BRITISH COLUMBIA UTILITIES COMMISSION

IN THE MATTER OF THE *Utilities Commission Act*, RSBC 1996, c.473

and

An Application by British Columbia Hydro and Power Authority
for the Filing of Energy Supply Contracts with Alcan Inc.
LTEPA Amending Agreement,
Amended and Restated Long-Term Electricity Purchase Agreement

BCUC Project No. 389846

WRITTEN ARGUMENT OF INTERVENORS
SIERRA CLUB OF CANADA (B.C. CHAPTER),
B.C. SUSTAINABLE ENERGY ASSOCIATION, AND
PEACE VALLEY ENVIRONMENT ASSOCIATION ("SCCBC, *et al.*")

December 19, 2006

Introduction

1. These are the submissions of the Intervenors Sierra Club of Canada (B.C. Chapter), B.C. Sustainable Energy Association, and Peace Valley Environment Association ("SCCBC, *et al.*") concerning the application by British Columbia Hydro and Power Authority ("BC Hydro") for filing under s.71 of the *Utilities Commission Act*, RSBC 1996, c.473 of the LTEPA Amending Agreement and the Amended and Restated Long-Term Electricity Purchase Agreement ("LTEPA+").

2. SCCBC, *et al* have had the opportunity to review the final arguments of the applicant BC Hydro, the intervenor Alcan Inc. (Alcan), and the intervenors Ministries of Energy, Mines and Petroleum Resources and Economic Development, all dated December 14, 2006.

Order requested

3. SCCBC, *et al.*, respectfully request that the Commission accept LTEPA+ for filing under s.71 of the *Act*.

Standard of review

4. The standard of review by which the Commission determines whether LTEPA+ is an energy supply contract that should be accepted for filing is determined by s.71(1) and 71(2) of the *Act*:

> 71 (1) Subject to subsection (1.1), a person who, after this section comes into force, enters into an energy supply contract must
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> (a) file a copy of the contract with the commission under rules and within the time it specifies, and
> (b) provide to the commission any information it considers necessary to determine whether the contract is in the public interest.
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> …
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> 71 (2) The commission may make an order under subsection (3) if the commission, after a hearing, finds that a contract to which subsection (1) applies is not in the public interest by reason of

(a) the quantity of the energy to be supplied under the contract,
(b) the availability of supplies of the energy referred to in paragraph (a),
(c) the price and availability of any other form of energy, including but not limited to petroleum products, coal or biomass, that could be used instead of the energy referred to in paragraph (a),
(d) in the case only of an energy supply contract that is entered into by a public utility, the price of the energy referred to in paragraph (a), or
(e) any other factor that the commission considers relevant to the public interest.

5. Subsection 71(1) contemplates the Commission making a determination as to whether the energy supply contract is in the public interest.

6. Subsection 71(2) is expressed in the negative. It authorizes the Commission to make certain orders under s.71(3) where the Commission finds, after a hearing, that the contract is *not* in the public by reason of five enumerated factors, the fifth of which is "any other factor that the commission considers relevant to the public interest."

7. Despite the fact that s.71(2) is expressed in the negative, SCCBC, *et al* argue that the Commission should treat the factors listed in s.71(2) as being equally applicable to the Commission's affirmative determination of whether the contract *is* in the public interest. This is for three reasons.

   (a) First, as noted above, s.71(1) contemplates the Commission making an affirmative determination as to whether the energy supply contract is in the public interest.

   (b) Second, paragraph 71(3)(v) refers *affirmatively* to "any *other factor* that the commission considers *relevant to the public interest*" [underline added]. This implies that all the listed factors are relevant to the public interest; and that the listed factors are not limited to a determination that the contract is *not* in the public interest.

   (c) Third, the *Act* should be interpreted so as to avoid an inconsistent result, which would be the case if the criteria for determining that an ESC *is* in the public

interest were different than the criteria for determining that an ESC is *not* in the public interest.

8. The upshot of this argument is that the Commission is entitled to determine that the contract is *in* the public interest by reason of the five factors listed in s.71(2), including “any other factor that the commission considers relevant to the public interest.”

9. The question is what “other factor[s]” the Commission should consider relevant to the public interest in this case is dealt with below.

Issues

10. SCCBC, *et al* respectfully submit that in the particular circumstances of the LTEPA+ application the determination of whether LTEPA+ meets the s.71 public interest test involves consideration of the following four basic issues:

    (a) Is there a *need* for the firm and non-firm energy, and other attributes such as capacity and dispatchability, to be supplied under LTEPA+?

    (b) Is the supply of electricity under LTEPA+ cost effective?

    (c) Do the elements of LTEPA+ that link with the Project Agreement and the Modernization Project make LTEPA+ more, or less, in the public interest? This is discussed further, below.

    (d) Considering the answers to the previous three questions *as a whole*, does LTEPA+ meet the s.71 public interest test?

11. If the Commission finds that LTEPA+, taken as a whole, does *not* meet the s.71 public interest test then there is the question of whether the Commission should exercise its authority under s.71(3). This topic is addressed below.

Argument

Need

12. SCCBC, *et al* will defer to other parties regarding examination of the size of the load/resource gap over time.

13. SCCBC, *et al* is satisfied that the need for the firm and non-firm energy supplies under LTEPA+ has been established.

14. SCCBC, *et al* notes that the size of the load/resource gap will be substantially affected by the efficacy of BC Hydro's demand-side management programs going forward. In that sense, LTEPA+ is desirable because it brings on firm energy (and dispatchability) immediately and thereby allows a lag time for increased DSM spending to produce electricity savings.

Cost effectiveness

15. SCCBC, *et al* will address the following issues regarding cost-effectiveness:

    (a) the Reinstatement Fee and the validity of Alcan's recall under the Original LTEPA,

    (b) the reliance on a proxy for market price as distinct from negotiations based on the respective opportunity costs of BC Hydro and of Alcan,

    (c) the use of the results of the F2006 Call as a proxy for market price,

    (d) the relevance and materiality of other potential benchmarks.

The Reinstatement Fee and the validity of Alcan's recall under the Original LTEPA

16. SCCBC, *et al* are of the view that the validity of Alcan's purported exercise of its right of recall under the Original LTEPA is a matter of mixed fact and law that would arise in the event that BC Hydro (or Alcan) sought a contractual remedy against the other under the Original LTEPA.

17. One topic that is material to whether LTEPA+ is in the public interest under s.71 is whether BC Hydro fully and properly considered the legal and financial merits of challenging Alcan's notice of recall (or the recall itself as of the effective date) in evaluating the opportunity cost of not entering LTEPA+ (which effectively settles any dispute under the Original LTEPA regarding the recall).

18. BC Hydro's direct evidence is effectively that it did indeed consider the pros and cons of challenging the recall as one of many factors that went into its decision to enter LTEPA+. The only contrary evidence is circumstantial: i.e., that the size of the Reinstatement Fee was calculated on the assumption that the recall was (or would be) valid, from which it might be inferred that BC Hydro had either neglected to consider the potential value of a contractual remedy under the Original LTEPA in agreeing on the business terms of LTEPA+ or that it incorrectly assigned a zero value to a potential dispute of the recall under the Original LTEPA. In response, BC Hydro's direct evidence is that BC Hydro did consider the potential value of disputing the recall and that it did so in its evaluation of the non-quantified merits of LTEPA+.

19. While resolving this issue might have been easier if BC Hydro had 'laid a paper trail' on this topic, SCCBC, *et al* take the position that the evidence does not support a conclusion that BC Hydro's handling of the Alcan recall under the Original LTEPA and in the negotiation of LTEPA+ was deficient in any way that would impact whether LTEPA+ is in the public interest.

Reliance on a proxy for market price as distinct from negotiations based on the respective opportunity costs of BC Hydro and of Alcan

20. BC Hydro's primary position has been that the price of firm and non-firm energy in LTEPA+ was the outcome of negotiations between BC Hydro and Alcan based on the results of the F2006 Call for Tenders as a proxy for the market price of Kemano power.

21. SCCBC, *et al* support the view that an alternative, or additional, approach would have been to negotiate a price based on each party's view of the other party's opportunity

cost of entering the agreement. (It should be noted that each party's opportunity cost is not restricted to the same product as the one being negotiated.)

22. That said, SCCBC, *et al* do not agree that the use of an opportunity cost approach would look only at Alcan's opportunity cost. BC Hydro too has an opportunity cost that would have to be examined.

23. On balance, SCCBC, *et al* do not believe that there is sufficient evidence for the Commission to conclude that BC Hydro's primary use of a market price proxy approach to the LTEPA+ negotiations indicates a result that would not be in the public interest.

The use of the results of the F2006 Call as a proxy for market price

24. In the view of SCCBC, *et al*, the evidence does not support a conclusion that there was any realistic alternative to using the results of the F2006 Call as a proxy for market price.

25. Significantly, the results of the F2006 Call form a relatively wide range of prices. Given the numerous differences between the "product" under LTEPA+ and the "product" under the F2006 Call, the challenge for each party (BC Hydro and Alcan) would have been to quantify and negotiate the financial impact of these differences.

26. There is no evidence regarding the *details* of how BC Hydro and Alcan arrived at the final negotiated price (referred to as $71.30/MWh for identification) from within the range of F2006 Call prices. The only evidence is that both BC Hydro and Alcan consider it to have been a freely negotiated price. As it happens, the final negotiated price is roughly mid-point within the F2006 price range.

