IN THE MATTER OF:

POLICY/GROUP GRIEVANCE NUMBER 490 I7 21 DATED OCTOBER 5, 2021;
AND

AN ARBITRATION OF THE SAID GRIEVANCE;

BETWEEN:

United Food and Commercial Workers Union, Local 1400,

UNION,

- and -

PepsiCo Beverages Canada,

EMPLOYER.

APPEARANCES:

For the Union: Heath Smith
For the Employer: Trevor Lawson

BEFORE:

T. F. (Ted) Koskie, B.Sc., J.D., Sole Arbitrator

AWARD DATE:

June 10, 2022

AWARD

I. BACKGROUND, DISPUTE AND PRELIMINARY ISSUES

[1] In Grievance Number 490 I7 21 (the "Grievance"),[1] United Food and Commercial Workers Union, Local 1400 (the "Union") alleges PepsiCo Beverages Canada (the "Employer") "failed to recognize September 30, the National Day of Truth and Reconciliation, in violation of the Collective Agreement and any applicable legislation."

[2] The parties were unable to resolve the Grievance and referred same to arbitration on October 15, 2021.

[1] Exhibit G-2, Grievance dated October 5, 2021

[3] The parties agreed I:

a) would serve as Arbitrator to hear the grievance; and

b) had been properly constituted and had jurisdiction to hear and determine the Grievance.

[4] The Union asks that I rule the Collective Bargaining Agreement between the parties (the "CBA")[2] obliges the Employer to observe and pay for September 30–the National Day for Truth and Reconciliation (the "NDTR")–as a general holiday. The parties agreed that in the event the Grievance is successful, any ruling as to any specific remedy be reserved pending further evidence and submissions from the parties.

[5] By agreement of the parties, this case was heard by video conference on March 29, 2022.

[6] Section 6-50(2) of *The Saskatchewan Employment Act* (the "*Act*") provides I will render a decision within sixty (60) days of the hearing. As allowed by section 6-50(3) of the *Act*, the Union and Employer agreed to waive this requirement.

II. FACTS

[7] The Union and Employer submitted the following Agreed Statement of Facts:[3]

> 1. The Employer and the Union (collectively, the "Parties") have agreed to stipulate to the facts set out herein (the "Agreed Statement of Facts").
>
> The Parties
>
> 2. At all material times, the Union was a "union" in accordance with *The Saskatchewan Employment Act*, S.S. 2013, c. S-15.1, and represented all employees of the Employer in the City of Regina in the Province of Saskatchewan, excluding managers and certain other positions.
>
> 3. At all material times, the Employer was an "employer" in accordance with *The Saskatchewan Employment Act*, S.S. 2013, c. S-15.1 and operated a warehouse in the City of Regina. The

[2]Exhibit G-1, CBA

[3]Exhibit G-3, Agreed Statement of Facts dated March 28, 2022

Employer's Regina operations and employees are provincially regulated.

The Collective Agreement

4. The Parties enjoy a mature collective bargaining relationship and have negotiated several collective bargaining agreements, the most recent of which expires October 6, 2022 (the "Collective Agreement").

5. The Collective Agreement reads in relevant part as follows (Article 23):

> ARTICLE 23 - GENERAL HOLIDAYS
>
> 23.01 (a) The following days shall be observed as paid general holidays for eligible employees:
>
> | | |
> |---|---|
> | NEW YEAR'S DAY | LABOUR DAY |
> | FAMILY DAY | THANKSGIVING DAY |
> | GOOD FRIDAY | REMEMBRANCE DAY |
> | VICTORIA DAY | CHRISTMAS EVE* (*half day) |
> | CANADA DAY | CHRISTMAS DAY |
> | SASKATCHEWAN DAY | BOXING DAY |
>
> (b) If, during the life of this Agreement, a general holiday should be declared by the Provincial or Federal Government, which is not listed above and which is to be generally observed in the Province of Saskatchewan, such holiday shall be observed and paid by the Company under the same terms and conditions as apply to the holidays which are listed above.

National Day for Truth and Reconciliation

6. On June 3, 2021, an *Act to amend the Bills of Exchange Act, the Interpretation Act and the Canada Labour Code*, S.C. 2021, c. 11 received Royal Assent, having been passed by Parliament some time before. This federal act effectively created the National Day for Truth and Reconciliation (the "NDTR"), which will be observed annually at the federal level on September 30.

7. S. 166 of the *Canada Labour Code*, RSC 1985, c L-2, as amended, now includes the following definition:

> **general holiday** means New Year's Day, Good Friday, Victoria Day, Canada Day, Labour Day, National Day for Truth and Reconciliation, which is observed on September 30, Thanksgiving Day, Remembrance Day, Christmas Day and Boxing Day and includes any day substituted for any such holiday under section 195; (*jours fériés*)

8. The NDTR is not a public holiday under *The Saskatchewan Employment Act*, S.S. 2013, c. S-15.1.

Grievance

9. On, or about, September 9, 2021, Mr. Aulden Furlong, Staff Representative for the Union, emailed the Employer, indicating that the Union's position is that the Collective Agreement requires the Parties to observe the NDTR as a paid holiday.

