IN THE MATTER OF SECTION 79(1)
OF THE CANADA LABOUR CODE

AND

IN THE MATTER OF AN INTEREST ARBITRATION

BETWEEN:

SEASPAN MARINE CORPORATION

(the "Employer")

AND:

CANADIAN MERCHANT SERVICE GUILD

(the "CMSG")

AND:

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 400

(the "ILWU")

Health Benefit Plans

ARBITRATOR:	Dalton L. Larson
REPRESENTING THE EMPLOYER:	Chris Leenheer David Woolias
REPRESENTING THE CMSG:	Brett Matthews Jeff Sanders
REPRESENTING THE ILWU	Leo McGrady Sonya Sabet-Rasekh
DATE OF CASE MANAGEMENT MEETING:	February 4, 2015
DATES OF HEARINGS:	February 24 – 27, 2015
PLACE OF HEARINGS:	Vancouver, British Columbia

INTERIM AWARD

1. Background

[1] The three parties to these proceedings have been involved in a protracted process to renew two separate collective agreements that had been in effect from October 1, 2010 to September 30, 2013. To say that it was not the first time that they have bargained collectively would be disingenuous. They have all been part of a long term mature bargaining relationship in the context of a much wider marine industry that has evolved considerably over the many decades of its existence.

[2] The CMSG is a national association of ship's officers and marine pilots. It was originally established by an Act of Parliament in 1919 and updated in 1981. It has collective agreements with every segment of shipping from offshore supply vessels to tankers, freighters, towboats, lakers, and deep sea vessels. Under the subject collective agreement it represents all Masters, Mates and Engineers employed on vessels owned, operated or controlled by Seaspan provided that such vessels are operated within the coastal and inland waters of British Columbia or waters bordering on the Yukon, Northwest Territories and Nunavut, or if operated on a national or international basis, that the port from which the vessel is dispatched is within those same waters of British Columbia, Yukon, Nunavut and the Northwest Territories.

[3] Similarly, the ILWU Local 400 represents all unlicensed employees employed on the deck, engine rooms and steward's departments of vessels owned, operated or controlled by the Company. Some 14,000 members belong to the ILWU Canada which is made up of 11 autonomous locals and three affiliates.

[4] Seaspan is part of what is called the Washington Companies, a large group of privately held independent companies operating throughout the United States, Western Canada, China and Russia controlled by Dennis Washington, a Montana businessman. His companies are generally involved in construction and mining, heavy equipment sales, aviation technology, and real estate development as well as rail and marine transportation. On this side of the border, Seaspan comprises a group of companies generally involved in coastal marine transportation, ship docking/ escort, ship repair and shipbuilding. In addition to the marine transportation services offered directly through the Seaspan Marine Corporation, commercial ferry, shipyard and bunkering services are provided through affiliate companies: Marine Petrobulk, Seaspan Ferries, Vancouver Drydock, Vancouver Shipyards and Victoria Shipyards.

[5] Seaspan Marine was formed through a merger in 1970 when Genstar joined the Dillingham Corporation to acquire Island Tug and Vancouver Tug. Genstar subsequently obtained full ownership of Seaspan in 1973 by purchasing the interest of the Dillingham Corporation and then embarked upon a series of acquisitions including the Vancouver Drydock Company in 1991. It was in the following year that the Washington Companies entered the Canadian marine business by acquiring CH Cates and Sons and in 1994 with the acquisition of a partial interest in Seaspan International Ltd., which is now Seaspan ULC. In 1996 the Washington Companies acquired 100% ownership of Seaspan and its subsidiaries. It is

also of some relevance to these proceedings that Seaspan acquired the tug and barge assets of SMIT Marine Canada in 2010 to strengthen its ship docking and escort services, primarily in the Vancouver Harbour area. It operates a wide variety of vessels including: ocean tugs, coastal tugs, ship assist/ harbor tugs, river tugs, flat deck barges, bulk carriers, chip barges, covered barges, oil barges, chemical barges, rail barges and log barges. These currently total 36 operating tugs and 122 barges.

[6] Apparently, the Unions have had a similar history by tracking the merger and acquisitions activities in the marine industry through a succession of their bargaining certifications. It is not disputed that there have been a series of collective agreements reaching back to well before 1992 – 94 when the Council of Marine Carriers generally represented the employers in the industry. In point of fact, Seaspan International Ltd. is a named participant in a Trust Agreement made effective June 1, 1990 which established a common health benefits plan, the terms of which became an issue in this case. Section 2.01 of the agreement gives the Council the right to do whatever the individual employers were permitted to be done by them individually. Indeed, the Council continues to exist currently although it would appear that its mandate has been changed from that of a bargaining agent to a lobby group that advocates policies, legislation and regulations that are beneficial to its membership by working with appropriate governmental and industrial agencies. Full membership is open to any individual or firm which owns or operates vessels, towboats or barges and employs seagoing personnel.

2. **History of Bargaining**

[7] Bargaining commenced to renew the collective agreements of both Unions on October 2, 2013 but very little common ground was found between the parties and they quickly sought assistance from the Ministry of Labour in the form of conciliation. Until then they had met 13 times. They filed for conciliation on December 2, 2013.

[8] Conciliation commenced on January 13, 2014. In the initial 30 day period the parties met with the conciliator 15 times but it was subsequently extended for a further period to March 7. They met during the extension period an additional 11 times after which a 21 day cooling off period came into effect. They met a further 5 times during the cooling off period which expired on March 28 but at that point the wheels fell off the cart.

[9] On April 29 the Company filed a complaint with the Canada Industrial Relations Board alleging that the Unions were engaging in an illegal work stoppage, based on an allegation that the employees were refusing call-outs. On the same day and May 2, the Unions responded by filing complaints alleging that they had been illegally locked out by the Company and that it had been bargaining in bad faith. On May 9 and 12 the parties met with John Rooney, a leading federal conciliator and Vince Ready, for the purpose of exploring mediation/ arbitration as a possible means of bringing about a resolution of the dispute but no agreement was reached. This was followed on May 26 by a notice from the Company to the Unions that it intended to unilaterally impose new terms and conditions of employment on the employees effective June 9, 2014.

[10] The proposed unilateral implementation of new terms was met by perhaps the only retaliatory step available to the Unions at that point, which was to conduct strike votes in advance, on June 3 and 4. That action resulted in an overwhelming majority of the employees voting in favour of a strike but it also precipitated a decision by the federal government to intervene on the basis that a work stoppage on the coast would have significantly deleterious effect on the entire Canadian economy. Accordingly, Kellie Leitch, the Minister of Labour, met with the parties on June 3 to advise them the government was prepared to pass legislation to preclude any such disruption if the parties were to fail to come to an agreement on how to settle it.

[11] As will appear, because the parties were so far apart on their positions to renew their respective agreements, renewal was not an option open to them. The only available option was, therefore, to devise an acceptable protocol by which the dispute could eventually be resolved. Accordingly, on June 13, 2014 they entered into a Memorandum of Agreement by which mediation/ arbitration would be undertaken. Amongst other things, the Company agreed not to implement new terms and conditions of employment and the Unions agreed not to strike. In addition, the Company agreed to accept certain changes to its fleet by returning certain vessels back to operating status and the Unions agreed to encourage their members to accept call-outs. On July 9 they mutually agreed to withdraw all complaints made to the CIRB and later that same month, on July 28 the Minister appointed me as the mediator/ arbitrator.

[12] For the record, the terms of the Memorandum of Agreement established the basic parameters by which the proceedings would be managed, as follows:

1. The current collective bargaining between CMSG and Seaspan and ILWU, Local 400 and Seaspan will be submitted to a mediator/ arbitrator who will engage in a mediation/ arbitration process to conclude the terms of new collective agreements;
2. The Minister of Labour will select a mediator/ arbitrator;
3. The parties will agree on the most expeditious timelines for the mediation/ arbitration process in consultation with the mediator/ arbitrator;
4. All parties agree to proceed with a joint process with respect to issues that concern both Unions using the same arbitrator;
5. Subject to the terms of this letter, the mediator/ arbitrator will set the terms of reference in consultation with legal representatives from each party for the mediation/ arbitration process;
6. The mediator/ arbitrator will set his own procedures for the mediation/ arbitration process;
7. If the mediator/ arbitrator is unable to mediate a settlement between the parties, he will have full authority to issue an arbitration award which will bind both parties and, therefore, constitute a new collective agreement. Such an award will not be subject to ratification by either party;
8. Upon agreement to the above terms, Seaspan will not implement the terms and conditions of employment as set out in Seaspan's May 26, 2014 letter to the CMSG and the ILWU advising of such implementation and both the CMSG and ILWU will, in return, not strike;

9. That Seaspan will return to operation the Protector and the Pacific Force by two weeks from the signing of this document and the Unions will ask and encourage their members to do call outs on an ongoing basis and, Seaspan will regularly crew two harbor boats that have been used as call out boats for the next two weeks; and
10. We represent that we have full authority to enter into this agreement to bind our respective principals.