The relevance and materiality of other potential benchmarks

27. SCCBC, *et al* are of the view that while prices other than F2006 prices could theoretically be used as benchmarks against which to compare the LTEPA+ price the differences between the product associated with those other prices and the product

associated with LTEPA+ is much larger than the differences between the F2006 Call product and the LTEPA+ product.

28. For example, the mid-C price is not a long-term product. And, repowering the Burrard Thermal Plant or developing a ('Duke Point') CCGT on Vancouver Island both carry substantial gas price risk and development risk.

Conclusion regarding cost effectiveness

29. For these reasons, SCCBC, *et al* conclude that LTEPA+ should be considered cost-effective from a price perspective.

LTEPA+ and the Project Agreement

30. SCCBC, *et al* make two arguments under this heading:

    (a) that the linkage between LTEPA+ and the Project Agreement warrants consideration as a factor going to whether LTEPA+ is in the public interest under s.71, and

    (b) that the linkage between LTEPA+ and the Project Agreement *supports* the conclusion that LTEPA+ is in the public interest in under s.71.

31. There are four main interconnections between LTEPA+ and the Project Agreement.

32. First, LTEPA+ and the Project Agreement were negotiated in tandem between Alcan and BC Hydro and between Alcan and the Province, respectively.[1] The evidence is that representatives of BC Hydro and representatives of the Province participated on the same negotiating team vis-à-vis Alcan's negotiating team. BC Hydro and the Province are not at arm's length with each other. BC Hydro is the agent of the Province; and the Province is BC Hydro's only shareholder. Without suggesting that the Province exerted any *improper* influence on BC Hydro in the negotiations, it is clear that the Province's interests in the Project Agreement are reflected in the content of BC Hydro's LTEPA+ agreement with Alcan.

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[1] SCCBC, *et al* do not agree that the negotiations should be characterized as "three-way" negotiations, because the outcome did not include an agreement between the Province and BC Hydro.

33. Second, the financial terms of the Amended and Restated LTEPA expressly depend on whether Alcan does or does not carry out the Modernization Project, Alcan's contingent commitment to which is at the heart of the Project Agreement. In particular, Alcan in effect incurs a financial penalty if it does not initiate or complete the Modernization Project.

34. Third, the Project Agreement terminates the Province's contingent commitment to provide replacement electricity to Alcan under the 1997 Replacement Electricity Supply Agreement (RESA) if and only if LTEPA+ is accepted for filing under s.71 by December 31, 2006, either unconditionally or on conditions acceptable to both BC Hydro and Alcan. Regardless of the likelihood of Alcan putting itself into a position to call on the Province to provide replacement electricity under RESA (by completing and operating the New Smelter in combination with the existing Kitimat smelter so as to draw electrical load greater than available Kemano power) in the event that LTEPA+ is not filed by December 31, 2006, the termination of the Province's RESA commitment is of value to the Province. The NPV of the Province's RESA commitment is roughly $415-million.[2] The Ministries of Energy, Mines and Petroleum Resources and Economic Development argue that "For the Province [termination of RESA] represents certainty."[3]

35. Fourth, Alcan's contingent commitment to the Modernization Project under the Project Agreement directly affects the amount of electricity that would be available to BC Hydro in the event that the Modernization Project is in fact commenced, completed and operated.

36. For these four reasons, SCCBC, *et al* argue that the linkage between LTEPA+ and the Project Agreement is factor relevant to the public interest under s.71.

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[2] B-7 BCUC IR 1.15.6.
[3] December 14, 2006, Submissions the Ministries of Energy, Mines and Petroleum Resources and Economic Development, para.4.

37. Next, SCCBC, *et al* would ask the Commission to draw the following two conclusions regarding the *content* of how the linkage between the Project Agreement and LTEPA+ affects the public interest under s.71.

38. First, LTEPA+ provides a mild incentive to Alcan to undertake the Modernization Project (in the form of a financial disincentive to not undertaking the Modernization Project). The Modernization Project involves replacing the existing Kitimat smelter with an aluminum smelter that would be more energy efficient, less polluting, less greenhouse gas intensive, and less of a worker health and safety hazard than the existing smelter. These factors weigh in favour of the conclusion that LTEPA+ is in the public interest.

39. Second, LTEPA+, or, more particularly, the filing of LTEPA+ under s.71, has the effect of terminating the Province's contingent commitment to provide some $415-million worth of replacement electricity to Alcan under RESA. Acquiring this certainty would be a tangible benefit to the Province. This weighs unequivocally in favour of LTEPA+ being in the public interest. Termination of the Province's contingent liability under RESA provides an opportunity value to the Province by putting the Province in a position to make a political decision regarding the advantages and disadvantages of subsidization of aluminum production without being fettered by a contractual obligation.

40. There are a number of other arguments that could be described as generally relating to the public interest aspects of LTEPA+ and the Project Agreement. SCCBC, *et al* argue that these arguments should be dealt with in terms of weight, rather than jurisdiction. Briefly, SCCBC, *et al* make the following comments.

    (a) The District of Kitimat confirmed in cross-examination[4] that its first priority is smelter jobs in Kitimat. There is nothing wrong with that position; but there is no solid evidence that the acceptance or non-acceptance for filing of LTEPA+ will have either a negative impact or a positive impact on Kitimat smelter jobs.

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[4] T4: 503.

(b) Whether Alcan should be trusted to carry out the Modernization Project is not material. The notion that Alcan has made an unconditional commitment to complete the Modernization Project is a 'straw man.' Alcan's media release does not claim that under any and all circumstances it will necessarily commence, complete and operate the Modernization Project. And, in the Project Agreement, Alcan makes a contingent commitment, with the emphasis on "*contingent*." Furthermore, it would be unreasonable to expect that Alcan would make a rigorous, unconditional, enforceable contractual commitment to undertake the Modernization Project under any circumstances and certainly in the current period prior to the final outcome of the District of Kitimat's litigation regarding the extent of Alcan's legal authority to sell Kemano power.

(c) Much of the criticism of LTEPA+ and the Project Agreement in the evidence amounts to criticism of the Province's negotiating decisions, whether in terms of propriety, legality, prudence or motivation. Whatever their merit in the political realm or in the courts, these criticisms are *remote* from the issues before the Commission in this proceeding. In addition, some of these criticisms cannot be resolved, one way or the other, unless and until there is a final, substantive outcome of the District of Kitimat's litigation referred to above.

LTEPA+ and the s.71 public interest test

41. SCCBC, *et al* argue that, on balance, and considering need, cost-effectiveness, and the LTEPA+ relationship with the Project Agreement, the evidence favours the conclusion that LTEPA+ *is* in the public interest and therefore should be accepted for filing under s.71 of the *Act*.

Commission questions

42. The Commission has invited parties to address four issues.

(a) Incentives and disincentives

43. SCCBC, *et al* understand the Panel to have asked[5] whether it is appropriate for an energy supply contract between a public utility and an electricity supplier to include incentives or disincentives aimed at motivating the supplier regarding a collateral matter.

44. The response of SCCBC, *et al* is three-fold:

    (a) The fundamental question is whether the energy supply contract (ESC) meets the s.71 public interest test.

    (b) As a matter of practice, it would *simpler* for a public utility to establish that an ESC meets the s.71 public interest test if the ESC did not include incentives or disincentives regarding a collateral matter.

    (c) Where the ESC does include incentives or disincentives regarding a collateral matter, the utility has the burden of convincing the Commission that the ESC, including such incentives or disincentives, meets the s.71 public interest test.

45. It follows that SCCBC, *et al* do not disagree with BC Hydro's opening statement this issue, that:

> "it is not necessarily inappropriate for energy supply contracts to include incentives or disincentives intended to influence the conduct of suppliers on matters not directly related to the supply of energy. The appropriateness of such measures in energy supply contracts depends upon the impact of the measures upon the public interest, considered from the perspective of the purpose of s.71 of the *UCA*. "[6]

46. However, SCCBC, *et al* do disagree with BC Hydro's proposed approach regarding its second argument on this issue. BC Hydro asks the Commission to examine whether the incentives or disincentives are favourable, neutral, or unfavourable to BC Hydro. BC Hydro suggests that if the incentives or disincentives are found to be

[5] T5: 805.
[6] BC Hydro Final Argument, para.150.

favourable or neutral to BC Hydro then there is no need to consider the incentives or disincentives in the context of s.71.[7]

47. SCCBC, *et al* respectfully disagree, because there is no statutory basis for separating an energy supply contract's impact on BC Hydro (or on BC Hydro and its ratepayers) from the provision's impact on the s.71 public interest test. There is only one test under the *Act* – the s.71 public interest test. In addition, the *Act* contemplates that it is the *whole* energy supply contract – not just those portions that are not excluded because they do not directly relate to the supply of energy and they are favourable or neutral to BC Hydro – that must meet the s.71 public interest test.

(b) Public interest scope

48. The Commission asks:[8]

> What are the interests that can be considered as part of the public interest in respect of the matters to be decided in this proceeding? (For example, whether or not the incentives or disincentives are adequate with respect to the completion of the Modernization Project.)

49. The broad question is addressed first.

50. SCCBC, *et al.* take the position that because LTEPA+ *does* contain provisions providing incentives to the supplier Alcan to undertake, and disincentives not to undertake, an action, the Modernization Project, which is not directly related to the supply of energy under LTEPA+, the question of whether LTEPA+ meets the s.71 public interest test must include consideration of whether the Modernization Project, directionally, weighs negatively, positively, or neutrally toward the s.71 public interest test. This is discussed in more detail, in paragraphs 30 to 36, above.