10. The Employer subsequently advised the Union that it does not recognize the NDTR as a paid holiday required to be provided by Article 23 of the Collective Agreement, as, inter alia, it is not generally observed in the Province of Saskatchewan.

11. The Parties continued to discuss the matter throughout September, but were unable to arrive at a resolution.

12. On, or about, October 5, 2021, the Union filed Grievance #490 I7 21 (the "Grievance"), having observed that the Employer did not, in fact, observe the NDTR as a paid holiday.

13. The Grievance was referred to arbitration on, or about, October 15, 2021.

[8] With the consent of the Union, the Employer tendered as Exhibits:

a) a Saskatchewan Government Certificate of Recognition:

i) designating September 30, 2021, to be "Truth and Reconciliation Day" in Saskatchewan; and

ii) requesting Saskatchewan citizens to recognize the day;[4]

b) a Saskatchewan Government press release that, *inter alia*, encourages all Saskatchewan residents to reflect and discuss "the importance of meaningful and lasting reconciliation";[5] and

c) an excerpt taken from a Saskatchewan Government web site:

i) listing the ten (10) public (statutory) in Saskatchewan; and

ii) stating:

> The National Day for Truth and Reconciliation, will be observed on September 30. This is a new statutory holiday for employees in federally regulated workplaces or those who have a collective bargaining agreement that identifies they will observe federal statutory holidays. The day is not a statutory holiday in Saskatchewan for employees who are not federally regulated.[6]

---

[4]Exhibit E-1, Certificate of Recognition dated September 13, 2021

[5]Exhibit E-3, Press Release dated September 28, 2021

[6]Exhibit E-2, Excerpt from Saskatchewan Government web site taken March 15, 2022

[9] The Union tendered evidence from its President, Lucy Figueiredo ("Figueiredo"). She testified:

a) she had been active in various Union-related capacities since 2003;

b) the Union's membership is diverse, spanning, *inter alia*, co-operative, food, industrial and service industries–it represents more than 6,600 individuals in various locals throughout Saskatchewan;

c) though she "does not know much about non-unionized workplaces," she has observed that "since Parliament passed the *Act*," employers "pretty much recognized" NDTR; and

d) with respect to workplaces with Union membership, almost all of the employers recognize NDTR as a statutory holiday and pay for same as such–this comprises approximately 6,400 Union members.

[10] In Cross Examination, Figueiredo:

a) said less than 250 of the Union's members fall under Federal jurisdiction;

b) acknowledged there are between 560,000 and 570,000 employees, unionized and non-unionized, over the age of 15 in Saskatchewan; and

c) said the Union membership represents a little over 1% of the total number of employees–both unionized and not–in Saskatchewan.

III. AWARD

[10] I find NDTR is not a general holiday that must be observed and paid by the Employer under

the same terms and conditions as apply to the holidays listed in Article 23.01(a) of the CBA.

[11] I dismiss the Grievance.

IV. DISPUTE

[12] The issue herein is whether NDTR is a general holiday that must be observed and paid by the Employer under the same terms and conditions as apply to the holidays listed in Article 23 of the CBA.

V. ANALYSIS

A. CBA

[13] In deciding this matter, I have had regard for the entire CBA. However, in particular, I considered the following provision:

> ARTICLE 23 - GENERAL HOLIDAYS
>
> 23.01 (a) The following days shall be observed as paid general holidays for eligible employees:
>
> | | |
> |---|---|
> | NEW YEAR'S DAY | LABOUR DAY |
> | FAMILY DAY | THANKSGIVING DAY |
> | GOOD FRIDAY | REMEMBRANCE DAY |
> | VICTORIA DAY | CHRISTMAS EVE* (*half day) |
> | CANADA DAY | CHRISTMAS DAY |
> | SASKATCHEWAN DAY | BOXING DAY |
>
> (b) If, during the life of this Agreement, a general holiday should be declared by the Provincial or Federal Government, which is not listed above and which is to be generally observed in the Province of Saskatchewan, such holiday shall be observed and paid by the Company under the same terms and conditions as apply to the holidays which are listed above.

B. LEGISLATION

[14] The relevant provisions of:

a) *An Act to amend the Bills of Exchange Act, the Interpretation Act and the Canada Labour Code (National Day for Truth and Reconciliation)*[7] are:

Purpose of this Act

Purpose

1 The purpose of this Act is to respond to the Truth and Reconciliation Commission of Canada's call to action number 80 by creating a holiday called the National Day for Truth and Reconciliation, which seeks to honour First Nations, Inuit and Métis Survivors and their families and communities and to ensure that public commemoration of their history and the legacy of residential schools remains a vital component of the reconciliation process.

