the court also noted the obligation of the fiduciary to inform the employer of any settlement and to reimburse the employer for any amount that exceeded 100% of salary. I would comfortably read into the obligation to inform the employer a requirement to make timely disclosure of relevant information, which would include the details of the claim and settlement. Perhaps most importantly, the court observed that "As soon as the ICBC settlement exceeded 100% of her salary, the Benefits no longer belonged to Ms. Skelly and the Province trusted her to act in its best interests by returning the funds."
>
> 206 These are substantially similar lists of responsibilities. I believe it is fair to conclude that the law is now settled that recipients of disability benefits in the circumstances described in the *Gaudet* and *Skelly* cases, *supra*, are in fact "fiduciaries." The facts in the instant case are clearly distinguishable on several

> different bases but not in a way that would cast doubt on the correctness of this characterization.
>
> 207 I conclude that Mr. Heinrich was in a fiduciary relationship with the Employer. It was a relationship which arose, as the Skelly court put it, "out of specific circumstances". The cases which have examined the relationship which arises from the receipt of disability funds have not provided support for the proposition that a person in Mr. Heinrich's position was also a "trustee" and so I am not able to agree with the Employer's assertion to this effect.

Given the extract quoted above, Chan was in a fiduciary relationship with the Employer and she owed it a duty of good faith. As a fiduciary and an employee who owed a duty of good faith what obligations did she owe? I do not read the quoted extract as holding that a fiduciary in the context of the integration and subrogation language owes obligations the same as or co-extensive with the duties of a fiduciary in equity. Notably, Arbitrator McConchie wrote that arbitrators "…have preferred to enumerate the responsibilities of the recipient and the Plan rather than adopting wholesale the terms that encompass responsibilities in equity."

What, then, are the duties that Arbitrator McConchie identified? In paragraph 204 he said they go beyond the duty to notify the Employer of an intention to commence an action and include an obligation to make timely disclosure of relevant information, so that the matter can be resolved and any recoverable amount factored into calculation of future benefits. In paragraph 205 he said the duties include an obligation to inform the Employer of any settlement and to reimburse the Employer for any amount exceeding 100% of salary. Arbitrator McConchie read into that obligation a duty to make timely disclosure of the relevant information, including details of the claim and settlement. Chan, therefore, bore a duty to inform the Employer in a timely way of the fact of the settlement and its details.

The Employer's submission, however, went further. It submitted that once an action has been initiated the employee has a duty to pursue a wage claim and to keep the Employer informed of its status. Such duties do not readily emerge from the language of Article 1.6. It speaks of an employee who "makes a successful wage claim" which implies a settled outcome. Nor does Arbitrator McConchie state that once an action is initiated the employee owes a duty to pursue a wage claim or a duty to keep the Employer abreast of its progress. As I read his award, the fiduciary and good faith duties he identified arise once there has been a successful wage claim. Accordingly, I am not prepared to hold that Chan was obliged to pursue a wage claim merely because she had initiated an action or to keep the Employer advised of the progress of a wage claim that she had asserted.

The central issue in this dispute, however, is factual. Did Chan deliberately drop her wage claim to put the most money in her own pocket? In my view, if in fact Chan deliberately abandoned a meritorious wage loss claim for the purpose of enhancing recovery under other heads of damage I would readily agree that she had acted in bad faith. In such a case she would have intentionally sabotaged the intent of the Collective Agreement. The question, however, is whether the evidence warrants such a finding. For the reasons that follow I am unable to find that it does.

Chan commenced an action in which she did advance a $4,264.16 wage loss claim as one head of damage. It is also true that ICBC's October 6, 2009 counter offer from its adjuster proposed settling the action on the basis of payment for individual heads of damage, one of which was $1,066 for net loss of income. But that was before Piper's medical opinion had been reviewed. Thereafter, on March 11, 2010 the defendants withdrew all settlement offers. Moreover, the March 15, 2010 Statement of Facts and Issues, partially quoted earlier herein, asserted, "…there is no wage loss as

there is no medical evidence explaining why Chan's recovery necessitated an absence from work". So at that point Stewart, on behalf of Chan, had no reason to expect a willingness to pay for wage loss, especially in view of his own misgivings arising from the independent medical examiner's report.