51. Addressing the example, SCCBC, *et al.* take the position that the question of "whether or not the incentives or disincentives are adequate respect to the completion of the Modernization Project" – "adequate" in the sense of being of sufficient

[7] BC Hydro Final Argument, paras.151-154.
[8] T5: 805.

magnitude to cause Alcan to actually commence and complete the Modernization Project -- is *not material* to whether LTEPA+ meets the s.71 public interest test.

52. First, the Project Agreement and LTEPA+, taken together, do not purport to establish a framework within which Alcan's contingent commitment to the Modernization Project is subject to contractually enforceable remedies in the hands of the Province of British Columbia.

    (a) Rather, the Project Agreement and LTEPA+, taken together, establish a framework in which the Province receives

        (i) the benefit (such as it is) of Alcan making a public, contingent commitment to the Modernization Project,

        (ii) termination of the 1997 RESA and the Province's contingent commitment therein, and

        (iii) Alcan's entry into LTEPA+ (with BC Hydro) under which Alcan is subject to incentives (arguably) to complete, or disincentives not to complete, the Modernization Project.

    (b) In addition, under the Project Agreement, Alcan's commitment to the Modernization Project is subject to three contingencies, the second of which – a future agreement between Alcan and the union – is entirely within Alcan's ability to negative.

53. The net effect is a contractual framework in which Alcan merely receives incentives to undertake, or disincentives not to undertake, the Modernization Project – not a framework in which Alcan is subject to a binding, contractually enforceable obligation to undertake the Modernization Project.

54. Therefore, the question of "whether or not the incentives or disincentives are adequate with respect to the completion of the Modernization Project" is *immaterial* because the incentives and disincentives are intended to motivate Alcan in the

direction of undertaking the Modernization Project, but they are not intended to *ensure* that Alcan undertakes the Modernization Project.

55. The second reason why the question of "whether or not the incentives or disincentives are adequate with respect to the completion of the Modernization Project" is immaterial is that the *adequacy* of the incentives and disincentives in LTEPA+ in comparison with the Province's interest in motivating Alcan to undertake the Modernization Project is a matter for the Province to determine. By entering the Project Agreement, the Province has presumably signified its satisfaction with the adequacy of the incentives and disincentives in LTEPA+ in the context of the Province's interests in the Project Agreement and LTEPA+, taken together. The question of whether Province's satisfaction with the terms of the Project Agreement and LTEPA+ is well founded is not material to whether LTEPA+ meets the s.71 public interest test.

(c) Does the Commission have jurisdiction to modify LTEPA+?

56. The Commission asks:[9]

> Does the Commission have jurisdiction to modify LTEPA+? If so, what modifications would you recommend.

57. The Commission's authority in relation to LTEPA+ is set out in subsections 71(2), 71(3) and 71(4) of the *Act*.

58. Where the Commission finds that an energy supply contract is not in the public interest under s.71(2) the Commission has authority under s.71(3)(a) to declare all or *a portion* of the ESC unenforceable. Presumably, the Commission's authority to declare only a *portion* of the ESC unenforceable implies that the Commission has authority to accept for filing under s.71 the remaining, enforceable portions of the ESC, although s.71 does not explicitly confirm this.

[9] T5: 805.

59. Thus, the Commission does have jurisdiction under s.71(3)(a) to modify LTEPA+ by declaring certain a portion of LTEPA+ unenforceable and accepting for filing the remainder of LTEPA+.[10]

60. It must be added, however, that the LTEPA Amending Agreement itself (s.3.1) contemplates the possibility of the Commission accepting the Amending Agreement for filing under s.71 *on conditions*. And, the Amending Agreement s.3.1 provides, in effect, that if either BC Hydro or Alcan finds such conditions unacceptable, acting reasonably, then the Original LTEPA is not amended and restated (i.e., LTEPA+ is of no force and effect).

61. Thus, while the Commission has jurisdiction under s.71(3)(a) to modify LTEPA+ by declaring a portion of LTEPA+ unenforceable the Commission's authority to accept for filing the remainder of LTEPA+ would become an empty authority if either BC Hydro or Alcan exercised its contractual entitlement to vacate LTEPA+ due to the conditions ordered by the Commission. In a sense, by using s.71(3)(a) to declare unenforceable a portion of LTEPA+, the Commission would be effectively granting BC Hydro and Alcan an option to 'take or leave' the Commission-modified LTEPA+.

62. It could be asked, What if the Commission exercised its authority under s.71(3)(a) to declare unenforceable both some portion of LTEPA+ *and* s.3.1 of the Amending Agreement, thereby purporting to remove BC Hydro's and Alcan's contractual entitlement to effectively terminate LTEPA+ if either party, acting reasonably, finds unacceptable any Commission conditions on filing? This legal question probably goes beyond the intention of the question posed by the Commission. Therefore, SCCBC, *et al* will not explore it here, beyond saying that it would require interpretation of s.71 within the context of the *Act* as a whole and it raises the question of whether an involuntary 'contract' could be said to be an "electricity supply contract" under the *Act*.

[10] It should be noted, for reference, that the Amended and Restated LTEPA does contain a severability clause, s.19.11, which provides that a provision of the contract that is unenforceable is ineffective without invalidating the remaining provisions of the contract.

63. In practical terms, before the Commission were to take the drastic step of attempting to impose a ‘contract’ on BC Hydro and Alcan that would supersede any objections of either or both of BC Hydro and Alcan the Commission would likely give the parties notice and an opportunity to comment.

64. In addition to its authority under s.71(3)(a), where the Commission finds that an energy supply contract is not in the public interest under s.71(2) the Commission has authority under s.71(3)(b) to “make any other order it considers advisable in the circumstances.”

65. SCCBC, *et al* are not aware of instances in which the Commission’s authority under s.73(3)(b) has been exercised. Presumably, the Commission would exercise its s.73(3)(b) authority where the Commission intended *not* to accept an energy supply contract for filing and the Commission wanted to direct the utility to take certain steps, or to refrain from taking certain steps, related to the alternatives to taking the energy supply under the proposed ESC. Presumably, this goes beyond the scope of the topic on which the Commission invited comments.

What modifications do you recommend?

66. This question applies only in the hypothetical scenario in which the Commission finds that LTEPA+ as a whole does *not* meet the public interest test under s.72(2).

67. In that scenario, SCCBC, *et al* recommend that the Commission simply decline to accept LTEPA+ for filing (with reasons, of course), rather than exercising the Commission’s authority under s.73(3)(a) to declare unenforceable some portion of LTEPA+ or under s.73(3)(b) to make an “other order.” SCCBC, *et al* take this position for two reasons.

68. First, it is not apparent that there is any particular modification(s) of LTEPA+ that would both (a) change LTEPA+ from *not* being in the public interest to being *in* the public interest and (b) meet the approval of BC Hydro and Alcan, acting together.

69. Second, as argued above, modification of LTEPA+ by the Commission effectively give BC Hydro and Alcan, acting together, an option to take or leave the modified LTEPA+. This could be seen as putting the Commission in the position of negotiating with a public utility and a third party, which, with respect, might well be inconsistent with the Commission's role as a regulator under the *Act*.

(d) Adverse inference

70. The Commission asks for input regarding the basis on which an adverse inference can be found, and whether the finding of an adverse inference is a discretionary matter for the Panel.[11]

71. The context is the suggestion that the adverse inference principle may be relevant to the decision of Alcan not to call a witness regarding the facts relevant to the validity of Alcan's recall of energy for the 2010-2014 period under the Original LTEPA.

72. The circumstances in which an adverse inference may be drawn from the failure to call a witness are discussed, for example, in a passage quoted by the B.C. Labour Relations Board in *Choices Market (1998) Ltd.*, BCLRB 428/2001, at para. 78, from the Board's earlier decision in *BC Transit*, BCLRB 395/99:

> The grievor asserts that the Arbitrator misapplied the principles applicable to adverse inferences by refusing to draw an inference in this case. However, it is not the rule that a party should produce every witness, no matter how numerous, who knew anything about an event. Whether an adjudicator resorts to an adverse inference may be a question of weight of the potential evidence. The appropriateness of drawing an inference depends on such circumstances as the place of the "missing" witness in the total evidentiary picture, the extent of the witness's involvement, the importance of the issue in which that witness was involved, and the state of evidence on that issue. Where a potential witness's evidence is comparatively unimportant or inferior to what is already utilized, calling that witness may be dispensed with on

[11] T5: 805.

> grounds of expense and inconvenience. Even where a witness may be more critical, a party affected by an inference may explain it away by showing circumstances which prevent the production of the witness. An adverse inference may be explained away by a plausible reason for non-production: *Wigmore on Evidence*, Chadbourne rev. (1979), vol. 2, pp. 202-203, para. 287, adopted in *Sunnyside Nursing Home* v. *Builders Contract Management Ltd.*, [1985] 4 W.W.R. 97 (Sask. Q.B.), at pp. 115–116. (para. 53)[12]

73. In the context of the present proceeding, SCCBC, *et al* respectfully submit that it would be incumbent upon a party asking the Panel to draw an adverse inference from the failure of another party to call a witness to establish the appropriateness of the Panel drawing such an inference.

ALL THE ABOVE IS RESPECTFULLY SUBMITTED

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December 19, 2006

[12] The *Sunnyside Nursing Home* decision was reversed ([1989] 3 W.W.R. 721), on other grounds.