[13] Although the MOU was not formally entered into evidence in these proceedings, I consider it important to make it a part of the record of the arbitration proceedings in this case. In a normal interest arbitration, the background facts are typically entered into evidence as an integral part of the historical matrix which is invariably necessary to a full understanding of the issues that must be determined, as I held in: *FortisBC Inc. and International Brotherhood of Electrical Workers, Local* 213, unreported, March 16, 2014.

[14] This has not been a normal set of negotiations in any sense. They have required a careful and deliberate approach, unlike any other of which I am aware. The problem derives from the fact that over the many years of its existence, the industry has developed in ways that have few counterparts. Many work practices have come to be seen as unproductive or uneconomic even though they originated as compromises of serious disputes, some of which were of national and international scope. Many have become part of the fabric of the marine industry, which has resulted in a very distinctive labour relations culture. More recently, new competitors have come into the industry with lower cost structures at the same time that many of the traditional shippers were suffering economic decline. On the other hand, new potential opportunities are beginning to appear, for example in a nascent LNG market. In short, it is a situation in which work practices have stagnated at the very time that the industry itself is in a state of flux.

[15] In these circumstances, the Company determined that it had no option but to deal with these issues in collective bargaining to improve its operational efficiency and permit it to better compete with the lower cost base competitors. In the result, instead of the Unions being the primary proponents of improvements in their collective agreements as is the more usual case, the Company assumed the onus for change in this round. In fact, I do not think that it is inappropriate to observe that at the outset of negotiations the Unions offered to accept a rollover agreement without any substantive changes, which was rejected by the Company on the grounds that it considered it to be imperative that it obtain the structural changes and cost savings that it was proposing. That is not to say that the Unions did not make proposals except the changes they sought were generally a reaction to the Company proposals. On its part, it is not inaccurate to say that what the Company is proposing to renew the agreements, if accepted, will result in nothing less than a major restructuring of them which, of course, is why the negotiations have been so difficult for all the parties.

[16] To be fair, I consider that most of the important changes proposed by the Company are not technically concessions, which would typically pose particular problems in negotiations except that in this case even though the changes proposed do not generally involve lower wages and working

conditions, if accepted, they have the potential to effect a profound change in the way the work is organized. Some proposals would have a significant effect on employee life styles outside of their work. The earned time off work that employees have come to enjoy has, over many decades, come to be an inherent feature of their employment but for the Company it creates huge issues relating to scheduling and productivity.

[17] The Unions see the proposed changes as a “race to the bottom” to meet the challenge of the competition, primarily from the Ledcor Group and its certified union, the Transport, Construction and General Employees’ Association Local No. 66, affiliated with the Christian Labour Association of Canada. In their view, the competition should be met in other ways than by encroaching upon employee life styles and work rules.

[18] Quite apart from the complex nature of some of the issues, the sheer volume of them has given rise to a monumental problem of how to manage the resolution process. When we started mediation, some 150 provisions of the two agreements were in dispute and while we were able to resolve many of them over the following six months, an overwhelming majority continued to be in dispute. None of the major issues have been resolved. At one point the Company put me on notice that if an agreement was not reached by years end it would consider the negotiations to be at an impasse but I refused to accept defeat. I persisted in my determination to attempt to find an amical resolution.

[19] Particularly in complex negotiations, certain issues often become deadlocked, as in this case, while the great myriad of other issues remain open to mediation. In such circumstances, mediators are naturally inclined to persist in pushing the parties towards a negotiated settlement. Even agreements on minor issues are regarded as important steps to be taken in a process of what is called “incremental convergence” (Gulliver, 1979; Walton and McKersie, 1965) which means that each small agreement made by the parties makes it harder to justify a continuation of the dispute. On that basis, even agreements on minor issues contribute significantly to the success of the negotiations by enabling agreement on the major ones.

[20] What must always be kept in mind is that if mediation/ arbitration is going to be a reasonable alternative to job action it must be sufficiently flexible to respond to the peculiar circumstances of each particular case. Moreover, it is the mediator who must determine whether the parties are at an impasse. The parties may have their own views about whether a negotiated agreement may be reasonably expected, whether on a single issue, a series of issues or on all the issues but they are not legally competent to declare an impasse to transition the proceedings from the mediation to arbitration. An individual party may unilaterally create an impasse by refusing to negotiate but even then the parties may not be deadlocked if the other side is prepared concede its demands. Just as it takes both parties to reach an agreement, they must concur that they are in deadlock or the mediator must make the decision.

[21] In this case, while I accept that it would not be technically accurate to say that the parties were deadlocked in any general sense in that they continued to demonstrate a willingness to bargain on the minor issues, as I said earlier, no progress was being made on most, if not all of the major issues. In

particular, it became obvious to me that there was no prospect of reaching a negotiated agreement on the Health Benefit Plans.

[22] What I decided to do was something quite unique the circumstances. Because the parties are only deadlocked on the major issues I decided to declare a limited impasse but to retain the mediation process in reserve. I determined that it would be appropriate to refer the major issues in sequence, commencing with the Health Benefit Plans. I considered that it would be appropriate to refer this issue to arbitration before any of the others for two reasons. Firstly, the parties had reached a kind of consensus on the principle by which it might be resolved and secondly, the Company negotiators identified it as having the highest priority, measured by the potential cost savings that might be realized in relation to all other proposed changes.

[23] A consensus developed in mediation was that it would be inappropriate to attempt to access available cost savings if it could be done without any substantive changes to the benefits received by the employees. On the cost side, the premium paid by the Company to fund the Health Plan for Guild members is currently $920/month while the contribution level for ILWU members is $1093. The respective agreements obligate the Company to pay the full premium cost of the plans without any limit. In the circumstances, the primary strategy of the Company has been to secure a limit on its costs to a fixed amount per month calculated consistently with the premium cost base of health insurance for its technical and office staff.

3. **The Health Benefit Plans**

[24] To say that the health plans of the two Unions are dramatically different would not be an exaggeration. The one similarity is that in both cases their members are covered by industry plans that include other employers. The licensed employees or officers are part of the CMSG Plan while the unlicensed employees are part of the BC Marine Industry Plan which includes the ILWU, SIU and Operating Engineers.

[25] The major difference is that the Guild collective agreement requires that the Company pay a monthly premium for each employee under Article 1.08 of the collective agreement and the trustees of the plan use the monies collected to fund whatever benefits they consider to be appropriate. In that respect, subsection 4 requires that the CMSG "will provide a Health Benefit Plan for all eligible Officers utilizing all of the contributions received…" There are certain provisions relating to eligibility, including such things as the enrolment of new employees, officers who have been promoted from the unlicensed ranks and such of them who are absent due to disability, temporary layoff, or leaves of absence but they are not generally controversial. In addition to the premium, subsection 15 also requires the Company to pay 100% of the BC Medical Services Plan premiums. The result is that the total contribution made by the Company on behalf of Guild members at the current time is $920 + $120 = $1040/mo/employee.

[26] By contrast, the ILWU has a "defined benefits" plan. Article 1.13 of its collective agreement specifies the benefits that are required to be provided to members by the trustees of the BC Industry Marine Employee Health Benefit Plan. These include a weekly indemnity benefit that will pay an

employee sixty-six and two-thirds percent of the employee's monthly rate if disabled and a long term disability benefit that will apply after the employee has been disabled for 52 weeks. In practice, the actual system is that the employee will first be put on WI and if the disability then continues after 52 weeks he will be assessed for eligibility for LTD. The benefit level is slightly different for each of WI and LTD. The LTD rate is sixty-three and two thirds percent of the employee's basic monthly rate. "Total disability" is defined to be where an employee is unable to perform any gainful occupation for which he is or may become reasonably qualified by training, education or experience and which will enable the employee to earn at least 60% of his inflation-indexed pre-disability income. Also included in the panoply of benefits required to be funded by the Company are a dental plan, an extended health benefit plan (vision care, hearing aids, travel, prescription drugs), life and accidental death and dismemberment insurance.

[27] It is important to understand that the effect of the Company proposal to limit its contribution to a fixed amount would be to convert the ILWU plan to a premium contribution plan similar to that of the CMSG and would eliminate the requirement to provide a specified level or type of benefits. The original proposal was to fund the respective industry plans at $400/month but that was subsequently raised to $500/month at some point in the negotiations prior to the commencement of mediation. A number of other incidental proposals were made by both parties to amend the industry plans but they are not important for my present purposes.

[28] In neither case did the Company proposal involve a requirement that the Unions withdraw from their respective industry plans. The proposal was to maintain the existing administrative structures but otherwise fund them at the proposed level. However, in the course of the mediation it morphed into something quite different from the original proposal. The Company submitted a report entitled a "Consulting Presentation for Seaspan Corporation" presented by Don Weitzel, President of Weitzel & Associates, Underwriting Analysts Inc. (the "feasibility study") which fundamentally involved soliciting offers from the major insurers to develop a consensus on what the premiums would be if the employees were drawn out of the two industry plans.