The Employer sought assistance from ICBC's April 20, 2010 file note, asserting it showed a willingness to pay for wage loss claim as of that date. I am unable to characterize the note in that way. Assuming its accuracy by an unknown author, at most it records the opinion of Beggs, defendants' counsel, that there was a risk of a ruling for wage loss, if the action proceeded to trial and judgment. The note does not record that ICBC shared that opinion, if in fact it did. Importantly, there was no evidence Begg's opinion was communicated to Stewart. Accordingly, there was nothing to alert Stewart to the possibility that the defendants or ICBC were potentially open to a change of position respecting wage loss.

In all of the foregoing circumstances, in my view Stewart's statements in paragraph 8 of his Statutory Declaration are both credible and record an honestly held belief that a wage loss claim was inadvisable and unlikely to form part of any settlement. That paragraph warrants repetition:

> 8. The Claim was set for trial for three days commencing May 10, 2010. On April 20, 2010, a Trial Management Conference was held (the "Conference"). I attended the Conference with Ms. Chan. Representing the defendants was Mr. Beggs. Prior to the Conference commencing, Mr. Beggs and I engaged in settlement discussions. Mr. Beggs was adamant that the defendants were not going to pay any loss of income for three reasons. The first reason was that he considered this a low velocity impact case and ICBC's policy was not to pay loss of income in low velocity impact cases. The second reason was that he considered that Ms. Chan's medical symptoms pre-existed the motor vehicle accident. The third reason was that there was information that Ms. Chan took a trip outside Canada shortly after the accident. Mr. Beggs also advised that if the Claim proceeded to trial the defendants would seek costs against Ms. Chan.

> In my view, if Ms. Chan proceeded to trial, there was a significant possibility that she would receive less than she ultimately settled for and a substantial likelihood of costs being awarded against her. Based on all of these considerations, Ms. Chan agreed with the defendants to settle the Claim for $6,000 in non-pecuniary damages plus disbursements.

It should be noted that the Employer disclaimed any suggestion Stewart had acted in bad faith. That allegation was made against Chan, asserting that she had done so through her lawyer. In my view that distinction lacks merit. Having acknowledged that Stewart did not act in bad faith, how could it be said that Chan had done so? There was no evidence Chan sought to influence Stewart to deliberately drop the wage loss claim with a view to increasing the money in her pocket. She appears simply to have acted on the advice of her counsel.

Accordingly, I conclude that Chan did not act in bad faith or breach any fiduciary duty respecting the settlement of the action. Further, given that there was not a successful wage claim, it follows that the Employer has not established a claim for recovery of STIIP benefits.

Did Chan breach her duties in any other respect? Arbitrator McConchie stated that an employee is obliged to inform the Employer in a timely way of the fact of a settlement and its details so the Employer can resolve integration matters and factor any recoverable amount into the calculation of future benefits. Here, however, there were no future benefits to consider; they were limited to past STIIP benefits. That said, the Employer has a legitimate business interest in knowing whether it has a claim for recovery of benefits paid. It cannot resolve that question without knowing and evaluating the details of a settlement.

On the evidence it is clear that Chan did not inform the Employer in a timely way that her claim had been settled or provide the details of the settlement. A long time elapsed before the Employer obtained the information and documentation it needed to evaluate its position. I am satisfied Chan breached this duty.

The Employer adduced no evidence of loss sustained by the breach. I have concluded a Declaration that Chan breached her duty to inform the Employer is sufficient in the circumstances of this case and I so declare. IT IS SO AWARDED.

"*Robert Diebolt, Q.C.*"

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Robert Diebolt, Q.C.