Cited as:

B.C. Transit (Re)

Between
B.C. Transit (the "Employer"), and
Nick Sansalone (the "Grievor"), and
Independent Canadian Transit Union,
Locals 2 and 11 (the "Union")

[1999] B.C.L.R.B.D. No. 395
BCLRB Decision No. B395/99

Case No. 37756

British Columbia Labour Relations Board
L. Parkinson, Vice-Chair, R. Chouhan and G. Howes, Members

Heard: January 14, 1999.
Decision: October 1, 1999.
(79 paras.)

Counsel:

Rick Edgar, for the Union and Grievor.
Bruce Greyell and Gabrielle M. Scorer, for the Employer.

DECISION OF THE BOARD

I. NATURE OF APPLICATION

¶ 1 The grievor applies under Section 99 of the Code seeking review of an arbitration award of Colin Taylor, Q.C., dated July 6, 1998, Ministry of Labour #A 44/98(a). That award upheld his dismissal from his employment as a bus driver. The grievor seeks review under both Section 99(1)(a) and (b) asserting a denial of a fair hearing and the inconsistency of the award with the principles expressed or implied of the Code.

II. FACTS

¶ 2 The grievor was dismissed by the Employer in September 1995 for sexual misconduct involving a passenger, Lily Chow. The allegations included misconduct arising out of his employment as a driver occurring both on and off duty. The period of misconduct was alleged to have occurred over a time when Chow was 15 to 18 years

old. The grievor acknowledged knowing Chow, but denied the allegations of sexual contact. He asserted that Chow had fabricated the allegations.

¶ 3 Five bus drivers who worked out of the same bus depot in North Vancouver, including the grievor, were initially suspended over allegations involving Chow. One of those five later resigned. There were two prior arbitration awards involving a review of the discipline of those bus drivers for the allegations of sexual misconduct. Each of those grievances was referred to a different arbitrator with the grievor's case being the last one to be heard.

¶ 4 In B.C. Transit v. I.C.T.U., Local 11, Ministry of Labour A-241/96, July 19, 1996, Arbitrator Donald Munroe, Q.C. granted the grievance of James McMaster on the basis that the Employer's decision to dismiss him, while reinstating another driver, was discriminatory discipline. A lengthy suspension without backpay was substituted for the dismissal. An application for review under Section 99 of the Code by the Employer was dismissed in BCLRB No. B54/97.

¶ 5 In the other grievance, Arbitrator Dalton Larson in B.C. Transit v. I.C.T.U., Local 11, Ministry of Labour A-48/96(b), November 25, 1997, upheld the termination of Alvin Hunnisett.

¶ 6 Apart from those arbitration proceedings, civil suits were initiated. In October 1995 the grievor commenced an action in defamation against Chow. In July 1996, Chow commenced a civil action seeking damages from Sansalone and others, including the Employer.

¶ 7 In the arbitration dealing with the grievor's dismissal, nineteen witnesses were called by the parties over the course of the 13 day hearing. The award summarizing the evidence and arguments is 93 pages.

¶ 8 During the hearing, two evidentiary issues arose which are the subject of this application - one relating to the use of evidence relating to other bus drivers, and the other a request for permission to use information obtained in the discovery process in the civil suit.

¶ 9 On the first evidentiary issue on the use of discovery evidence, the award provides no record of the ruling. According to a statutory declaration filed by the grievor, an objection was raised to the admissibility of evidence relating to the other four transit operators. The Arbitrator permitted that evidence to be called on the basis that it may establish the narrative or be part of the res gestae (e.g. acts, declarations and incidents which accompany or explain the incident in issue).

¶ 10 On the other procedural issue, the Arbitrator gave his ruling in an interim award dated February 26, 1997. That ruling was prompted by the evidence led by the Employer through Chow about the medical treatment she was receiving. Chow testified in direct examination about her reasons for seeking therapy and the negative effects on her health

that she attributed to the actions of the grievor. The grievor then sought leave to cross examine Chow on the medical records from her general practitioner and her therapist. Those records were already in the possession of the grievor through the civil proceedings. The Arbitrator permitted cross examination on the discovery transcripts, but refused to permit cross examination on the medical records. The Arbitrator referred to the civil rule that documents and information obtained as a result of discovery were subject to an implied undertaking by the party receiving them not to use the documents for purposes other than the litigation in which they were produced. The Arbitrator noted the party receiving discovery is required to obtain the agreement of the parties, or the court's leave to use the discovery evidence in proceedings other than in the proceeding in which they were produced.

¶ 11 The Arbitrator found that he had jurisdiction to grant leave under the powers found in the Code for arbitration boards to control their own procedure and from the statutory obligation to ensure a fair hearing. The Arbitrator held that the grievor could use the transcript of the examination for discovery to question Chow upon potentially inconsistent statements which were relevant to the facts at issue in the arbitration. However, the Arbitrator denied leave to use the medical records.

¶ 12 After reviewing the criminal authorities setting out the relevant principles, the Arbitrator reviewed the factors in this case favouring disclosure against those keeping the discovery evidence confidential. The medical records contained matters of a sensitive nature and originated in confidence with the expectation that they would not be disclosed. That privacy interest outweighed the grievor's right to a fair hearing as the grievor had other material available to him which would permit full opportunity for cross examination on the factual basis of her allegations. The records may reveal the extent of harm said to have been suffered, but those details were not of sufficient relevance to outweigh the privacy rights. The Arbitrator ruled that the medical records were relevant only to issues collateral to the arbitral dispute over whether the wrongful conduct occurred. While the issue of mental distress was relevant to the civil suit for damages, it was a collateral issue in the case before him. The Arbitrator further reasoned that refusal to grant leave to use the medical records would not impair the grievor's defence as the grievor was precluded from pursuing inconsistencies on collateral issues in any event. He also noted that the records sought to be used covered a period of time far in excess of the alleged conduct.

¶ 13 In the final award dealing with the merits of the grievance, the Arbitrator recognized that the seriousness of the allegations required proof on a higher degree of probability, and indicated that the Employer was required to prove the allegations that the misconduct occurred on a clear and convincing standard. He noted the impact of the allegations on the grievor, and stated that he began his inquiry from the premise of the inherent improbability of the allegations.

¶ 14 There were four instances of misconduct alleged: what was known as the "back of the bus" incident, an incident occurring on Chow's graduation night, sexual contact in a park and "generic" incidents of sexual activity over a period of time at a bus

terminus. The Arbitrator noted the significant degree of similarity in the testimony of Chow and the grievor about the timing and circumstances of their first meeting and the frequency and duration of subsequent events. The two differed on the crucial question of whether sexual relations occurred as alleged.

¶ 15 Apart from the back of the bus incident, there were no other witnesses beyond Chow and the grievor who had direct knowledge of the events alleged. On that occasion, Chow's mother and father approached the bus in the mother's car, and the mother came to the door of the bus and confronted her daughter. Chow's mother and father were not called to testify.

¶ 16 The Arbitrator noted the discrepancies in the dates Chow had given at various times for some of the incidents, and the divergence of her evidence in some of the different proceedings. He also found that she was unable to remember precise dates and times of the alleged sexual contact and had difficulties with sequence of events. The Arbitrator referred to the Supreme Court of Canada decision, R. v. R.W., (1992), 74 C.C.C. (3d) 134, on the issue of addressing the credibility of witnesses who testify about events occurring during their childhood. He then considered the evidence led through an expert witness, Dr. John Yuille, on the memory patterns of persons affected by sexual abuse. (Both parties to this application agreed that there is an error in the description of Yuille's qualifications - he is a forensic psychologist, not a forensic psychiatrist as indicated in the award). Yuille gave testimony about the different kinds of memory - episode or narrative and script. Yuille also testified that the inability to remember times and dates is not of much probative value. The Arbitrator concluded that Chow's inability to recall dates, times and the number of incidents, while only recalling generalized versions of other instances, fit the pattern described by Yuille.

¶ 17 The Arbitrator found Chow was not truthful in some aspects relating to the nature of her relationship with another witness, Marty Copeland. Copeland was a bus driver who had held Union positions in the past and who had supported Chow in her decision to report her allegations to the police. The Arbitrator did not accept the claim that Chow and Copeland were merely friends and made the observation that this lack of truthfulness was "troubling". The Arbitrator also considered whether Chow had a motive to fabricate, but concluded that she did not because she had not filed her civil suit until after these allegations were reported to the police.

¶ 18 While the Arbitrator did not believe some of Chow's evidence, he did not find the grievor credible in other respects. Faced with this conflict between the two key actors, the Arbitrator considered the evidence of another bus driver, Duglass Mackintosh, as critical. Mackintosh was not an eye-witness to any of the encounters alleged, but gave evidence about an admission made by the grievor to him in the first aid room. There was no dispute between Mackintosh and the grievor that there was an exchange between them in the first aid room; what was at issue was what occurred then and what was said. Mackintosh testified that he confronted the grievor about having sexual relations with Chow and the grievor said to him: "Yeah I fucked her so what". The grievor denied that he had made such a statement.

¶ 19 The credibility of Mackintosh was tested by the suggestion that he was not being truthful about when he became aware of the allegations. There was a dispute over whether Mackintosh had knowledge of the allegations involving the grievor before a work-related retirement party in March 1995. To discredit him as a witness, the grievor attempted to establish that Mackintosh referred to Chow's allegations on an earlier occasion in making a comment to the effect of "something heavy was coming down". The Arbitrator records the evidence from Mackintosh and others giving an explanation attributing that comment to other events relating to management, not to drivers.