[29] The reason for that restructuring will be explained later in this award but for my present purposes it is sufficient to say that four insurance companies elected to submit proposals, all of which were significantly lower than what the Company was paying under the industry plans as follows:

	Desjardins	Manulife	Standard	Cooperators
Guild	$721.30	$683.07	$669.48	$526.70
ILWU	$488.21	$457.90	$418.88	$347.62

[30] As the study indicates, if one takes an average of the four quotes, it demonstrates that market coverage is available for the licensed employees @ approximately $650 per month while the ILWU cost would average out at $428 per month representing huge savings in costs over the current contribution rates. The problem was, however, that the offers give rise to some very important issues of fact relating to their viability, at least in the longer term. The issue that originally appeared to be the only one of

importance at the time of the mediation, whether the premium offered by the Company of $500/month per employee was adequate, came to be subsumed in a myriad of collateral issues that became the substantive issues in dispute in this arbitration.

[31] The premium proposal, if it had been accepted, would have left it to the two Unions to determine what coverage could be obtained for the proposed amount. It is in that context that the consensus of principle was reached that if similar coverage could be arranged at a lower cost it would be accepted by the Unions. That is why the Company sought and obtained the quotations referred to above, which then gave rise to the collateral issues. Most fundamentally, what drove the parties into an initial morass of confusion was the determination that the premium level proposed by the Company would not be achievable within the existing industry plans and that the only way it would work was if a new separate plan were established just for the employees of Seaspan.

[32] To the Unions, this was thought to be an unimaginable outcome because it would involve a complete restructuring of a part of the industry in which they have had an important collaborative role with employers in the management of the plans. Furthermore, they consider that the boards of trustees have done a masterful job of managing the costs, as I will discuss when I review the evidence. This is the source of their skepticism about the proposals and their conclusion that, if accepted, the lower premium cost would not be retainable and would quickly rise once again to current levels.

[33] Even that description of the essential nature of the dispute, however, results in a gross over simplification of all of the many spinoff issues that arose from it which can conveniently be described as follows:

1. The Unions take the position that the quotations are unworkable and are incapable of acceptance. Even if that is wrong, they say that the quotations are not valid because they do not reflect the actual cost of coverage and that it is inevitable that the costs will rise to approximate current premium levels upon renewal following expiry of the first term. They argue that it is the renewal costs to which a comparison should be made to the current premium costs. Counsel described them as the “real costs” because only the renewal contracts of insurance will factor in each groups’ experience rating.

2. For what period can the proposed pricing be guaranteed? Would the length of the lock-in period justify the disruption inherent in changing the carrier? What would the point be of changing carriers if the cost structure rises to current levels within a relatively short period of time? And if the premium costs are subject to an increase within the prescribed term of the collective agreement who would pay the excess cost? In other words, who would bear the risk of cost increases on that prescription?

3. All the parties concede that they are not authorized to represent the two industry plans which currently administer the plans prescribed by the current collective agreement. They agree that any agreement made relating to health plan benefits, including premium

contributions, would not be binding upon the trustees but that, in principle, plans outside of the industry could be independently established involving only the parties to this collective agreement. If the parties were to remain in the industry plans, would the quotes made by the four insurers be available to them? If it is determined that the insurance should be established outside of the industry plans, how would those plans be structured? Who would administer them? Are the parties legally entitled to withdraw from the industry plans? If they are, what would the impact be on the industry plans given that Seaspan is the largest employer contributing to them? On the other hand, is the impact relevant to these proceedings?

4. Do each of the proposals provide similar benefit coverage to what is currently being provided by the industry plans? Are there any significant differences to distinguish them? Which is the preferable proposal and on what basis should the decision be made, if any? What are the cost structures of competitors who provide similar benefits?

It is to those issues that I now turn.

5. Feasibility

[34] It is important to understand the approach of the Company in these proceedings, which is not really whether the proposals of the four insurance companies constitute offers in law that are capable of acceptance. Counsel took the position simply that the Company should not be held to the industry rate represented by the cost premiums applicable to the industry plans if it was able to determine, as it did, that the same benefits are available in the marketplace at the much lower quoted costs. As he described them, the industry costs are a legacy of a bargaining system that no longer exists.

[35] At the same time he asserts that the Unions are wrong when they say that the proposals in the study done by Weitzel & Associates are not valid and would not be honoured. Although Manulife has now merged with Standard Life, he takes the position that the three remaining proposals are open for acceptance. Most critically, however, Mr. Leenheer says that the Company's proposal to contribute $500 per employee to the industry plans should technically still be seen to be on the table. While he supports the feasibility study and says that the proposals made by the insurance companies in the report are viable, he does not say that I should treat them as offers that I or anyone else should accept. Rather he says that the only purpose of the report is to provide the best evidence that is available on what is the true market cost of the benefits. He says the employees should continue to be able to obtain coverage through their industry plans if they chose but the Company should only have to pay the market rate represented by the study. Therefore, he argues that the Company does not have to prove anything else. As he said, it was a proposal made in bargaining; it had a rational basis; and it would provide essentially the same benefits as employees are currently receiving at a justifiable market cost of $500/ month per employee.

[36] The problem with the argument, however, is that it is not consistent with the evidence, which is that it would be insufficient to fund the benefits within the industry plans. It is only by taking the

Seaspan employees out of the industry plans that funding at that level could possibly work and, even then, it may only work for the short period that the initial rates are locked in.

[37] Taking up that challenge, Counsel proposes, in the alternative, that if separate Seaspan plans are established under its exclusive administrative control it will agree to pay the full costs of funding them. The problem it poses, however, is that there would still be a need to concern ourselves with the level and type of benefits that would have to be provided. Moreover, the Unions would have to give up all participation in the administration of the plans and would be concerned that the administration by the Company would be unduly restrictive and through that mechanism would result in employees being denied benefits. On the other hand, it would eliminate any need to determine the true market cost of the benefits, make any comparisons to the costs borne by other similar employers, or otherwise determine the viability of the feasibility study. At the same time, Mr. Leenheer said that the Company would assume the risk of any cost increases on the premiums over the entire term of the collective agreement.

[38] The Unions argue that there is even a more compelling technical reason why the proposal should not be accepted which is that it has been tried before by other employers and it did not work. They say that the current contribution levels of employers who are members of the CMSG Western Branch Benefit Plan were established a few years ago by John Hall in an arbitration award dated June 30, 2009. The award resulted from a variety of legal actions taken when certain employers to the plan started to withhold monthly contributions, claiming that the contribution levels were excessive and should be significantly reduced, similar to what the Company is saying in this case. As I understand it, Seaspan was a contributing member of the plan but was not a party to the withholding of funds in that case. The party employers filed an action in the Supreme Court of British Columbia in support of their claim and initiated a number of grievances while the CMSG cross claimed that the employers were in breach of their obligations under their respective collective agreements. The Hall Award ended up as a consent award by which all of the legal action was settled.

[39] Amongst other things the party employers agreed to amend their collective agreements to the extent necessary to give effect to the award. All the parties agreed that they would not then seek any changes to the Consent Award until after the next round of collective bargaining. Further, if any disputes on contribution rates remained outstanding during the remainder of any collective agreement in effect on June 30, 2012 it was required to be referred to Arbitrator Hall for a binding decision.

[40] In the meantime, the parties agreed that the contribution rate effective July 1, 2009 would be $900/ month per eligible officer with a right on the part of the trustees to increase the rate by $10 per month in each successive year. That resulted in a rate of $910 for the period July 1, 2010 to June 30, 2011 and $920 from July 1, 2011 to June 30, 2012.

[41] Article 1.08(1) of the current collective agreement between Seaspan and the CMSG requires that the Company pay to the Guild a monthly contribution of $826 or such higher rate as may be in effect. The consequence of that wording was that the Company became obligated to pay whatever rate

was prescribed by the insurance carrier required to maintain the existing levels of coverage. As Article 1.08(2) says:

> "Increases will be based on expense experience of providing current levels of benefits, and will be calculated by the Administrator of the plan and provided to the company."

[42] In practice the rates prescribed by the Hall Award for the few employers involved in the dispute ended up applying to all the employers in the industry plan. The arbitrator prescribed a set contribution rate of $920 per month in the last year to the middle of 2012, which turned out to be the highest annual cost year in the five year period from 2010 to 2015.

[43] Lisa Bombaco, Vice President, Human Resources, testified that the issue of the cost for the provision of health benefits became a particular concern to the Company during the term of the previous collective agreement. As she said,

- the total annual costs borne by the Company for health benefits for both its ILWU and Guild marine employees increased from approximately $4.3 million to approximately $5.6 million between 2010 and 2012; and

- the Company's competitive position was increasingly negatively impacted by peripheral labour costs, including health benefits.

[44] Although the cost figures were not broken down between the two Unions, or show the per capita contribution levels during the period, the numbers provided to me were as follow:

		CMSG		ILWU	
Total Base Wages		Benefit Premium	% of Base	Benefit Premium	% of Base
2010	$20,751,957	$2,310,150	11.1%	$2,036,994	9.8%
2011	$22,051,735	$2,403,710	10.9%	$2,763,678	12.5%
2012	$22,644,010	$2,439,010	10.8%	$3,145,619	13.9%
2013	$25,110,166	$2,282,321	9.1%	$2,555,701	10.2%
2014	$20,883,449	$1,986,204	9.5%	$2,090,746	10.0%

[45] As is demonstrated by the chart, Ms. Bombaco observes that costs fell in the last two years from their peak high in 2012 although she asserted that, to a large degree it could be attributed to layoffs that occurred since that time. That seems to me to be a logical conclusion to draw from the total base wages column which reflects essentially the same total base rate costs in 2014 as they were five years earlier in 2010 with a significant drop over the 2013-2014 period. Nevertheless, she says that the most important conclusion that the Company derived from those numbers is that in 2014 it still paid in excess of $4 million for the two Unions combined representing 19.5% of their total base wages.