Bills of Exchange Act

2 **Subparagraph 42(a)(i) of the *Bills of Exchange Act* is replaced by the following:**

(i) Sundays, New Year's Day, Good Friday, Victoria Day, Canada Day, Labour Day, National Day for Truth and Reconciliation, which is observed on September 30, Remembrance Day and Christmas Day,

Interpretation Act

3 **The portion of the definition holiday in subsection 35(1) of the *Interpretation Act* before paragraph (a) is replaced by the following:**

holiday means any of the following days, namely, Sunday; New Year's Day; Good Friday; Easter Monday; Christmas Day; the birthday or the day fixed by proclamation for the celebration of the birthday of the reigning Sovereign; Victoria Day; Canada Day; the first Monday in September, designated Labour Day; National Day for Truth and Reconciliation, which is observed on September 30; Remembrance Day; any day appointed by proclamation to be observed as a day of general prayer or mourning or day of public rejoicing or thanksgiving; and any of the following additional days, namely,

Canada Labour Code

4 **The definition general holiday in section 166 of the *Canada Labour Code* is replaced by the following:**

general holiday means New Year's Day, Good Friday, Victoria Day, Canada Day, Labour Day, National Day for Truth and Reconciliation, which is observed on September 30, Thanksgiving Day, Remembrance Day, Christmas Day and Boxing Day and includes any day substituted for any such holiday under section 195; (jours fériés)

5 **Subsection 193(2) of the Act is replaced by the following:**

Alternative day for holiday falling on non-working Saturday or Sunday

---

[7] S.C. 2021, c. 11 (Assented to 2021-06-03)

(2) Except as otherwise provided by this Division, when New Year's Day, Canada Day, National Day for Truth and Reconciliation, Remembrance Day, Christmas Day or Boxing Day falls on a Sunday or Saturday that is a non-working day, the employee is entitled to and shall be granted a holiday with pay on the working day immediately preceding or following the general holiday.

Coming into Force

Two months after royal assent

6 **This Act comes into force on the day that, in the second month after the month in which it receives royal assent, has the same calendar number as the day on which it receives royal assent or, if that second month has no day with that number, the last day of that second month.**

b) *The Saskatchewan Employment Act*[8] are:

Public holidays
2-30(1) In this section:

(a) "Family Day" means the third Monday in February;
(b) "Saskatchewan Day" means the first Monday in August.

(2) For the purposes of this Part, the following are public holidays in Saskatchewan:

(a) New Year's Day;
(b) Family Day;
(c) Good Friday;
(d) Victoria Day;
(e) Canada Day;
(f) Saskatchewan Day;
(g) Labour Day;
(h) Thanksgiving Day;
(i) Remembrance Day;
(j) Christmas Day.

(3) In this Part, a reference to a public holiday is a reference to one of the days mentioned in subsection (2) or to a day substituted for that day in accordance with section 2-31.

c) *The Legislation Act*[9] are:

2-29 In an enactment:

. . .

"holiday" means:

---

[8]S.S. 2013, c. S-15.1

[9]S.S. 2019, c. L-10.2

(a) Sunday;

(b) New Year's Day, Family Day, Good Friday, Victoria Day, Canada Day, Saskatchewan Day, Labour Day, Thanksgiving Day, Remembrance Day, Christmas Day and Boxing Day, and when one of those dates, other than Remembrance Day or Boxing Day, falls on a Sunday, it includes the following day; and

(c) any day appointed by an Act of the Parliament of Canada or by proclamation of the Governor General or Lieutenant Governor as a public holiday; (« *jour férié* »)

C. ANALYSIS

1. Interpretation of Collective Bargaining Agreements

[15] The facts presented in this case are not in dispute, only the proper interpretation of Article 23 as applied to these facts.

[16] The parties are in agreement Article 23 creates a three-part test that must be met, namely is NDTR:

a) declared a general holiday by the Provincial or Federal Government;

b) not listed in Article 23.01(a) of the CBA; and

c) to be generally observed in the Province of Saskatchewan.

[17] The third part of the test is where the issue between the two parties lies. It stipulates that the general holiday "is to be generally observed in Saskatchewan."

[18] The Union contends this phrase means the general holiday may be generally observed in a variety of ways, including simply discussions of the issues, and not just as a general holiday. It further argues that the CBA makes no distinction between whether this observation is mandatory or voluntary.

[19] The Employer, on the other hand, argues that the general holiday must be generally observed

as a general holiday in Saskatchewan. It argued that not only did the Government of Saskatchewan not proclaim the NDTR as a general holiday in the province, but observance of it by individual employers was mixed in much the same way as some employers choose to close on Christmas Eve while others do not.

[20] Further, the Employer contended that since it is provincially regulated, it is only subject to those holidays proclaimed by the provincial government. This is clearly rebutted by the first part of the test–it includes general holidays declared by the provincial or federal government.