¶ 20 On the exchange in the first aid room, the Arbitrator accepted Mackintosh's evidence of the grievor's admission of sexual intercourse with Chow over the grievor's denial. The Arbitrator remarked that Mackintosh's evidence was thoroughly tested, and his credibility was challenged on several levels, but he "withstood the test" (at p. 82). The Arbitrator also observed that he was a disinterested witness with no plausible reason to fabricate evidence.

¶ 21 The Arbitrator concluded that the misconduct complained of had occurred, and upheld the decision to dismiss. He found that the grievor's misconduct provided just and reasonable cause for dismissal and that discharge was not excessive.

III. POSITIONS OF PARTIES

¶ 22 Before setting out an overview of the arguments, we make the observation that the grievor's submission initiating the Section 99 application was 44 pages long with numerous lengthy attachments, and was followed by a 23 page reply by the grievor. The Employer's reply submission itself was 27 pages long. Those extensive written submissions that were exchanged, and the four statutory declarations that were filed detailing the evidence, were supplemented by the further oral submissions of counsel at the hearing. Given the length of those submissions, not all of the intricacies of each argument will be recorded. Only a brief summary of the arguments advanced is provided at this stage, but we elaborate upon those arguments in these reasons.

1. Grievor

¶ 23 The grievor argues that the Arbitrator failed to properly apply the standard of proof which in cases of moral turpitude comes "perilously close" to the criminal standard of proof beyond a reasonable doubt : Scott McKee v. College of Psychologists of B.C., Vancouver Registry No. A90383, November 1, 1991. The grievor complains that the Arbitrator failed to consider crucial pieces of evidence. Although an arbitrator does not have to advert to every piece of evidence or point of argument, a denial of a fair hearing occurs where there is a failure of a decision-maker to consider a matter directly bearing on the central matter in dispute: Selkirk Tunnel Constructors, I. R. C. No. C244/88. Disregard of an important issue which may prove to be determinative of the dispute is a reviewable error: Philipp Weinstein, I.R.C. No. C83/99.

¶ 24 The grievor faults the Arbitrator for not drawing an adverse inference for the Employer's failure to call a number of potential witnesses and for the failure of Chow to produce her diary. The grievor maintains that calling Chow's parents as witnesses was absolutely critical to determining the truth of the "back of the bus" incident. The parents' evidence would have revealed the location of Chow in the bus when her parents arrived. The inference should have been drawn that the parents' evidence would have supported the grievor's version that Chow was in the doorway when they arrived, not at the back of the bus as Chow maintained: Wigmar Construction (B.C.) Ltd., BCLRB No. 278/84, 7 C.L.R.B.R. (ns) 99.

¶ 25 The grievor further submits that the Arbitrator should not have permitted the evidence of the allegations against the other bus drivers to be led. Although it may be permissible to lead such evidence as part of the narrative, it should not have been used to establish the truth of the allegations against the other drivers, or as corroborative evidence to assist the Arbitrator in making findings of fact. The only permissible use of that evidence was limited to background context; it should not have been used for the truth of the events alleged or as corroborative evidence: R. v. J.E.F. [1993] 85 C.C.C. (3d) 457 (Ont. C.A.).

¶ 26 The grievor submits that the Arbitrator's failure to permit the medical records to be used for cross examination purposes was a denial of a fair hearing as it prevented use of relevant evidence. That error was compounded by the Arbitrator later relying on assertions as to her purported medical condition in coming to his decision.

¶ 27 The grievor also argues that the Arbitrator has misapplied the rule in R. v. R.W., supra, on the use of evidence of children in sexual assault cases. That rule has no application as Chow was not a child when she testified, or when these events occurred. On Chow's own evidence she was 17 at the time, and a 17 year old is not a child of "tender years": R. v. D.K.R., B.C.C.A., February 12, 1998, Vancouver Registry No. CA022633; R. v. J.J.S., Ont. Court of Justice, December 5, 1994, [1994] O.J. No. 2892; and R. v. G.D.L., Ont. Court of Justice, November 25, 1993, [1993] O.J. No. 3356. Through the misapplication of that rule, the Arbitrator has reduced the standard of proof by making allowances for Chow's evidence which would otherwise not be made for an adult.

¶ 28 The grievor argues that termination was excessive under the framework in Wm Scott, BCLRB N. 46/76, [1977] 1 Can LRBR 1. Even the most serious cases of misconduct by professionals do not automatically attract the penalty of dismissal where there is no risk of a repeat offence: Board of School Trustees of School District No. 65 (Cowichan) v. Peterson, (1988), 22 B.C.L.R. (2d) 98 (C.A.).

2. Employer

¶ 29 The Employer maintains that the Arbitrator appropriately applied the "clear and convincing" standard of proof and the Arbitrator's determinations of the credibility of the witnesses were not capricious findings.

¶ 30 In response to the grievor's allegation of the Arbitrator's failure to consider various issues, the Employer relies on the line of authority that the Board will not infer from the absence of an express mention that the issue was disregarded, particularly where it was the primary issue before the adjudicator to which evidence and argument was advanced: Lornex Mining, BCLRB No. 96/76, [1977] 1 Can. LRBR 377; Savin Canada Inc., BCLRB No. B330/96, at p. 35; and Estall Mining Corporation v. Tagish Resources Ltd., February 24, 1995, B.C.C.A., Vancouver Registry No. CA 015100.

¶ 31 On the issue of a failure to draw an adverse inference, the Employer argues that an arbitrator has a discretion as to whether an inference should be drawn. On the failure to call Chow's parents, the Employer notes that there was no dispute in the evidence of Chow and the grievor that the mother came to the door of the bus. Calling the mother as a witness would not advance the central issue of whether there was sexual contact between Chow and the grievor on that occasion. Furthermore, a reasonable explanation for not calling her parents was provided in their lack of proficiency in English, the mother's state of ill health and the collateral nature of the evidence they could offer.

¶ 32 In support of the Arbitrator's ruling on the use of the medical records, the Employer argues that to further the protection of privacy interests, the Arbitrator only foreclosed the grievor's ability to cross examine on matters collateral to the main issue.

¶ 33 On the issue of the evidence relating to the other drivers, the Employer says that the Arbitrator did not import evidence from the other cases as proof corroborating the assertions of sexual contact with the grievor.

¶ 34 The Employer says the Arbitrator committed no error in the application of the Wm Scott factors. The nature of the Employer's business, the grievor's position of trust and the grievor's dishonesty in lying under oath about the misconduct justified the Arbitrator's determination that dismissal was not an excessive response.

IV. ANALYSIS

a. Appropriate Standard of Proof

¶ 35 Many individual grounds for review are advanced by the grievor, but broadly characterized, most are in essence an allegation that the Arbitrator did not properly apply the standard of proof. The grievor asserts that the Arbitrator merely purported to apply the appropriate standard of proof and made his findings instead on an incorrect lower standard.

¶ 36 The question of whether an employer has established just and reasonable cause for dismissal is tied to the standard of proof and the application of that standard to the evidence: Board of School Trustees of School District No. 46 (Sunshine Coast) v. Sunshine Coast Teachers' Association, BCLRB No. B389/94, (Reconsideration of BCLRB No. B108/93), 26 CLRBR (2d) 69, (1997) 36 B.C.L.R. (3d) 237, leave to S.C.C. denied, [1997] S.C.C.A. No. 473. As the concept of just cause flows from the law of the

statute, the test applied in reviewing these types of evidentiary issues is one of correctness. This type of alleged error engages a more searching enquiry by the Board given its connection to the principles of the statute. While in cases such as this involving allegations of sexual impropriety evidence is required on a "clear, cogent and convincing" standard, it is the whole of the evidence of all the witnesses, not just the deficiencies of a particular witness looked at in isolation that must meet that standard.

¶ 37 Before turning to the myriad particular grounds for review advanced, we address some of the broader general complaints. As one of those, the grievor maintains that what is missing from the award is a reasoned analysis on issues critical to the determination of the dispute. For the reasons that follow, we are not persuaded by that general submission. Faced with contradictions from all sides, the central issue for the Arbitrator was one of credibility. The Arbitrator acknowledged that there were problems with the evidence of all witnesses in some respects and gave reasons why he did not find either Chow or the grievor entirely credible, and why he believed Mackintosh's evidence of the grievor's admission. The Arbitrator clearly had reservations over how trustworthy Chow's evidence was, and looked for comfort in more reliable sources. Ultimately, the Arbitrator was persuaded that Mackintosh as a disinterested witness would not have any reason to have fabricated evidence by lying about the grievor's admission of sexual contact with Chow. It is not the role of the Board to interfere with such an assessment of credibility where the arbitrator has had the unique advantage of seeing the witnesses testify and to hear the whole of the evidence.

¶ 38 The grievor further complains that the Arbitrator failed to consider critical evidence and argument, and that these issues are not addressed in the reasons nor referred to in the summary of the arguments. As for the general allegation that the Arbitrator failed to take evidence into account on several key points, we observe that an absence of a reference to an item does not mean that an arbitrator has necessarily failed to consider it. In these circumstances, an equally plausible inference may be that, given the already extensive length of the award, the Arbitrator confined his reasons to the evidence considered most relevant. Faced with a massive body of evidence led over 19 days, the Arbitrator had a most daunting task in sifting through the extensive testimony and winnowing out the irrelevant to isolate the most compelling evidence. That selective handling of the evidence is not a reviewable error as an arbitrator is not required to set out each and every piece of evidence leading to findings of fact: Sunshine Coast, supra.