[46] The other major effect of the Hall Award was to amend the Trust Agreement dated June 1, 1990 to provide employers with equal representation on the Board of Trustees. The Trust Agreement had given the Council of Marine Carriers only one trustee representative and the Guild had three such members. Accordingly, section 8 of the Consent Award required that the Trust Agreement would be amended to include the following:

(a) a term that the Guild would appoint three (3) trustees and the companies that were party to the new trust agreement would collectively appoint three (3) trustees;
(b) a mechanism to resolve any disputes that might arise in the event that the trustees are unable to reach a decision on any matters over which they have authority pursuant to the new trust agreement; and
(c) a term that the Trustees would restructure and manage the Benefit Plan to ensure that it remained cost effective and sustainable within the fixed monthly contributions.

[47] In point of fact, I accept that the total benefit premium costs set out in the above chart must have been influenced more by changes in staff levels than per capita premium costs which remained relatively stable during the extant period. While the evidence is that the CMSG was successful in stabilizing the financial performance of its Benefit Plan over the period, the savings were used to establish reserves and to otherwise shore up its balance sheet but not to reduce the premiums payable by the Company. The premium rates established by the Hall Award in a range from $900 to $920/mo/employee have remained in effect essentially over the entire period. .

[48] The ILWU experience is somewhat different in that it was successful in substantially reducing the total premium costs of its BC Marine Industry Health Benefits Plan. In its case, the savings were so substantial that they were able to increase the Plan's reserves and also reduce its per capita premium costs. The problem is that even with those savings its costs have remained well above those of the CMSG. Moreover, the current $1093/mo/employee rate required to fund the ILWU plan, is essentially more than double what the Company is paying for its shore employees.

[49] Don Weitzel testified that following the Hall Award, he was approached by the CMSG to assist them in reducing the costs of their plan. He said that its financial situation was "not good", which appears to be a modest assessment of its actual condition. He said that he made a presentation to them and was then retained by the Guild as the plan consultant, a role that he continues to perform to the present. He said that he found the plan to be in considerable danger of insolvency. At first he made some easy changes relating to the payment of MSP premiums for retirees and then, as he said, they turned to more serious matters.

[50] He said that the insurance carrier at that time, Sunlife was imposing punitive rates for apparently what it saw as abuses, without specifying what those were. He said that while they were successful in obtaining relief to a degree, in the end they moved the plan to a new carrier, Standard Life, which also happens to be one of the insurance companies that made an offer in response to the RFP referred to earlier soliciting indicative offers from the industry. The effect of the change was to leave Sunlife with a loss on its books of $1.8 million, which the plan did not have to pay. Moreover, he said

that Standard Life was prepared to accept a premium rate of half of what Sunlife was offering. In addition, he said that they achieved a rate reduction last year and expect more on September 1 this year at the time of contract renewal.

[51] He said that when a plan is moved to a new insurer there is a statutory requirement to set up incurred but not reported ("IBNR") reserves which refers to potential disability payments to injured or ill employees for end of plan claims which are typically set at between one to one and one half months of premiums. There are also reserves set up of known claims where actual employees are put on benefits for a projected period of time depending upon the disability. In each case, the reserves are left behind when the plan is moved so that there is money available to cover any existing or potential claims.

[52] Another change made was to access employment insurance benefits. Normally the EI Plan will not pay benefits if another agency is liable for the same benefits. Mr. Weitzel said that they were able to register the plan with the government so that the EI plan will contribute a top up benefit. Although that means that employees have more paperwork to access the two different plans, it has saved the CMSG plan about $50,000/mo. He said that they are now working on changes to the administration of the extended health plan that will permit the substitution of generic drugs for prescribed drugs. As of March 1, 2015 the plan will only pay the cost of the generic substitute unless the prescription prohibits substitutions. He said this is now the general practice in the industry designed to meet the huge inflation in cost of drugs. He said they expect to save something in the order of 10% of the extended health costs and that most unions have already come to terms with the fact that existing health plans are not going to continue to be able to meet the huge inflation in the cost of drugs over an extended period of time.

[53] He said that he also implemented a change in investment strategy in that the CMSG plan had only been realizing a return of about 1% on invested funds but is now earning 7.2%. Finally, he said that the other area of potential savings relates to the cost of administrative services but he suggested that this is unlikely to yield much in savings because the fees charged by Coughlin are generally reasonable.

[54] He was asked about the financial state of the CMSG Health Benefit Plan at the moment to which he replied that the direct costs have now been reduced to a point where they are substantially less than contributions and that the surplus thereby generated is being used to build accounting reserves, currently at about $1.4 million including the statutory reserves described earlier. He expressed his opinion that at some point the plan will reach a stage where it is "fully funded", which I take to mean that the excess contributions will no longer be needed to fund reserves. This will be achieved when it accumulates a total of about 3 months of premiums at which time it would have $129/mo per employee of unallocated funds. While the entirety of those funds would obviously be available to substantially reduce the premium costs, Mr. Weitzel testified that the prudent approach would be to only use a portion of them for that purpose.

[55] Continuing his history with the CMSG Health Benefit Plan, Mr. Weitzel testified that in 2011 a trustee, Linda Worton, suggested that he meet with Seaspan to discuss whether he might provide similar services to the trustees of the ILWU Marine Industry Employee Health Benefit Plan. He then met with Seaspan and subsequently the ILWU between November 2011 and August 2012 and put a proposal

to the trustees to work with them to reduce the increasing costs that they were incurring in providing health benefits. He said that he was concerned that without both the imposition of cost controls and making structural changes to the plan, premiums would continue to increase. He was advised on August 20, 2012 that the trustees were not inclined to accept his proposal although one may appropriately observe that they managed to implement independent cost savings measures by which they were able not only to commence accumulating reserves, but also to substantially reduce the per capita premium costs.

[56] Later that same year, Seaspan retained him to test the insurance market and obtain indicative pricing on an anonymous and confidential basis whether the ILWU plan could be funded on a much lower cost base. As we have seen, on that occasion he received two quotes one from Standard Life at a cost of $425.71 per single employee and one from Cooperators at $370.50. There is no evidence, however, that any action was taken on the report after it was submitted to Seaspan on March 19, 2013 other than, perhaps, to motivate the Company to develop the collective bargaining strategy that I have already described.

[57] One year later, the Company again engaged Weitzel & Associates but this time to obtain the formal proposals for providing benefits to all of its employees who were members of the CMSG and ILWU. This turned into the feasibility report admitted into evidence that I discussed earlier. An RFP was prepared and circulated to nine insurers representing most of the major players in the BC insurance market. The request was made in the form of an email from Todd Castonguay dated October 9, 2014 which was, therefore, made some time after the mediation in these proceedings had commenced.

[58] The text of the request is instructive because it clearly illustrates the marketing strategy behind the initiative as well as the critical assumptions. It is equally important that Mr. Weitzel testified that he was the actual author of it. He simply provided Mr. Castonguay with the text for distribution to the insurance industry to solicit offers:

> We have a once in a lifetime opportunity to quote on a significant business opportunity involving roughly 500 employees with a rich benefit program. The account is Seaspan ULC. Seaspan owns and operates a number of Canadian companies primarily involved in coastal and deep sea transportation, bunkering, ship repair and shipbuilding services in Western North America. In addition to the marine transportation services offered through Seaspan, commercial ferry, shipyard and bunkering services are provided via affiliate companies: Marine Petrobulk Seaspan Ferries, Vancouver Drydock, Vancouver Shipyards and Victoria Shipyards. As you may be aware Seaspan is a major international player who was recently awarded significant contracts in the billions of dollars to build the next generation of Canadian Navy and Coastguard vessels. …
>
> Benefits for many of their operating divisions have historically been provided through various Union industry wide programs, including the Canadian Merchant Service Guild, the Seafarer's International Union, the International Longshoremen and the Operating Engineers. In an initiative to look at reducing costs and centralizing control, Seaspan has approached us and

asked about the possibility of getting pricing on these unionized employees group plans under one umbrella plan.

One of the challenges this creates is that there is no relevant experience or rate history that can be provided for the Seaspan union employees as they only represent a small percentage of the makeup of the various industry wide union plans they are currently a part of. We suggest this therefore be treated as a virgin group for the purposes of providing a quotation.

We have attached the following to help you with your quote:

1. Data listing showing name, age, sex, marital status, earnings and occupation for all employees also broken down by operating division;
2. Plan summary for the CMSG (licensed staff) as compared to the Marine Trades Union Plan (unlicensed staff). The Marine Trades Union has various unions involved including the Operating Engineers, the Longshoremen, and the Seafarer's International; and
3. Copies of the CMSG and Marine Trades booklet.

We would ask you to quote ASAP on a comparative plan with two classifications for the licensed and then the unlicensed Seaspan employees. The significant difference is that rather than being in union controlled joint trusteed plans, should the proposal be accepted, the control and ownership of the policy will be vested in Seaspan as the sole employer.