[21] The Union argues that the CBA should be read in the ordinary sense. It states the language of the CBA is plain and should be read that way and that dissimilar terms should be given different meanings.

[22] The Employer argues that the words of the CBA should be given their plain and obvious meaning and that doing so means the grievance must be dismissed. The Employer further argues that an interpretation that adds a monetary benefit should only be made when the language clearly supports such an intent. It argues that where the language is not clear–as is it argues is the case here–then the dispute must be decided in the Employer's favour. This is an argument that was also made by the employers in both *Windsor (City) and CUPE, Local 543 (40-21), Re*,[10] and *Mission Hill Vineyards and SEIU, Local 2 (National Truth and Reconciliation Day), Re*.[11]

[23] Arbitrators in Saskatchewan have adopted the principles of interpretation for collective bargaining agreements laid out in *C.E.P., Local 777 v. Imperial Oil Strathcona Refinery (Policy Grievance)*. These were quoted in full by Arbitrator Kraus in *RRR SAS Capital Facilities Inc. and SEIU - West, Re*:[12]

> 41 Arbitrator Elliott, in C.E.P., Local 777 v. Imperial Oil Strathcona Refinery (Policy Grievance) [2004] A.G.A.A. No. 44, 130 L.A.C. (4th) 239 (Alta. Arb.), at paras 39-47, had this to say

---

[10] 2022 CarswellOnt 1649

[11] 2022 CarswellBC 1081

[12] 2015 CarswellSask 363

about the interpretation of the collective agreements:

> 39. I use as my approach to the interpretation of collective agreements the same principle that the Supreme Court of Canada has adopted for the interpretation of legislation. I refer to this approach as the modern principle of interpretation. In my view, the modern principle of interpretation is a superior statement, as a guide to interpretation, than the rule stated in Halsbury's Laws of England to which Canadian texts refer, which relies heavily on the "intention of the parties". The modern principle of interpretation is, I believe, particularly apt for interpreting collective agreements which, of course, are based upon legislation.
>
> 40. The modern Canadian approach to interpreting agreements (including collective agreements) and legislation, is encompassed by the modern principle of interpretation which, for collective agreements, is:
>
> > In the interpretation of collective agreements, their words must be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object, and the intention of the parties.
>
> 41. Using this principle, interpreters look not only to the intention of the parties, when intention is fathomable, but also to the entire context of the collective agreement. This avoids creating a fictional intention of the parties where none existed, but recognizes their intention if an intention can be shown. The principle also looks into the entire context of the agreement to determine the meaning to be given to words in dispute.
>
> 42. Before applying the modern principle of interpretation to this grievance I will identify the components of the modern principle and what they encompass. The modern principle of interpretation is a method of interpretation rather than a rule, but still encompasses the many well-recognized interpretation conventions. The modern principle directs interpreters:
>
> 1 to consider the entire context of the collective agreement
>
> 2 to read the words of the collective agreement
>
> - in their entire context
> - in their grammatical and ordinary meaning
>
> 3 to read the words of a collective agreement harmoniously
>
> - with the scheme of the agreement
> - with the object of the agreement, and
> - with the intention of the parties.
>
> **1 What is the "entire context of a collective agreement"**
>
> 43. The "entire context" includes
>
> - the collective agreement as a whole document. One provision of a collective agreement cannot be understood before the whole document has been read because what is said in one place will often be qualified,

modified or excepted in some fashion, directly or indirectly, in another

- reading one provision of the collective agreement keeping in mind what is contained in other provisions. In the first instance it must be assumed negotiators knew not only the provisions specifically bargained but all the others contained in the collective agreement. An example is the use of words that have defined meanings. Those meanings must be applied whenever the defined word is used in the collective agreement

- keeping in mind the legislative framework within which collective agreements exist and keeping that framework in mind as part of the entire context.

2 Reading the words

44. Words in a collective agreement are to be read

(a) within their entire context in order to figure out the scheme and purpose of the agreement and the words in a particular article must be considered within that framework,

(b) in their grammatical and ordinary meaning. Typically this involves taking the appropriate dictionary definition of a word and using it, unless the dictionary meaning is modified by a definition, by common usage of the parties or by the context in which the word is used, and

(c) harmoniously with

- the scheme of the agreement (which could include the arrangement of provisions and the purpose of the agreement or a particular part of the agreement)

- its object

- the intention of the parties, assuming an intention can be discerned. The intention is to be found in the words used, but evidence of intention from other sources may be appropriate in order to decide on what the words used by the parties actually mean.

3 The meaning of "context"

45 The word "context" itself means

> the circumstances that form the setting...for [a] statement . . . and in terms of which it can be fully understood Concise Oxford Dictionary (10th) and the Merriam-Webster Dictionary includes in its definition of context:
>
> > the weaving together of words; the parts of a discourse that surround a word or passage and can throw light on its meaning; the interrelated conditions in which something exists or occurs.