¶ 39 One area where the Arbitrator is said to have overlooked evidence relates to the timing of the bus schedules for the grad night incident. The grievor urges us to conclude that the timing of the bus schedules proves that Chow was lying about the time she was dropped off at the bus stop. Although the grievor argues that the Arbitrator ignored this evidence, the Arbitrator does recite in the award the evidence on the timing points and schedules of the buses before reaching the conclusion that the sexual conduct occurred. Halford's evidence set out in the award is that she and Chow left the grad dinner together and she dropped Chow off at Park Royal at about 11 p.m. (at pp. 20, 40). Halford's testimony placed Chow's arrival somewhat earlier than Chow's version (at pp. 39-40). In her evidence Chow placed the encounter with the grievor at midnight or 1

a.m. as the explanation for the grievor offering her a ride home when it was too late for her to catch a connecting bus (at p. 10). However, the grievor testified that it was 11 p.m. when he left Chow at Park Royal, and it was not too late for her then to go home on the bus (pp. 47, 55). Apart from that evidence set out in the award, a statutory declaration establishes that there was further evidence before the Arbitrator that his shift ended on the day of the grad night incident at 1:41 a.m.

¶ 40 Contrary to the grievor's submission, the Arbitrator does confront that evidence on the issue of the timing in making the observation that Chow's evidence of missing the last bus was "insupportable" (at p. 40). After reiterating that finding that Chow's evidence on the time was "clearly wrong or false" (at p. 72), the Arbitrator went on to deal with the failings of the grievor's evidence on this incident and the failure to raise some issues in cross examination of Chow (a matter dealt with more fully below). Having concluded that neither party's evidence on this particular incident was entirely satisfactory, the Arbitrator went on to test the competing stories of Chow and the grievor with the inherent probabilities that surround the existing circumstances. The Arbitrator queried whether it was likely that the grievor would have, as he described it, left the grievor alone at 11 p.m. with no means of transportation (at p. 72). That evaluation of the evidence undertaken by the Arbitrator by way of comparison to the surrounding probabilities is entirely consistent with the test of credibility set out in Faryna v. Chorney, [1952] 2 D.L.R. 354 (B.C.C.A.). Apart from the incongruity of the grievor's story with the surrounding circumstances the Arbitrator found as well that it did not fit with other evidence in the case. There was other evidence relating to that incident on the ability of Chow to describe the interior and exterior of the grievor's vehicle which persuaded the Arbitrator of the likely truth of Chow's version. The Arbitrator noted that Chow's description is consistent only with her having been in the vehicle where the sexual contact was alleged to have taken place (at p. 72). By contrast, the Arbitrator found that the grievor's explanation for Chow's ability to describe the interior of his vehicle was "exceptionally weak" (at p. 72).

¶ 41 In short, the Arbitrator did not disregard the evidence of the bus schedules. He found against Chow on the timing issue as to when the encounter at Park Royal occurred and any circumstances preventing her from taking a bus, but accepted Chow's other evidence that sexual contact occurred later in the grievor's vehicle given her ability to describe the interior of his truck. It is open to a trier of fact to find witnesses to have discrepancies in their testimony in one area, but to be credible in others. An adjudicator may reject portions of a witness's testimony, but find them to be credible on other issues: Mackenzie v. Palmer, (1921), 62 SCR 517, 63 D.L.R. 362.

¶ 42 The grievor also complains that the Arbitrator ignored the evidence that showed Chow had a financial motive in advancing these allegations. The grievor points to the testimony of a witness, Marion Halford, as showing the reason for Chow and Copeland's attempts to deceive the arbitration board of the nature of their relationship to avoid "interfering with the progress of the case". Halford also testified about a conversation with Chow about buying a new car in which Chow mentioned she would be "getting a lot of money" from her lawsuit against the Employer and the bus drivers. To answer that

suggestion of financial gain as a motive for disguising the true nature of her relationship with Copeland, the Employer responded by noting that Halford also testified that the reason advanced by Chow for moving out of the suite they shared was that at the time Copeland was involved with the Union and could have been perceived as in a position of conflict of interest.

¶ 43 We do not consider that Halford's evidence was disregarded. The Arbitrator was critical of Copeland and Chow for not being forthright. The fact that they were not forthcoming about the nature of their relationship and engaged in a deception to disguise their close association was weighed by the Arbitrator against their credibility. Nor did the Arbitrator ignore the evidence relevant to possible motive, but concluded on the basis of the timing of Chow's report to the police relative to her first inquiries with a lawyer about the possibility of a civil suit that financial reward was not the impetus. The Arbitrator concluded that there is no evidence that she had financial reward in mind when she went to the police (at p. 80). That type of factual finding is not reviewable by a Section 99 panel absent a palpable, overriding error. We see no such error as there is no dispute that her first visit to a lawyer to discuss a civil suit was a month after the complaint was laid with the police (at p. 18).

¶ 44 One of the other areas where there is alleged to be flawed evidentiary findings is in the handling of Mackintosh's evidence which the grievor maintains was neither probative nor reliable. The grievor says that the Arbitrator does not confront the fact that Mackintosh's evidence was vague and confused and that both the credibility and reliability of his evidence was at issue. On the credibility point, the main question was whether he knew of Chow's allegations before the retirement party. The grievor asserts that the Arbitrator ignores that debate. The Arbitrator does not expressly resolve the evidentiary controversy over whether Mackintosh knew of Chow's allegations before a retirement party of one of the co-workers. However, the Arbitrator implicitly accepted Mackintosh's explanation about the meaning of his earlier comment about "something heavy coming down" in making the general observation that Mackintosh withstood the challenge to his credibility. Although the Arbitrator does not refer to every line of attack on Mackintosh's credibility, we consider the Arbitrator did deal by implication with the issue of prior knowledge by the comment that Mackintosh was subjected to rigorous cross examination and withstood the test (pp. 29 to 31).

¶ 45 On the reliability point, the grievor complains that Mackintosh's concession that he might have confused the grievor with someone else was not dealt with. The grievor relies upon evidence set out in a statutory declaration which notes that when Mackintosh was questioned in cross examination on the incident in the first aid room, he admitted he had testified before another arbitration board that at the time he spoke to the four bus drivers, it was "like a schmoozle to me as to who exactly said what". The transcript of that proceeding was put to Mackintosh and he confirmed that "who said what" was "still a schmoozle" at the time of this arbitration. In response to this argument, the Employer argues that the grievor did not put these inconsistencies to Mackintosh in cross examination, and there is nothing in Mackintosh's evidence which indicated any uncertainty on his part as to the content of the grievor's statement to him. The Employer

asserts that at no time during the cross examination was Mackintosh asked about whether he was confused about what the grievor said to him in the first aid room, or whether he was confused about who made the remarks to him.

¶ 46 As the Employer argues, the sketchy description of the evidence given in cross examination in the statutory declaration does not affirmatively establish any confusion tied specifically to what the grievor said. Notwithstanding Mackintosh's acknowledgement of some confusion among the conversations with the various bus drivers, the Arbitrator found his evidence to be reliable given his steadfast and adamant denial of the grievor's version of the conversation despite vigorous cross examination. As noted by the Arbitrator: " [The grievor's counsel] tried mightily to get Mackintosh to agree that the grievor had admitted in the first aid room that he knew Chow but denied any sexual contact. Mackintosh flatly resisted each attempt". In the passage that followed, the Arbitrator further observed that Mackintosh's evidence was thoroughly tested and his credibility was challenged on several levels, but he withstood the test (at p. 82).

¶ 47 The Arbitrator's acceptance of Mackintosh's evidence as credible and reliable was "buttressed" by the Arbitrator's conclusion that the testimony given by the grievor on these issues was considered improbable. The Arbitrator considered that it was not believable that the grievor would not have told anyone else about the conversation with Mackintosh in the first aid room, or that he would have been falsely accused of sexual improprieties. (at p. 83)

¶ 48 The grievor attempts further to make much of the fact that in relation to the first aid room incident the exchange Mackintosh reported had the grievor using a different slang term describing the form of sexual contact than what Chow alleged. The grievor argues that Mackintosh testified as to an admission of conduct by the grievor which she never testified occurred. The grievor asserts that Mackintosh's report of the grievor's admission is not capable of being corroborative of Chow's evidence as it does not precisely reflect the sexual conduct alleged. In advancing this argument, the grievor relies on the evidence set out in his statutory declaration that in cross examination Mackintosh confirmed that the word "fucked" meant "sexual intercourse".

¶ 49 We are not persuaded by the grievor's argument on the degree of particularity required in an admission of misconduct. Even if Mackintosh understood the grievor to be saying that he had sexual intercourse with Chow, that term may bear other meanings. We find that the slang term used by Mackintosh in his report of the grievor's admission is capable of being construed as a euphemism for other forms of sexual contact beyond intercourse. We consider Mackintosh's evidence of the grievor's admission is corroborative of Chow's evidence in essential matters, even though it does not reflect precisely the sexual conduct alleged. Although the words used are not an exact match, they provide some confirmatory evidence that tends to make the testimony of Chow more probable and to that extent substantiates her version of events. At the very least, it implicates the grievor in some form of sexual contact with Chow.

b. Adverse Inference

¶ 50 The grievor argues that an inference should have been drawn from the failure of the Employer to call a number of witnesses that the evidence those witnesses could offer would not confirm Chow's story. Although the grievor advances this argument in relation to a number of potential witnesses, in the grievor's Section 99 application and at the hearing, the submissions on this point were concentrated primarily on the failure to call Chow's parents as witnesses and the failure of Chow to produce her diary.