Again, this is a dramatic opportunity to be a part of a paradigm shift in the way the marine industry conducts their business. It represents a unique opportunity to be an instrument of change in the waterfront trades with a world class employer who through their naval shipbuilding contracts that they have already been awarded, already has an immense footprint in that process of change.

[59] As can be seen, although the RFP refers to the goal of creating a single plan Mr. Weitzel asked them to provide separate quotes for each union. He testified that the proposals received are in substantially the same terms as the benefit plans currently available to Seaspan employees subject to a caveat that they may not precisely match the industry plans in every respect and that to provide identical plans could cost somewhat more or less money. Subject to that, he said that the proposals are open for acceptance for the precise dollar figures quoted in the report until February 18, 2015 or to such extended period as may be agreed. Of equal importance, he said that the offers are not subject to further negotiation before they can be accepted and that the premium costs would be locked in and not subject to review for a defined period depending on the terms offered by each particular provider.

[60] He referred to a Weekly Indemnity Claims Portfolio Status Report as of January 1, 2015 which he identified as a report prepared by Coughlin, giving the names of all employees on weekly indemnity claims. It shows that although Seaspan employees generally constitute 45% of the enrolment in the plan, the 16 Seaspan employees who were claimants represented 78% of the total. Nevertheless, he said

that it would be a mistake to conclude that Seaspan is generally a disproportionately high user. Nor, he says, does it permit one to separate the Seaspan experience or to otherwise determine if it is higher or lower than other employers in the plan.

[61] He said that a rule of thumb is that it takes 25 years of individual life experience to give "full credibility" to a separate LTD plan or 10,000 life years of experience for a group, which I take to mean that at that point an insurer could have complete confidence that a plan could be fully funded at the indicated level of experience.

[62] He conceded in cross examination that an initial proposal by an insurer in the circumstances without an experience rating would be considered a "WAG" or wild assed guess until it could be fully experienced. He said when there is no available use history the premium is not based so much on the science of the particular group but rather the general population. He said that one may expect a virgin plan without experience to involve a degree of rate volatility and that the insurer would want to move things to the right rate as soon as possible, the right rate being the level at which the premium contributions generally balance with the costs of the plan.

[63] He conceded that the quotes given by the four insurance companies were stated to be valid for only three months, which have now expired but he expressed confidence that they could be renewed at the stated levels. In fact, he said that after he completed his "will say statement" he went back to the companies and asked them individually if they would stand by their quote. He said that each of them confirmed that they would and that two of them followed up with letters to the same effect. He volunteered to produce the letters but I declined the invitation on the grounds that his testimony on the point was sufficient in the circumstances. In the alternative he said that he would be prepared to obtain fresh quotations. My concern, however, is not so much whether the quotes are still effective, but rather that the rates would be locked in for only a short period of time: 16 months for dental, extended health and weekly indemnity benefits, which Mr. Weitzel called "experience rated benefits" and 28 months for pooled benefits, meaning LTD. He went on to say that under the circumstances where the premiums were established without an experience rating he would expect annual cost increases in the range of 8% to 10% until the benefit costs stabilize.

[64] By contrast, Harvey Mason who is employed by D.A. Townley, the plan administrator for the BC Marine Industry Employee Benefit Plan, testified that he has held that same position for 25 years. He said that D.A. Townley is the largest 3rd party employee benefits administrator in western Canada and has over $1 billion in assets under administration. It provides group benefit programs to over 1000 corporate and union clients in BC and the rest of Canada with coverage for 100,000 employees/ members and dependents.

[65] He confirmed that the BC Marine Industry Plan is directed by a Board of Trustees composed of trustees from the ILWU Local 400, the SIU and employer trustees from the Council of Marine Carriers. The majority of the employees covered by the Plan are employees of 12 active employers although 7 of them are subsidiaries of or related to Seaspan. He said that in 2013 the Board of Trustees retained Point Break Consulting Group to conduct a competitive review of the Plan. The main goal of the assigned task

was to review the program's financial competitiveness and service offering of qualified providers in the group insurance marketplace. While the review involved sending RFPs to 11 insurers, only two submitted competitive rates. He said it would have resulted in offered savings ranging between 16% and 18.5% except that the trustees elected to remain with Great West Life, the existing carrier. Nonetheless, it offered savings of approximately $712,000 in annual costs derived primarily from reductions in the life insurance and long term disability premium rates.

[66] While I do not intend to analyze the report at this stage, I will discuss it in some considerable detail later in my award. What is important at this point is that the witness testified that he was asked to review the Weitzel Report and for that purpose he offered the following opinion:

> I have carefully reviewed the report and have found it to be of little or no value. The reason I say that is because it is stated at the top of the page entitled Methodology, unnumbered, but page 6 in the report:
>
> > No experience data was available, therefore the selected insurers were asked to quote as if this was a new group."
>
> That statement is incorrect. Experience data was available. It was simply not sought from us or the Canadian Merchant Service Guild Plan. If it had been requested for the purposes of the analysis we would have happily provided it.
>
> More importantly, in the absence of that data, the calculations performed by the bidding companies and the bids offered are meaningless. They would not be put into effect even if accepted, as they were completely unrealistic and uneconomic.

[67] Of course, it is important to recognize that Mr. Mason was not qualified as an expert witness although given his lengthy administrative tenure at D.A. Townley his views must be seen to have considerable cogency. Nevertheless, I am not convinced that he has been sensitive to the subtlety of the underlying message behind the statement of Mr. Weitzel when he said that no experience was available. I do not consider that he was saying, as Mr. Mason appears to suggest, that the experience could not be extracted from existing records. Obviously, it would have been relatively simple to identify those Seaspan employees who have accessed the system over the recent past. Rather his real message is that if the plan is restructured on some basis, different from the existing industry wide plan, the responding insurers were prepared to treat it as a virgin plan. I am quite prepared to accept that the insurers knew that the use history was available to them but they were prepared to quote based on an assumption that new plans would be created for Seaspan employees outside of the current industry plans.

[68] Moreover, his statement that the bids are meaningless, while of concern, really addresses the issues raised by Counsel for the Unions in this case, which is that because they are not based on actual experience, the quotes must be seen to be speculative on some level. To use the rather pejorative characterization of Mr. Matthews, they are nothing more than "WAGS" or wild assed guesses, which I accept is true in a general sense, but otherwise is itself somewhat of an exaggeration.

[69] Mr. Weitzel was quite frank about the nature of the quotes and that the insurers saw the RFP as an opportunity to acquire an attractive customer base in the rather unique maritime industry. They accepted that it would take many years to de-risk the new plan to the point where they would be able to have actuarial confidence that costs would balance against premium revenues. As I understand his point, it is that the quotes of that nature are typically based upon the use experience of a general population which must then be refined and adapted to a particular group.

[70] In the circumstances, I accept the basic message that Mr. Mason attempted to convey, that the subject quotes cannot be expected to remain static in the short term. But I do not accept that they can be properly said to be meaningless except in the most technical sense. I also agree with Mr. Matthews that we will see a much more realistic valuation put upon the plans at the time of the first renewal. Even Mr. Weitzel agreed on this point, the difference being that he was of the view that any changes would be relatively modest while the Unions contend that it is most likely that they will rise once again to current premium levels. They say that could properly be expected based upon the fact that the current plans are already risk mitigated which cannot be said about the subject quotes. Of course, the answer to that, as I have already discussed, is that the experience of the industry plans may not correlate with new more discrete actuarial groups. Nor was it the experience of the CMSG itself when the industry plan was moved from Sunlife to the current carrier.

[71] If one were dealing with the same groups, the Unions would be absolutely correct that a change of carrier would not likely produce a significantly lower premium rate over the longer term. It becomes uncertain only if the actuarial group is changed in some material particular. What I do not agree with, however, about the evidence of Mr. Mason is his unconditional assertion that the quotes would not be implemented even if accepted because they are so unrealistic and uneconomic. If he was addressing whether a quote would be binding on an insurer it would be more a legal question and not one that he is qualified to answer. On the other hand, if he meant that as a practical matter it would not be implemented then it must be relegated to the area of pure speculation which is inconsistent with the evidence. In cross examination he testified that prior to the hearings he canvassed the three insurers who submitted quotes and none of them gave any indication that they would not be prepared to implement coverage.

6. **Comparability**

[72] While it was not their only argument, the Unions take the position that the majority of the industry is organized by the CMSG and the ILWU. They say that within the two health benefit plans they are the dominant parties. Accordingly, they argue that the CMSG Western Branch Benefit Plan and the BC Maritime Industry Employee Health Plan must be seen to constitute the overwhelming prevailing standard in the industry and that while Seaspan is the largest employer within the group, it does not make up the majority of contributions. While I will deal with the issue in more detail later in this award, they make the point that other employers have similarly attempted to withdraw from the plans but without success, as an aspect of comparability.