46 And so, entire context in terms of a collective agreement and the

> interpretation of the words used in it includes considering
>
> - how the words have been weaved together
> - how those words connect with other words
> - the discourse (other information) that can throw light on the text to uncover the meaning
> - any conditions that exist or may occur that might affect the meaning to be given to the text,
>
> **Testing the interpretation**
>
> 47 Once an interpretation is settled upon, it should be tested by asking these questions:
>
> - is the interpretation plausible — is it reasonable?
> - is the interpretation effective — does it answer the question within the bounds of the collective agreement?
> - is the interpretation acceptable in the sense that it is within the bounds of acceptability for the parties and legal values of fairness and reasonableness?

[24] The principles of interpretation further provide that the surrounding circumstances may considered. This was set out in *Regina Professional firefighters Association, IAFF Local No. 181 v Regina (City)*:[13]

> 27 Modern principles of collective agreement interpretation require that the decision maker consider whether the words used in the collective agreement are consistent with the surrounding circumstances known to the parties at the time of formation of the contract. This recognizes that ascertaining contractual intention can be difficult when looking at word on their own, because words along do not have an immutable or absolute meaning. While the surrounding circumstances cannot overwhelm the words of the collective agreement, they are to be used "to deepen a decision-maker's understanding of the mutual objective intentions of the parties as expressed in the words of the contract": *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 (S.C.C.) At para 57, [2014] 2 S.C.R. 633 (S.C.C.). I find the Board's approach to admitting and using extrinsic evidence as an aid to interpretation was consistent with the modern approach to collective agreement interpretation and was therefore reasonable in the circumstances.

[25] The Union contends that the surrounding circumstances when the CBA was made must be taken into consideration when interpreting the agreement, citing *Creston Moly Corp. v Sattva Capital*

[13] 2020 SKQB 134

Corp.[14] It argues that context is vitally important in this case. In this case, the greater context of truth and reconciliation should be considered. The Union argues that the mandate extends to consideration of, *inter alia*, the discovery of hundreds of unmarked graves at residential schools.

[26] The Employer states that there is no need to consider *Sattva*. It contends the Union has failed to establish a link between the truth and reconciliation process and the bargaining that took place between the parties.

Evidence, Onus & Judicial Notice

[27] The onus rests with the Union to prove the NDTR was generally observed in the province. It is up to the Union to find and proffer appropriate evidence to support its contention. This was clearly stated in *Railway Assn. of Canada v Railway Employees' Department, Division No. 4*:[15]

> 14 Both holidays have, no doubt, been recognized for years. Whether or not the substitution by the parties of Civic Holiday for Remembrance Day reflects any change over the years in the degree of recognition afforded to each, it will be necessary, as I have indicated, for a party seeking to replace Civic Holiday by Remembrance Day to adduce evidence to show that the latter is the more generally recognized. It is not necessary to speculate as to the nature of the evidence which might be adduced relative to the issue; that is a matter for the ingenuity of counsel. It is sufficient to say that the material before me does not show that, at any time material to the matter, one of the days in question was "more generally recognized" than the other.

[28] The Union noted that the Government of Saskatchewan recognized the NDTR and contemplated/encouraged the populace to observe the day, even though the Government did not declare it a general holiday in the province. The Union, which represents approximately one percent of the provincial workforce, noted that 6400 out of 6600 of their members were employed by companies that gave their employees the day off. As well, Figueiredo testified that she personally saw a number of businesses recognize NDTR by doing such things as having lunches, workshops and wearing supportive apparel. Aside from this, however, the Union did not call any evidence as to what it means for a day to be generally observed, nor that the NDTR was generally observed in

---

[14] 2014 SCC 53 (S.C.C.)

[15] 1970 CarswellNat 474

the province.

[29] In discussing the evidence which an arbitrator may consider when reaching a decision, the Ontario Court of Appeal in *Imperial Oil Ltd. v C.E.P., Local 900* stated:[16]

> 35 Boards of arbitration, like other tribunals and, indeed, the courts, are required to base their findings of fact exclusively on evidence that is admissible before them. They enjoy no authority to base their decision on information and material not contained in the evidence before them: see Keeprite Workers' Independent Union v. Keeprite Products Ltd. (1980), 29 O.R. (2d) 513 (Ont. C.A.), at paras. 15-16; Kane v. University of British Columbia, [1980] 1 S.C.R. 1105 (S.C.C.), at pp. 1113-14; Mugesera c. Canada (Ministre de la Citoyeneté & de l'Immigration), [2005] 2 S.C.R. 100 (S.C.C.), at paras. 41-43. Brown and Beatty put the proposition this way, at p. 3-50:
>
> > Apart from circumstances in which he may take a view, or take "judicial notice" of certain facts, an arbitrator cannot gather evidence himself or make any assumptions of fact except through evidence properly put before him.
> >
> > . . .
> >
> > Accordingly, apart from agreed statements of facts and decisions of other competent tribunals, and possibly in those instances where issue estoppel might apply, all other facts must be proved through documentary evidence or through the oral testimony of witnesses. [Citations omitted; emphasis added.]