¶ 51 That emphasis placed on Chow's parents is understandable give that these other potential witnesses who were not called to testify were hardly principal actors. We do not consider them to be in the category of key witnesses who could have offered crucial evidence. Any evidence they could have offered was in areas peripheral to the central issue of the allegations of sexual contact and would relate chiefly to the credibility of other witnesses on collateral matters. To illustrate, the grievor complains that other bus drivers, McMaster and Williams, were not called in relation to the incident involving "Serge" (at p. 41). However, the controversy over that issue relates only to the details of the first meeting between the grievor and Chow. The grievor denied Chow's assertion that he introduced himself to Chow as "Serge" on that occasion (at p. 44). We do not see how calling those witnesses would advance greatly the case of the grievor where the Arbitrator did not rest his analysis on that incident. Although the Arbitrator does not expressly deal with this issue, we find no reviewable error as we do not see the evidence these potential witnesses, or any of the others, could offer as being either vital or useful.

¶ 52 We focus instead on Chow's parents. Chow's father appears from the award and statutory declarations to have had a more minor involvement than his spouse. The grievor did not know with certainty if Chow's father was in the car at the time of this incident (at p. 54). The grievor did not see the father on that occasion, but only saw the car (at p. 46). As far as we can surmise, at best the father was likely outside the bus in the car at the time of the "back of the bus" incident. However, Chow's mother is in a slightly different category in terms of her involvement. Chow's mother came on to the bus, but would have been an eyewitness only to where Chow and the grievor would have been located when she arrived at the door of the bus. The grievor says that the observations of Chow's mother may have assisted in resolving the dispute over where Chow and the grievor were placed in the bus and whether the door was closed.

¶ 53 The grievor asserts that the Arbitrator misapplied the principles applicable to adverse inferences by refusing to draw an inference in this case. However, it is not the rule that a party should produce every witness, no matter how numerous, who knew anything about an event. Whether an adjudicator resorts to an adverse inference may be a question of weight of the potential evidence. The appropriateness of drawing an inference depends on such circumstances as the place of the "missing" witness in the total evidentiary picture, the extent of the witness's involvement, the importance of the issue in which that witness was involved, and the state of evidence on that issue. Where a potential witness's evidence is comparatively unimportant or inferior to what is already utilized, calling that witness may be dispensed with on grounds of expense and

inconvenience. Even where a witness may be more critical, a party affected by an inference may explain it away by showing circumstances which prevent the production of the witness. An adverse inference may be explained away by a plausible reason for non-production: Wigmore on Evidence, Chadbourne rev. (1979), vol. 2, pp. 202-203, para. 287, adopted in Sunnyside Nursing Home v. Builders Contract Management Ltd., [1985] 4 W.W.R. 97 (Sask. Q.B.), at pp. 115 - 116.

¶ 54 In this case, some of the facts relevant to the explanation for why these two potential witnesses were not called is set out in the award, but the grievor's argument on an adverse inference is not expressly dealt with. The evidence recorded in the award discloses that Chow's mother had been ill from a brain aneurysm and had suffered memory loss (at p. 17). Elsewhere in the award it is recorded that another witness, Copeland, testified that Chow's parents also spoke little or no English (at p. 21). The grievor attempts to counter the explanation of illness as a grounds for not calling Chow's mother by reliance on the evidence in a statutory declaration that Chow acknowledged in cross examination that her mother's health was "physically stable", and that she had recently gone on a vacation to Las Vegas. The Employer responded in one of its statutory declarations by noting that Chow testified that in addition to the memory loss, her mother had problems with "nervous shock, anxiety, she is very unstable".

¶ 55 We do not accept the lack of proficiency in English as an adequate reason for not calling Chow's parents as witnesses, given the ready availability of interpreters. The failure to call them cannot be excused simply by their inability to communicate effectively in English. But, on the other grounds, we find the illness of the mother and the collateral evidence that the father could offer provide an adequate explanation for a failure to call them as witnesses. We do not discount the evidence the grievor advances in the statutory declaration of an admission by Chow of the "physical" stability of her mother's health, but that does not answer the inferential question of her "mental" stability and the other evidence of her memory loss due to the aneurysm. We accept the argument that the Arbitrator was persuaded by that explanation not to draw the inference suggested.

¶ 56 As for the diary, we do not find the circumstances invoke the inference as an explanation was provided for the failure to produce that document. The grievor put before the panel a statutory declaration saying that when Copeland was asked if he had seen Chow's diary, he said "I saw her diary, I looked in it, I don't recall it now". The parties also agreed that a transcript of Copeland's cross examination in one of the other arbitration proceedings could be put before this panel as it was put before Copeland in this arbitration. That transcript was to the effect that he had no idea whether Chow kept diaries and had no memory of any conversation about diaries. The Arbitrator recorded the evidence relating to the diary as follows. There was hearsay evidence from another witness, Don Cliburn, that Copeland had allegedly said there was a diary with times and dates. Copeland testified before the Arbitrator initially that it was a diary, but then went on to say it was just notes (at pp. 41 - 42). Chow testified that she did not keep a diary, but made notes on a calendar which were discarded at the end of the year (at p. 17 of award). While the grievor argued before the Arbitrator that the discarding of the

calendars amounted to the suppression of evidence, the Arbitrator implicitly has accepted the validity of the explanation offered that those documents were no longer in her possession. No adverse inference is appropriate where the documents no longer exist.

c. Use of evidence as child

¶ 57 The grievor advances another ground of review that the Arbitrator improperly extended latitude to Chow's testimony in explaining away the presence of inconsistencies by a misapplication of the rule in R. v. R.W., supra. The Supreme Court of Canada in that case set out what has been described as a "common sense" approach to the evidence of adults who testify about events which occurred when they were children. That rule provides for a varying assessment of the effect of errors in peripheral detail occurring in a restatement of observations made as a child. As stated by the court, in relation to evidence about events which occurred in childhood, the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which the witness is testifying.

¶ 58 The grievor says that Chow should not have been afforded that latitude as she was not a child, and consequently, her lack of precision in dates, times and locations should have diminished her credibility. As that submission illustrates, Chow's age at the time of the relevant events is in dispute. According to the Employer, Chow would have been between 15 and 17 years of age. By contrast, the grievor argues that Chow was 17 years old at the time and supplies a statutory declaration establishing that Chow testified in an examination for discovery in her civil suit that her first sexual encounter with the grievor occurred after she obtained her driver's license when she was 17 years old. In light of this dispute between the parties over what age Chow was at the relevant times, we are in a position to rely only on the evidence which appears on the face of the award. The Arbitrator records the evidence of Chow that she was 15 to 18 years old at the time of these events (at p. 2). The assertion in her Statement of Claim in her civil claim was that the sexual activity occurred in 1991 when she was 17 (at p. 36). On the grievor's own evidence before the Arbitrator, he was told by her that she was 15 (at p. 52). As this review indicates, for some of the incidents, Chow may have been within the purview of the rule, as strictly construed by the grievor, and for others, at the age of 17 or 18 she may have been at the outer fringes of "childhood", more broadly construed.

¶ 59 Unlike the grievor, we do not read the Supreme Court's ruling in R. v. R.W. as prescribing a precise cut-off, but merely reflecting a sliding scale approach. The Court did not limit the age range to which this assessment should apply to strict time frames. But, logically, the younger the child, the more compelling may be the latitude to be extended for errors in peripheral details, and the older the child, the less deference may be given. We see that varying approach as being consistent with the observation elsewhere in R. v. R.W. that every person giving testimony, of whatever age, is an individual whose credibility and evidence must be assessed by reference to criteria appropriate to the witness's mental development, understanding and ability to communicate (at p. 267).

¶ 60 Turning to the application of the rule in this case, we are not necessarily convinced by the grievor's argument that the Arbitrator subjected Chow's evidence to a lower level of scrutiny of reliability than would be conferred to an adult's testimony. When the challenged portions of the award are considered in the context of the passages that follow, we do not consider the award is capable of such an interpretation. The citation to R. v. R.W. is immediately followed by the Arbitrator's observation that Chow was not the only witness who had difficulty remembering dates and times. As we read the award, the Arbitrator was not necessarily holding adults to a higher standard of reliability, but was extending some latitude to all witnesses. If anything, the Arbitrator equated the difficulties she displayed in recalling detail to difficulties the grievor as an adult experienced. From the immediate reference to the same difficulties other witnesses experienced, we do not see the Arbitrator as applying a greatly different standard than that applied to an adult. The tenor of that part of the award is that the Arbitrator did not find it surprising that any witness would have difficulty recalling the dates and number of the encounters between them given the length of time elapsed. Given the juxtaposition of those remarks, we do not see the Arbitrator treating those inconsistencies as necessarily all attributable to her youth, but the difficulty attributed as much to the passage of time than to any inherent characteristics of a child. In summary on this point, even if the grievor were right that Chow was 17 or 18 at the time of some of the events, the Arbitrator did not misapply the rule in R. v. R.W..

d. Medical Records

¶ 61 The grievor says that the Arbitrator erred in denying leave to use the medical records in the cross examination of Chow. The grievor says leave should have been granted to allow the use of those documents to prove that her medical condition could be attributed to events other than a supposed sexual relationship. The grievor complains that he was denied an opportunity to prove that other facts, apart from the impact of an alleged sexual event, could have accounted for the depression and stress Chow said she suffered.