[73] Capt. Roland Gerak, has been the President of the CMSG for only a short period of time, having been elected to office on October 1, 2014. However, he has been in the industry for close to 30 years having been employed firstly by Riverside Towing Services Ltd. and more recently by Hodder Tugboat Co. Ltd. He testified that the Guild represents the majority of officers employed in the tug boat industry on the coast and water ways of British Columbia and the vast majority of unionized officers in the industry. He says that every CMSG organized employer engaged in the coastal tug boat industry, with one current exception, makes the same monthly contribution of $920 to the Guild for each eligible officer in lieu of providing a Health and Benefit Plan.

[74] He referred to the collective bargaining that occurred in 2006 and 2007 between the CMSG and four log tow employers: Hodder, Riverside, Harken and Jones. As he said, the bargaining occurred for the most part at a single table with the employers using a single spokesperson. At some point, the parties reached an impasse, primarily over the Health Benefit Plan. The trustees had set the contribution amounts at $885 per employee per month but the employers had obtained a quote, similarly to this case, from a third party insurance carrier of $635/month for precisely the same level of benefits that were then being provided by the plan. As a consequence, while they did not propose to withdraw from the industry plan, they insisted that their contribution level should not exceed that of the quote from the third party insurer.

[75] It created an impasse and on February 4 the employers served a lockout notice on the Guild and a full scale lockout commenced four days later on February 8, 2007. Prior to the job action Riverside sent a communication to its employees which adequately describes the intense emotion of the issue:

> The key issue in the collective bargaining is the Benefit Plan. We can provide the same Benefit Plan as the Guild at a cost of $635 per person per month. The Guild wants us to pay $885 per person per month. Effectively, the Guild wants us to subsidize the claims experience and “people-factors” that at other companies under the Guild plan make their costs much higher than at our company.
>
> Earlier we offered to pay $650 per month per person into the Guild plan. The union’s response was that you would have to pay the $235 difference to make the total monthly payments equal the $885 being demanded by the Guild.
>
> We don’t want you to have to pay anything for the Benefit Plan and we don’t want you to have any reduced benefits. But we are not going to subsidize Seaspan and other companies to the tune of $250 per person per month in higher premium payments than we can achieve through a third party insurance provider.

[76] The CMSF responded in a press release on February 22 saying that the four employers were attempting to destroy the “longstanding Towboat Industry Health and Welfare Benefit Plan” and that it was not prepared to allow them to “begin dismantling this Plan with the resultant severe consequential impact to our members and their families”.

[77] It should be obvious just how remarkably similar those negotiations were to those in this case with effectively the same arguments except in that case a lengthy lockout occurred. Of course, I recognize that all the parties were resigned to job action in this case except that the Minister of Labour intervened to prevail upon the parties to refer their issues to mediation/ arbitration for resolution. Interestingly, the employers even advanced an issue of financial distress and competitive pressure, as Seaspan did in this case, as proper reasons to compel the union to accept a lower contribution rate. As Daryl Jones said in his letter to his employees:

> Our major customers are increasingly using their economic clout to limit, if not reduce, log towing rates and are pitting our company against a growing number of non-union competitors in terms of who gets the available work – and how much they get paid for doing this work. The result is that our company is being seriously pressured by competitive forces significantly beyond our control that are limiting the work that we can get and our ability to generate sufficient revenue to ensure our survival, let alone any degree of prosperity.

[78] That short note almost mirrors the position taken by Seaspan in this case in both content and the vigor in which it was advanced. However, in the end the Log Tow Employers were unsuccessful in their attempts to achieve lower contribution levels or alternatively to obtain offsetting concessions. Capt. Gerak testified that the CMSG is willing to endure a strike to preserve the contribution levels currently required by its Benefit Plan and while I do not doubt the sincerity of it, it must be regarded essentially as an expression of principle because, in point of fact, all of the parties agreed to forego any job action in favour of mediation/ arbitration. He also asserts that if Seaspan employees were to leave the benefit plan, other employers would follow suit and the plan would eventually fold but no empirical evidence was submitted in support of it.

[79] Based on that history he expressed his view that the same benefits could not be obtained at a better cost, based on the assertion that, "Our trustees are doing a real good job." In other words, not only did he express skepticism that the proposals made by the four insurance companies were capable of implementation, he feels that the trustees of the existing plan have managed the plan so efficiently that there is little additional room for the kind of economies proposed by the four insurance companies to be realized. At the same time, he accepted the proposition that Seaspan would be more competitive and would be able to increase employment if it could achieve a lower cost structure but he was adamant in his assertion that the Union was not interested in a Seaspan only plan. As he said, "It would be no plan, eventually."

[80] I should also like to comment on an exhibit that he tendered for admission entitled, "Seaspan ULC Dues Paying Members." As he testified, this document sets out the number of officers covered by the CMSG plan in each month from January 2010 through December 2014. The document then shows the total accumulated premiums paid to the plan in each year divided by the average number of employees to yield the "yearly benefit per officer". Over the years of the plan study, the total benefit for each employee is shown to range from $11,246.17 in 2010 to $11,237.37 in 2014. In some years the

benefit was slightly lower but in general, the total annual contributions made to the plan has remained relatively steady at around $11,000 for each employee.

[81] As I understand it, however, the premiums paid on behalf of the employees are not treated as a taxable benefit. Rather, income taxes are paid on the actual amount paid by the insurer in the event of a claim which reflects that the benefit is not the amount of the premium, since the employees do not receive the cash equivalent of it but rather the benefit is the amount paid to an employee who is disabled by injury or illness which is not shown by the chart.

[82] Susan Davison was a particularly interesting witness, having been called by the Unions, but employed by Lafarge Canada Inc. as its Labour Relations Manager. She sits as one of three employer appointed trustees of the Guild Benefit Plan, a position she has held since 2009. The other employer-appointed trustees are Larry Smith of Harken Towing Co. Ltd. and Keith Lee of Seaspan. As has already been noted, all of the other three trustees are appointed by the Union.

[83] She testified that between 2004 and 2008 the employer contribution rates increased dramatically:

October 1, 2004:	$788
October 1, 2005:	$826
October 1, 2006:	$884.11
October 1, 2007:	$992.09
October 1, 2008:	$1,038.13

[84] Referring to the earlier evidence relating to the etiology of the Hall Award, she said that it was on March 31, 2008 that five tow companies filed a grievance with the Guild over benefit plan contribution levels. They also filed a writ of summons and statement of claim with the BC Supreme Court later that year on October 3, 2008 alleging that the trustees had effectively misrepresented the financial health of the plan, in that it had accumulated a surplus by which the plaintiffs were induced to enter into the collective agreement. The Guild had already filed a grievance against the employers who were refusing to pay the full rates set by the plan trustees.

[85] On December 22, 2008 the parties agreed to a protocol by which the dispute would be settled using John Hall as a mediator/ arbitrator to restructure the plan while maintaining the benefit categories, ensuring that the plan was cost effective and sustainable and that it had balanced governance. After a period of negotiations the parties reached agreement on a consent award, as I discussed earlier, changing the governance of the plan to include three employer trustees and three appointed by the Union with premiums for 2009 at $900 increasing to $910 on July 1, 2010 and $920 for a term from July 1, 2011 to June 30, 2012. Since that time, the trustees have maintained contribution levels at $920/mo/employee notwithstanding, as we have already seen, that it has yet again accumulated substantial reserves that arguably could properly have been used to reduce the contributed cost of the benefits.

[86] She confirmed that when Mr. Weitzel was retained by the trustees as a consultant to the Benefit Plan he was successful in reducing the benefit plan costs without dramatically cutting the benefit levels. She said that Seaspan employees make up about 50% of the membership of the plan and that their claims history is disproportionately higher than the Benefit Plan as a whole. She stated that she has read the current Weitzel report and that with the current plan design it would be impossible for the plan to match the quotes provided in the report. At the same time, she said that the plan is healthy and costs are under control such that an increase in premiums is unlikely, certainly in the near future.

[87] In cross examination she testified that there are only 20 LaFarge bargaining unit employees in the plan out of a total of approximately 10,000 employees throughout Canada, suggesting that its operations in this area are small compared to elsewhere in Canada. She also conceded that the Guild Plan has the highest contribution costs of all other LaFarge plans but was adamant, nonetheless that as a trustee she was charged with a duty to act in the best interests of the Guild Plan. Even from the perspective of her employer she expressed support in favour of the sustainability of the plan. While she was not prepared to conclude that if Seaspan were to pull out that it would destroy the plan, she said that it would create a lot of complication and extra work which would be a challenge to sustain and that most certainly other employers could be under pressure to follow. She said that she was not attempting to prevent Seaspan from doing what it feels is in its own best interests but was only supporting the industry plan.

[88] Rounding out the evidence of the Unions, Terry Engler, who has been the President of ILWU Local 400 for 15 years, testified that he has also held a position of trustee of the BC Maritime Industry Employee Benefit Plan for that entire period of time. He accepted that the Plan went through a period of dramatic cost increases which compelled the trustees to take drastic action. In negotiations for the previous 2010 – 2013 collective agreement he said the ILWU agreed to a co-pay arrangement where employees would pay 50% of any increases beyond $50 above the premium rate at that time. In fact, he said the premium costs did go up more than the threshold limit with the result that employees had to pay half of the increased costs until the Union was able to implement cost savings measures, which interestingly enough, mirror what is currently being attempted by Seaspan in this case, which was to market the plan to a new insurer.