[30] The Union argued that I could and should take judicial notice of:

a) aboriginal issues in Saskatchewan, particularly as they relate to residential schools and unmarked graves; and

b) the Truth and Reconciliation Commission's final report and the recommendations that flow from it (the "Report").

[31] Regarding the facts that a decision-maker may take judicial notice, McLachlin, C.J. stated in *R v Find*:[17]

> 48 Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or

---

[16] 2009 ONCA 420

[17] 2001 SCC 32

> beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy . . . .

[32] In *Canada Post Corp. v C.U.P.W.*,[18] the British Columbia Supreme Court summarized the discussion of Binnie, J. in *R v Spence*,[19] which expanded upon McLachlin's comments in *Find*:

> 74 A recent Supreme Court of Canada authority on judicial notice is R. v. Spence, 2005 SCC 71, [2005] 3 S.C.R. 458 (S.C.C.). In Spence, Binnie J. Reviewed the differing views of judicial notice propounded by two American professors, James Thayer and E.M. Morgan. According to Binnie J., "Professor Thayer's view was that '[i]n conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved;", and that "courts may and should notice without proof, and assume as know by others, whatever, as the phrase is, everybody knows". Morgan's view, much stricter than Thayer's, was that judicial notice should only be taken of facts so norotiously correct as "not to be the subject of debate among reasonable persons" or capable of immediate demonstration by resort to "readily accessible sources of indisputable accuracy". Binnie J. noted the "useful distinction between adjudicative facts (the where, when and why of what the accused is alleged to have done) and 'social facts' and 'legislative facts' which have relevance to the reasoning process and may involve broad considerations of policy". Binnie J. continued (paras. 61-63, and 65):
>
> > To put it another way, the closer the fact approaches the dispositive issue, the more the court ought to insist on compliance with the stricter Morgan criteria. Thus in Find, the Court's consideration of alleged juror bias arising out of the repellant nature of the offences against the accused did not relate to the issue of guilt or innocence, and was not "adjudicative" fact in that sense, but nevertheless the Court insisted on compliance with the Morgan criteria because of the centrality of the issue, which was hotly disputed, to the disposition of the appeal. While some learned commentators seek to limit the Morgan criteria to adjudicative facts (see, e.g. Paciocco and Stuesser, at p. 286; McCormick, at p. 316), I believe the Court's decision in Find takes a firmer line. I believe a review of our jurisprudence suggests that the Court will start with the Morgan criteria whatever may be the type of "fact" that is sought to be judicially noticed. The Morgan criteria represent the gold standard and, if satisfied, the "fact" will be judicially noticed, and that is the end of the matter.
> >
> > If the Morgan criteria are not satisfied, and the fact is"adjudicative" in nature, the fact will not be judicially recognized, and that too is the end of the matter.
> >
> > It is when dealing with social facts and legislative facts that the Morgan criteria, while relevant, are not necessarily conclusive. There are levels of notoriety and indisputability. Some legislative "facts" are necessarily laced with supposition, prediction, presumption, perception and wishful thinking. Outside the realm of adjudicative fact, the limits of judicial notice are inevitability somewhat elastic. Still, the Morgan criteria will have great weight when the legislative fact or social

[18] 2008 BCSC 338

[19] 2005 SCC 71

> fact approaches the dispositive issue....
>
> . . .
>
> When asked to take judicial notice of matters falling between the high end already discussed where the Morgan criteria will be insisted upon, and the low end of background facts where the court will likely proceed (consciously or unconsciously) on the basis that the matter is beyond serious controversy, I believe a court ought to ask itself whether such "fact" would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute for the particular purpose for which it is to be used, keeping in mind that the need for reliability and trustworthiness increases directly with the centrality of the "fact" to the disposition of the controversy.
>
> Thus, the centrality of the fact in question to the disposition of the controversy affects the standard for appropriateness of judicial notice . . . .

[33] The Union has suggested that I may take judicial notice of aboriginal issues and the Report. The existence of residential schools and unmarked graves falls under the first type of fact of which an arbitrator may take judicial notice, namely, that it is so notorious or generally accepted as not to be the subject of debate among reasonable persons. The Report falls under the second type of fact of which a judge or arbitrator may take judicial notice, that is, it is something which is capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy. However, even if judicial notice was to be taken of either of these facts, it would not assist the Union much. Neither shows that there was a general observance of the NDTR by the population of Saskatchewan, despite the fact that each provides compelling reasons to do so. As well, the Union has not presented any evidence to show that these issues were considered in any way during the collective bargaining process.