¶ 62 We agree with the conclusion of the Arbitrator that the medical state of Chow may be relevant to the harm she says she suffered for which she seeks compensation in her civil suit, but it is peripheral to the arbitral issue of whether the misconduct occurred. The Arbitrator's weighing of the relevancy and the overbreadth of the request against the confidentiality and privacy issues displays no reviewable error. The Arbitrator appropriately balanced the criteria of relevancy against confidentiality, and weighed the probative value of records against the prejudicial effect on privacy rights. The Arbitrator held that disclosure would not advance greatly the central issue of whether sexual contact occurred and the scope of the request spanning five years was well beyond the period of the alleged sexual contact. We do not consider the refusal to grant leave denied a fair hearing; nor are we persuaded that the Arbitrator used Chow's evidence on her medical state to conclude that her allegations were true.

e. Expert Evidence

¶ 63 The grievor argues that the Arbitrator's references to memory patterns described by the expert witness were used to diminish the difficulties with Chow's evidence. He maintains that Yuille's evidence in cross examination pointed to the equal possibility that Chow was a liar. The grievor complains that the Arbitrator does not acknowledge the qualification elicited in cross examination that what the psychologist described was a common experience of all witnesses, and was not limited to victims of sexual assault. The grievor asserts that the Arbitrator relied on Yuille's evidence to conclude that the deficiencies in Chow's evidence ought not to be weighed against her credibility. The Employer argues that there is no such statement on the face of the award, only the comment that some aspects of her testimony are reflective of the memory patterns described by Yuille.

¶ 64 Giving the disputed passages a sympathetic reading, we find that the Arbitrator accepted the psychologist's evidence that the inability to remember times and dates was not of much probative value. Yuille's evidence taken as a whole was that no inference could be drawn from the manner of testifying and that it was not a reliable indicator of credibility. In the analysis that immediately follows the references to Yuille's evidence, the Arbitrator remarks that if Chow's evidence is in many respects unsatisfactory, there was much about the grievor's evidence which fails the test of reliability. In the circumstances, we consider Yuille's evidence at best to have been a neutral factor.

f. Evidence relating to other drivers

¶ 65 We turn to the next category of alleged error relating to the use of the evidence on the other drivers. There is no dispute that this evidence could be used as part of the narrative to explain the surrounding circumstances of the events at the material time. What the grievor complains of is that the evidence was used improperly for the purpose of determining the validity of the charges against the grievor and to buttress Chow's oral testimony. The Employer responds by arguing that the Arbitrator did not make any finding with respect to the truth of the allegations against the other drivers.

¶ 66 The grievor challenges a number of excerpts, most notably the passage in the award where the Arbitrator stated: "To accept the grievor's denials would be to conclude that Chow had fabricated all of the incidents which she has alleged and has told this story to Copeland, Mackintosh, the police, this arbitration board and on examination for discovery" (at p. 84). We accept the Employer's argument that this disputed passage relates only to incidents alleged to have occurred with the grievor, not others. That intent is made clear by the introductory phrase to "to accept the grievor's denials".

¶ 67 The grievor next challenges the passing reference to the issue in the immediately following paragraph of the award on the "interrelationship" of the five drivers and the coincidence of all five working out of the same depot and driving some of the same routes (at p. 84). Although that comment is made, the findings in the analysis portion do not begin until later in the award (at p. 86). Reading the award as a whole, we do not find the evidence relating to the other drivers to figure largely in the analysis. We are not convinced of its improper use as corroborative of the assertions of Chow relating to

sexual contact with the grievor. The Arbitrator never expressly infers from the evidence of Chow of the existence of sexual relations with other drivers that, therefore, the grievor is likely to have engaged in sexual relations with her.

¶ 68 The grievor also points to the other statement in the award that: "Hunnisett's termination for the sexual misconduct alleged by Chow was upheld by Arbitrator Larson" (at p. 35). The Arbitrator did no more in that passage than merely note that, despite some inconsistencies, another arbitration board had nonetheless found the allegations in relation to Hunisett were true. A reference to the finding in that case does not go beyond the limited permissible use of this type of evidence as narrative.

¶ 69 In sum, we find no merit in this ground for review as we consider the Arbitrator merely referred to the evidence of other drivers, where necessary, to give context to Chow's evidence concerning the grievor.

g. Failure to put grievor's story in cross examination

¶ 70 The grievor further complains that the Arbitrator wrongly failed to give weight to some of the grievor's evidence by an error in concluding that an allegation was not put to Chow in cross-examination. The Arbitrator comments at one point in the award that the grievor's version of his son missing his grad night celebration was not put to Chow. The grievor says that issue was indeed put, and notes that elsewhere in the award, the Arbitrator records the fact that the issue was put (at pps. 39 - 40).

¶ 71 In the award, the Arbitrator records the testimony of the grievor that "he told Chow of his son's experience in missing his grad night; that he related the story of his son going to a race, getting a speeding ticket and eating ravioli" (at p. 55). The Arbitrator later observes the "grievor's evidence that he told Chow a lengthy and detailed story about his son missing his grad night was not put to Chow" (at p. 72). After making observations about the failure to put other items to Chow in cross examination, the Arbitrator concludes that "[t]he failure to put the grievor's version of these events to Chow, during her cross examination, result in them being given little or no weight" (at p. 73).

¶ 72 The submissions disclosed a battle over what the evidence was on this point. The panel was provided with competing statutory declarations of counsel evidencing a disagreement over whether particular questions were put and different records of answers given. There was stark conflict between the statutory declarations of the Employer and the grievor as to whether that particular issue was put to Chow in cross examination. Counsel for the grievor asserted that a brief description of the grievor's version of events about a discussion of his son's grad night was put to Chow; the Employer has no record of that issue being raised.

¶ 73 We are persuaded that the defect alleged by the grievor is more of a semantic squabble. On a careful reading of this portion of the award, we find that the Arbitrator was not saying that the issue was not raised, only that the detailed story was not put. The

issue may well have been raised with Chow in cross examination, but the whole story later testified to by the grievor may not have been put to Chow in its entirety. In those circumstances, it was not improper for the Arbitrator to give lesser weight to that evidence.

¶ 74 In any event, we observe that the disputed passage giving little or no weight to some of the grievor's explanations refers to other events, apart from this incident, where the grievor's version of events was not put to Chow for an opportunity to respond (at p. 73). As a consequence, even if there were an error on this one aspect, a finding we do not make, the Arbitrator had a basis on those omissions for giving little or no weight to this other evidence (at p. 73).

h. Failure to Reinstate

¶ 75 As the last ground for review, the grievor argues that the Arbitrator misapplied the second and third questions in Wm Scott, supra, in refusing to consider alternatives to the excessive penalty of dismissal. The grievor says the Arbitrator made no serious attempt to determine whether the grievor could be reinstated, and failed to consider that there was no propensity to reoffend.

¶ 76 We are not persuaded by this submission. In the course of his analysis on this point, the Arbitrator referred to authorities acknowledging that even extraordinarily serious cases involving a breach of fundamental trust between employer and employee do not automatically attract dismissal as a first response, and there is a need for individual assessment (at p. 91). The Arbitrator engaged in such an assessment in this case, but concluded that dismissal was warranted. The Arbitrator considered the grievor's previous exemplary employment record and his long service, but found those factors did not overcome the fact that the repeated misconduct was deliberate, and of the most serious nature. He pointed to the public interest in fostering the protection of vulnerable people, and the Employer's interest in preservation of its reputation. He was mindful of the economic hardship dismissal posed for the grievor, but given the nature of the work setting and the position of trust held by the grievor, concluded that reinstatement was not appropriate.

¶ 77 On the issue of rehabilitative potential, the Arbitrator referred to the grievor's acknowledgement that the conduct he was accused of was unacceptable. Notwithstanding that acknowledgement, the grievor had been found to have committed repeated deliberate acts. In light of that evidence that the misconduct was not a momentary aberration, the Arbitrator implicitly concluded that there was insufficient rehabilitative potential for the grievor to meet those trust obligations. The Arbitrator clearly recognized the gravity of the result, and the effect of an adverse finding of his future employability. From his earlier remark on the anguish he experienced in arriving at his conclusion, it cannot be said that the Arbitrator disregarded the gravity of the consequences (at p. 86). At the outset, the Arbitrator set out in the award the age of the grievor and his family responsibilities; he repeated that evidence again elsewhere in the award (at pps. 42 and 63), and commented in closing on how it was a tragic case (at

p. 93). Nonetheless, he concluded the seriousness of the offence amounted to an irreparable rupture of the bond of trust.

¶ 78 We find the Arbitrator properly considered the mitigating factors in Wm Scott such as an assessment of the seriousness of the offence which precipitated the discharge, the record of long service, the absence of previous discipline and the repetitive nature of the activity. Those factors are not a rigid checklist, but are questions posed to give an arbitrator guidance in determining whether an employer's decision to discipline was excessive. As the Board has observed, there may be other questions of relevance and the weight for each factor may vary case-to-case: Venice Bakery Ltd, IRC No. C131/87, at p. 3. The overall assessment of those factors is an issue for the arbitrator to determine. It is not the mandate of the Board to disturb such judgments; it is the arbitrator's determination of what is just and equitable in all the circumstances that prevails: Labatt Brewing Co. Ltd., IRC No. C189/89, at p. 7. The Arbitrator applied the right framework for analysis, and arrived at a decision which is within the discretionary area of exercise of an arbitrator's remedial powers: B.C. Transit, BCLRB No. B54/97, at para. 43. Whether or not the outcome would be the one this panel would arrive at in determining what is appropriate and equitable, we find no reviewable error in the exercise of the Arbitrator's remedial powers.

V. CONCLUSION

¶ 79 The grievor's application under Section 99 is dismissed.

L. PARKINSON, VICE-CHAIR
R. CHOUHAN, MEMBER
G. HOWES, MEMBER

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