[89] As I discussed earlier, Mr. Engler confirmed that the trustees engaged Pointbreak Consulting Group to put it out for bids in precisely the same way that Weitzel & Associates did in this case except that its RFP did not contemplate any restructuring. In addition, it included the plan experience. Probably for that reason, numerous of the companies approached refused to bid. However, the bid of Great West Life was approximately 10% lower than the existing premium costs so it was awarded the contract. Since then the operating costs of the plan have been reduced a further 10% in each year and is presently significantly lower than the current premium rate of $1093/mo.

[90] As I understand it, the reason lies in the difference between operating costs and premium costs. Similarly to the CMSG, the operating costs of the plan have been substantially reduced but not all of the reductions have been passed on to the Employer in the form of premium cost reductions. Some of the

savings have been used to establish reserves and to shore up the balance sheet, which is a good part of the reason why the Unions have both expressed optimism that further substantial reductions in premium costs can be expected without going through the disruption of any restructuring. In cross examination, Mr. Engler testified that the industry plan currently has a surplus of $1.4 million and he expected that a 10% decrease in premium costs could be achieved at the time that the GWL contract is renewed and more thereafter.

[91] I accept the evidence that the trustees of both plans are fully committed to containing the cost of coverage of the existing plans. Mr. Engler even went further saying that the Union was fully aware that if they were not successful that it could impact their ability in the future to negotiate wage increases for its members. He said that while they do not support changes to the plan, their main concern is to protect their benefits by controlling costs. However, he said that the advantage of the industry plan is that it provides a level playing field for everyone thereby attracting the people who are required to do the work.

7. **Analysis of Proposals**

[92] I think that it is eminently appropriate to reiterate at this point that it is the Employer that has been the source of almost all of the bargaining pressure in these negotiations. It is fundamentally the Employer that seeks, certainly all of the major changes to the collective agreement that have been so controversial. Some of the changes sought would profoundly affect the essential character of the work environment in the marine industry. Even some of what could even be called ‘minor proposals’ were equally as controversial as the major ones. More to the point, is the fact that it showed almost no willingness to compromise or modify the great bulk of its major proposals in bargaining on the grounds that it is facing withering financial pressure resulting from a number of factors from attempting to accommodate customers in declining industrial sectors to a balance sheet that is inadequate to provide financial returns sufficient to fund needed capital investment to renew the fleet, not to mention inexorable competition from low cost marine operators.

[93] Counsel for the Employer argues that this pressure is evidence that Seaspan was in a strong bargaining position. The reason he considers this to be important derives from a principle he says was adopted by Arbitrator Shime in *McMaster University and McMaster University Faculty Association* (1990) 13 LAC (4th) 199 at pp. 201 and 202 that where the economic circumstances or bargaining power between the parties at a particular point in time strongly favours one party, that should be reflected in the award.

[94] The problem is that I do not take that case to establish any such principle. The arbitrator was addressing various approaches typically taken in negotiating collective agreements with university faculty associations. The case involved a single issue whether a proposal by the faculty association for an additional 2% catch up on an already agreed upon salary increase of 5.1% should be awarded by the arbitrator using final offer selection as the sole criterion.

[95] The bargaining methodologies that he identified included firstly, the correlation of academic salaries with various indices, primarily the Consumer Price Index of Canada; secondly, total compensation, thirdly, compensation relationships with employees in other economic sectors; fourthly, the historical realities of the particular workplace such as where workers may have had to endure layoffs of varying lengths or have engaged in strike activity in order to secure compensation levels that are then incorporated into the extant wage schedules and finally, what he called, “acquiescence”.

[96] With regard to the latter, his premise was that collective bargaining issues are normally resolved in the context of an economic power struggle where wage determination is governed by market conditions. His thesis was that settlements made in collective bargaining reflect market conditions at any given time but not what the parties individually consider to be a perfect solution and that generally they emerge from bargaining not truly satisfied with their collective agreement but one in which they have acquiesced as a practical matter. In other words, they reach a compromise presumably weighted one way or the other depending upon market conditions at the time but nonetheless, one that does not result in the entire satisfaction to the parties, his point being that arbitrators therefore cannot take such settlements to be a precise measurement of what may be acceptable in other circumstances.

[97] When it comes to adjudication, however, the arbitrator held that different considerations applied. He said that notwithstanding his skepticism about reviewing the past, he was prepared to give great weight to salaries negotiated in other universities. He said that he saw no reason to pay people performing the same functions at McMaster University less than those at other universities. As he said @ p.203, “It seems to me that an assistant professor teaching biology at McMaster should not receive less than an assistant professor teaching the same course at another Ontario university”. In referring to their salaries, he was, of course, including benefits in the generic sense. He said that the most significant indicator to the arbitrator of what their salaries should be is what free collective bargaining had produced for the same or similar positions at other universities.

[98] He ended up adopting the position of the faculty association based upon the following factors in descending order of importance:

- salary schedules and benefit comparisons with other universities in Ontario;
- the same comparisons with universities outside of Ontario;
- comparisons within the education sector such as high schools and community colleges;
- comparisons with other professional salaries such as lawyers, doctors, engineers and social workers;
- comparisons with the Consumer Price Index and Individual Composite Index as well as other relevant indices; and
- all comparisons should be based on total compensation which would include pensions and other benefits.

[99] In this case, Mr. Leenheer enumerates the market conditions that he says have compelled the Employer to press for the changes to the collective agreements in this case. He says they include highly competitive pressures; newly emerging competitors “stealing” significant contracts; an array of valuable

contracts coming up for retendering during the term of the next collective agreement; high pressure to reduce costs from customers; and a necessity to increase capital expenditure due to an aging fleet. To mitigate the impact of those conditions he says that significant cuts to other areas of the business have already been implemented and significant layoffs have occurred with the risk of future layoffs if a reduction in labour costs cannot be achieved through collective bargaining.

[100] What has to be understood, however, is that while I accept that those elements contribute to bargaining pressure in the ordinary course of collective bargaining, in practice they are largely taken on faith. Actual confirmation to support those assertions may or may not be presented to the other side but when it comes to arbitration to simply make a proposal, even one supported by well-developed arguments will never be sufficient. Empirical proof of them must be tendered into evidence. It is not sufficient to make an argument based upon assumed market conditions. All of the elements making up the marketing pressures that one party or the other may wish to assert must be exposed to the refining processes of a hearing.

[101] To the extent that the Unions have made proposals, they have been largely incidental to the proposals made by the Employer. They do not assert that important structural or other basic changes need to be made to the agreements or that major improvements need to be achieved. As I indicated earlier, they expressed a willingness to accept a roll over agreement without any changes whatsoever except perhaps for some modest improvements in their wages. While their bargaining has consisted primarily of resisting the changes being proposed by the Employer, they say that the market conditions asserted by the Employer do not provide compelling reasons to support the magnitude of the changes to the agreement that it seeks.

[102] Both sides are adamant that if they had not been forced into agreeing to binding arbitration by the Minister they would have been willing to engage in protracted job action to force the other to agree to their proposals. Accordingly, they say that based upon the replication theory of interest arbitration, I should conclude that their position would have prevailed and that the agreement that I prescribe should resemble more their proposals than those of the other side. Moreover, I am on record as accepting such a proposition as a general principle. As I explained in *Fortis BC Inc. v. International Brotherhood of Electrical Workers Local 213* [2014] BCCAAA No. 134 @ para 83 the replication theory is that the mandate of an interest arbitrator is to discover the shape of the contract that the parties would have arrived at ordinarily as an outcome of free collective bargaining, including any recourse that might be had by them to a strike or lockout. However, while I observed that the theory has universally been adopted by interest arbitrators, the problem comes in the application of it, which is how one determines what the agreement would have been where the parties themselves have been unable to do it. In that sense, the replication model must be seen to be more of a concept or a goal to be achieved. There a standard methodology by which to accomplish the objective except through adjudication.

[103] In fact, this is the approach endorsed by the BC Labour Relations Board, as it discussed in *Health Employers Association of British Columbia and Hospital Employees Union* BCLRB No. B96/2000. The LRB confirmed that it typically uses a combined approach in dealing with the imposition of first collective

agreements, although that particular case involved an appeal of an interest award of Arbitrator Hope in which he ordered that hospital employees receive “comparable” benefits and wages to those paid to government workers. The problem was that he did not determine what those were. He simply referred the matter back to the parties. Although the LRB took jurisdiction to review the award, it refused to direct the arbitrator to reopen the hearings to provide the parties with an additional opportunity to call evidence and make further submissions.

[104] The adjudication model requires that an arbitration board reach a fair and reasonable decision, taking into account the evidence and arguments of the parties by applying standard criteria, primarily the wages and working conditions that other comparator groups have voluntarily agreed to in the course of collective bargaining, as the best indication of what the parties themselves would likely have arrived at in other circumstances. In no case of which I am aware has an arbitrator ever accepted a bare subjective declaration of one or the other of the parties that they were willing to sustain job action in support of their proposals as *conclusive* evidence of what the collective agreement should be.