[34] Legislation, including regulations, falls under the second type of facts of which an arbitrator may take judicial notice. In *Campbellton (City) v C.U.P.E., Local 76*,[20] the Court stated:

> 29 The applicant has also argued that the Arbitrator misconducted himself and exceeded his jurisdiction by relaying upon an extreneous (sic) matter not raised in the evidence before him.
>
> 30 The Arbitrator in fact quoted a regulation under the Occupational Safety Act and there is some dispute as to whether or not the Regulation was introduced into the evidence.
>
> 31 In my view, the status of an Arbitrator was well described in the case of Babcock and Wilcox

[20] 1982 CarswellNB 163

Canada Ltd. et al. v. Sheet Metal Workers, (1975) 12 N.B.R. (2d) 493 at page 505:

> In an arbitration proceeding the procedure is not usually as formal as in a judicial trial but the general format should vary little from judicial procedure. The parties must relay upon their own resources to adduce and prepare the appropriate evidence and argument. It may be presented simply and without all the formalities of a trial but it remains their responsibility not the Arbitrator's. The Arbitrator sits as a judge not as an assessor and should not descend into the arena as a participant calling witnesses and acquiring extrinsic evidence not introduced by the parties. See L.S.U.C. 1954 page 136 to 138 incl.

32 If therefor the Arbitrator, to some extent, sits as a "judge", I fail to see why he could not take judicial notice of an Act of the Legislature or the Regulations thereunder.

[35] As such, judicial notice is taken of section 2-29 of *The Legislation Act* ("*LA*"):[21]

2-29 In an enactment:

. . .

"holiday" means

. . .

(c) any day appointed by an Act of the Parliament of Canada or by proclamation of the Governor General or Lieutenant Governor as a public holiday; (<<jour férié>>)

[36] Consideration must be given to how this section of the *LA* relates to section 2-30 of *The Saskatchewan Employment Act* ("*SEA*"):[22]

2-30(2) For the purposes of this Part, the following are public holidays in Saskatchewan:

(a) New Year's Day;
(b) Family Day;
(c) Good Friday;
(d) Victoria Day;
(e) Canada Day;
(f) Saskatchewan Day;
(g) Labour Day;
(h) Thanksgiving Day;
(i) Remembrance Day;
(j) Christmas Day.

(3) In this part, a reference to a public holiday is a reference to one of the days mentioned in

---

[21] SS 2019, c L-10.2

[22] SS 2013, c S-15.1

> subsection (2) or to a day substituted for that day in accordance with section 2-31.

[37] The question is how does the definition of holiday given in the *LA* affect the list of public holidays given in the *SEA*. At first glance, it would appear to expand the list to include the NDTR. However, upon closer consideration, it is clear that this is not the case.

[38] Section 2-2 of the *LA* specifies when the provisions of the *LA* are to apply to other pieces of legislation:

> 2-2 Every provision of this Part applies to every enactment, whenever enacted, unless a contrary intention appears in this part or in an enactment.

[39] One must turn to the rules of statutory interpretation to determine whether a contrary intention is expressed in the *SEA*. In *Regina Bypass Design Builders v Supreme Steel LP*,[23] the Saskatchewan Court of Appeal outlined the rules of statutory interpretation:

> 23 The proper approach to any issue of statutory interpretation is the so-called modern principle articulate in *Rizzo & Rizzo Shoes Ltd., (Re)*, [1998] 1 SCR 27, which "recognizes that statutory interpretation cannot be founded on the wording of the legislation alone" (at para 21). The modern principle has been codified in s. 2-10(1) of *The Legislation Act*, which reads as follows:
>
> > 2-10(1) The words of an Act and regulations authorized pursuant to an Act are to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature.
>
> 24 In s. 2-10(2), *The Legislation Act* also requires every enactment to be interpreted in a remedial fashion and to be given a "fair, large and liberal interpretation" that best attains the objects of the statute.
>
> 25 The language of the statutory provision in question is always the starting point, but not the end point, of an exercise in interpretation. As noted in *Hess v Thomas Estate*, 2019 SKCA 26, 433 DLR (4th) 60:
>
> > [50] The modern principle and s. 10 demand a contextual and purposive approach. However, that does not mean the court can ignore the ordinary meaning of the words chosen by the legislature. AS noted in Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed, (Markham, Ont: LexisNexis, 2014) at 29 [Sullivan]:
> >
> > . . . interpretation properly begins with the ordinary meaning –

[23] 2021 SKCA 82

> with reading words in their grammatical and ordinary sense – but does not stop there. Interpreters are obliged to consider the total context of the words to be interpreted in every case, no matter how plain those words may seem upon initial reading.
>
> [51] The ordinary meaning prevails unless there is a reason to reject it based on contextual considerations. Such considerations – one of which is the avoidance of absurdities - may result in the adoption of an interpretation that differs from the ordinary meaning, but only if that interpretation is plausible (Sullivan at 28-29). The plausible meaning rule requires that the interpretation is one that the words of the text can reasonably bear (Sullivan at 191). As LeBel J. said in *Re: Sound v Motion Picture Theatre Associations of Canada*, 2012 SCC 38, [2012] 2 SCR 376: "Although statutes may be interpreted purposively, the interpretation must nevertheless be consistent with the words chosen by Parliament" (at para 33).

26 In Ballantyne, Ryan-Foslie J.A., also citing Ruth Sullivan in *Sullivan on the Construction of Statutes*, 6th ed, (Markham, Ont: LexisNexis, 2014) [Sullivan], wrote: [20]...

> 2. Even if the ordinary meaning is plain, courts must take into account the full range of relevant contextual considerations including purpose, related provisions in the same and other Acts, legislative drafting conventions, presumptions of legislative intent, absurdities to be avoided and the like.
>
> 3. . . . the court may adopt an interpretation that modifies or departs from the ordinary meaning, provided the interpretation adopted is plausible and the reasons for adopting it are sufficient to justify the departure from ordinary meaning.

27 The modern principle emphasizes the importance of purposive analysis in statutory interpretation. All legislation is presumed to have a purpose which courts should strive to discover and give effect to through the interpretative process. Legislative purpose must be taken into account at every stage of the interpretation exercise and, so far as the language of the text permits, interpretations that are consistent with or promote legislative purpose should be adopted, while those that defeat or undermine legislative purpose should be avoided (*Sullivan* at §9.3; *Farm Credit Canada v Gustafson*, 2021 SKCA 38 at para 58).

28 Context must also be taken into account. As Sullivan observes, at §2.19, "in hard cases the contextual factors point in different directions" and "[i]n such cases, reading the text harmoniously with the scheme and object of the Act and the intention of the legislature requires a balancing act". All of this eans that in some instances, the plain meaning of the words used will receive greater weight in the analysis and, in other cases, less. As Sullivan describes, at §2.37:

> The factors that justify outcomes in statutory interpretation are multiple, involving inferences about meaning and intention derived from the text, non-textual evidence of legislative intent, specialized knowledge, "common sense" and legal norms. These factors interact in complex ways. It is never enough to say the words made me do it.

[40] Section 2-30(3) of the *SEA* clearly limits public holidays in the province to those listed in subsection (2), though it does allow another day to be substituted for one of these. If the legislature had meant for the definition of 'holiday' in the *LA* to modify this section, it would not have set such clear limits to the days to be considered public holidays. Thus, the legislation does assist the Union.

Other Cases

[41] The Union made note of various cases that have dealt with CBAs and recognition of the NDTR:

a) *Windsor*;

b) *AUPE and Alberta Health Services (848846), Re*;[24]

c) *Terrapure Environmental and USW, Local 2009 (Statutory Holiday), Re*;[25]

d) *LIUNA, Local 1059 and London & District Concrete Formwork Contractors' Assn. (Statutory Holiday), Re*;[26]

e) *UFCW, Local 1006A and National Grocers Co. (GR0148), Re*;[27] and

f) *Olympic Motors (WC1) Corp. And IAMAW, Local 1857 (National Day for Truth and Reconciliation), Re*.[28]

[42] Of these cases, only *Terrapure* was decided in favour of the employer.

[43] The Employer contends that these cases are distinguishable from the matter at hand. It says the language utilized in these CBAs is different from that employed in this CBA.

[44] The CBAs in all of these cases include a list of recognized holidays and a clause regarding

---

[24] 2022 CarswellAlta 685

[25] 2021 CarswellBC 4110

[26] 2021 CarswellOnt 13607

[27] 2021 CarswellOnt 14694

[28] 2021 CarswellBC 3513

the inclusion of other holidays declared/recognized/proclaimed in the future in:

a) *Windsor*, this clause reads as "and any other day declared by a competent authority to be a holiday";

b) *LIUNA*, this clause states, "any other holiday proclaimed by the Provincial or Federal Government";

c) *Olympic Motors*, this clause says, "or any other day proclaimed by the provincial or federal government";

d) *AUPE & AHS*, it reads, "and all general holidays proclaimed by the municipality or the Government of Alberta or Canada";

e) *Terrapure*, it states, "and any other day recognized as a Statutory Holiday by the Provincial and/or Federal Governments"; and

f) *National Grocers* the CBA reads, "In the event that the federal or provincial governments should declare any other day(s) a legal holiday, the Company agrees to recognize such day(s) as a Paid Holiday."

None of these cases have a further phrase requiring the holiday to be generally observed in the province. As such, none of these cases are of any assistance to the Union in this matter.

45. I therefore find the Union has failed to meet its onus to prove the NDTR was generally observed in the province. I dismiss the Grievance.

Dated on June 10, 2022.

T. F. (Ted) Koskie, B.Sc., LL.B.,
Sole Arbitrator