[105] In this case, Mr. Leenheer took the position that the Company’s proposal on the health plan issue is based on a sound rationale. It is to be recalled that most fundamentally it seeks to achieve an objective that would considerably simplify its collective agreement obligations in this respect by limiting what it is required to do to the payment of a prescribed premium amount leaving it to the trustees of the two industry plans to find an insurer who would provide coverage with that amount. He says that was the purpose it sought to achieve by retaining Mr. Weitzel after the previous round of bargaining was concluded to see if insurance could be obtained at a lower cost.

[106] It is to be recalled that the report, dated March 19, 2013 indicated that significant savings could be achieved for the Company’s ILWU employees if they were grouped together in a Seaspan only plan. Only two insurance companies provided quotes in that instance, the least expensive one being from the Cooperators which offered a premium of $370.50/mo/employee for essentially identical coverage to what was then in place. Mr. Leenheer explained that the Company took that to mean that it is possible to obtain insurance at a much lower cost than it was then paying to the BC Maritime Industry Employee Benefit Plan. This amount then formed the basis of the Company’s initial proposal in this round of bargaining that it would pay a premium contribution of $400 per month to the two industry benefit plans on the basis that it was evidence that the same product could be had for a lower price. He argues that it would be highly unfair to the Company to require it to continue to pay the existing premium costs of the plans where the same coverage can be had for $400.

[107] It is true that over the course of the negotiations the proposal was increased to $500 per employee based on the second report made by Mr. Weitzel dated December 5, 2014 which showed that the Cooperators had increased the premium cost for coverage to $430.71. What he said about it was that it was being offered in lieu of providing a benefits plan, on the assumption that it would then be up to the Unions what they did with the contribution. If they wanted to create a Seaspan-only plan for that amount they could do so. Alternatively, if they wanted to stay with the industry plan and, one would expect, either reduce the benefit levels to an extent or require some additional contributions from

employees in order to support the industry plan, they could do that too. But he says that the Company's position was that it should not be forced to pay for that choice in circumstances where it could provide its employees with the same coverage and pay only $430.71.

[108] Having taken that position, however, he says that the Company recognizes that the premiums offered by the insurance companies most recently are of limited duration – being 16 months for experience-rated benefits and 28 months for pooled benefits with a very real risk that after that time the premiums will increase. He argues that this may be a basis on which I might be inclined to conclude, applying the principle of replication, that the parties would be unlikely to reach an agreement if no provision was made for such an outcome. He said that in those circumstances the Company would agree to bear the risk that the premium costs would increase beyond the $500 once the initial term of coverage were to expire.

[109] He says that the Company would not have any difficulty with a collective agreement clause that imposes an obligation to provide employees with the same benefits which they currently have under the CMSG Plan Booklet and the BC Marine Industry Plan Booklet. Under this arrangement the employees would be guaranteed the same benefits they currently enjoy and the Company would bear all the risk. In addition, he says the Company would bear the risk that there may be some impediment to extricating employees from the industry plans. If that were the case, he said the Company would simply have to make whatever contribution is required to the industry plans. Presumably, the same commitment would apply to the risk of extracting the Company from the trust agreements by which the insurance coverage is generally managed by trustees appointed by each of the parties or to a potential impediment to removing Seaspan employees from their plans relating to contractual obligations with the administrators of those plans.

[110] The problem with the proposal of the Company to make a singular premium contribution of $500/employee per month to the existing industry plans was recognized by all the witnesses who addressed the issue to be unworkable. In particular, Mr. Weitzel stated categorically that the quotations received were conditional on the Company withdrawing from the industry plans, if for no other reason than if they stay in the existing plans the experience of each group would have to be taken into account. He testified that the quotations were valid only if they are structured as virgin plans. In cross examination he admitted that he was generally aware that the Company wanted to cap its premium contributions to $500 but when he was then asked whether it could be done he said, "Not through the CMSG".

[111] Because he is very familiar with that plan he was able to say that although the trustees had achieved considerable cost savings over the recent past their direct costs were still well in excess of the premium contribution offered by the Company. Mr. Gerak was even more definitive. He thought it was disingenuous to even suggest that the same benefits could be obtained at a lower cost. While he said that the CMSG was not interested in a Seaspan only plan, he ventured his opinion that if the Company were to withdraw it would possibly achieve savings initially but that the premium costs would go up dramatically once experience was factored in.

[112] I am satisfied on the evidence available to me that the original proposal of the Company to cap its premium contribution to the industry plans is not feasible. Since Seaspan comprises a sizable proportion of each plan, to attempt to fund them @ $500/employee per month would fall well short of its cost base and would quickly render them insolvent. The only way to avoid that result would be to require the employees to make up a significant shortfall, which in the case of the CMSG would be $420 for each member and for the ILWU it would be much larger, $593 for each member. Those contribution levels would amount to a significant loss of income for every employee.

[113] I have no interest in presiding over the bankruptcy of the plans. Nor do I accept that there is any compelling evidence available to me at this time that demonstrate that the circumstances are appropriate to mandate concessions from the employees of those magnitudes. At the same time, I recognize that there is no proposal for co-payments to be made by the employees because the Company takes the position that the $500 that it has offered is sufficient, the problem being, however, that it must be seen to be completely unrealistic.

[114] Even if one considers the contribution level to merely represent a reasonable cost level beyond which the Employer should not be required to pay, the validity of it has very much been put in doubt. The proposed contribution level has been derived from a cost structure that does not currently exist. It is completely inadequate to fund the existing industry plans. Furthermore, if the employees are withdrawn from the industry plans, the evidence is that in the short term coverage equivalent to what is presently being provided by the existing industry plans can only be achieved if it is done using virgin plans. Even then, a consensus developed amongst the witnesses that upon the expiry of the initial term it is inevitable that the premium cost will rise, the only question being how much. Accordingly, the issue cannot be whether the proposal is a reasonable contribution level. Rather the real issue is whether a separate Seaspan plan should be adopted in order to capture whatever savings are available, and not whether the proposed cap has independent validity, which it does not.

[115] This brings me to a rather troubling feature of the case put by Counsel for the Employer. It is troubling because in my view, he perceived that the original proposal of the Company to fund the health plans significantly below their cost base would not be accepted and he used the hearings as an opportunity to negotiate new terms rather than to support positions taken by the Company in the mediation. I refer to the commitments he made on behalf of the Company to take the various risks enumerated above relating to such things as:

- potential premium cost increases during the term of the collective agreement, and
- whether Seaspan can lawfully withdraw from participation in the industry plans or from any other agreements by which they are administered.

[116] Using a replication model, he says I ought to conclude that the parties would have agreed to the following in their respective collective agreements:

CMSG Deletion of Article 1.13 (excluding 1.13(4) dealing with pensions for the purposes of this arbitration) and replacement with:

Seaspan will provide employees with health benefits in substantial compliance with the benefits specified in the Canadian Merchant Services Guild (CMSG) Western Branch Benefit Plan as at February 27, 2015.

ILWU Deletion of Appendices M and O and Article 1.08 and replacement with:

Seaspan will provide employees with health benefits in substantial compliance with the benefits specified in the BC Marine Industry Employee Health Benefit Plan as at February 27, 2015.

[117] In truth, quite apart from the issue of whether an adequate opportunity was given to Counsel for the Unions to prepare to meet that case, to which they did not object, I consider the proposals to have a great deal of merit based upon certain perceived advantages that he outlines as follows:

(1) the arbitrator would not be ordering the removal of Seaspan employees from the industry plans;
(2) the arbitrator would be imposing on Seaspan the obligation to determine how it can comply with the award which could be by continuing to leave employees in the industry plan if:

(a) it is not possible or lawful for Seaspan employees to be removed from the plan under the terms of the trust agreements:
(b) if the contractual arrangements with the administrators of each plan do not permit such removal or require compliance with particular conditions or the payment of fees or penalties in order to do so; or
(c) the quotes provided by Mr. Weitzel prove not to be viable;

(3) the employees would be guaranteed to receive the same health benefits which they currently enjoy;
(4) Seaspan would bear all the risk of premium increases that may occur on renewal; and
(5) in light of the above, there could be no issue that the award was not feasible to implement.

[118] In general, it appears to me that one obvious problem with the proposals is a lack of critical detail. To leave it to the Company to determine how the benefits would be provided is indicative of the general approach it has taken, which is to trust it to be fair in the way it administers the collective agreement and to preclude opportunities to the Unions to collaborate in the administration of them to the Unions. While that might be a reasonable expectation in other circumstances, the problem is that quite apart from the antipathy that currently exists between the parties, collective bargaining should not be seen to be any different from negotiating essential detail in any normal commercial agreement.

[119] In the circumstances, where it has essentially conceded its initial position that it would make a limited contribution to the existing industry plans to one where it will provide essentially the same benefits presumably through separate plans that it would administer, I would have expected it to come to the hearings with a definitive strategy by which such new discrete plans could be established. Done properly, it would have delineated the precise benefits that would be provided, do an analysis by which

to measure the financial and operational feasibility of the plans over the long term, and how they would be managed and administered. I would also expect them to address the issues raised above such as whether it would be lawful for Seaspan employees to be removed from the industry plans, the impact on contractual arrangements with existing administrators and consultants and whether it had actually secured an extension of the offers made by the insurance companies through Weitzel & Associates and that they would be capable of acceptance consequent upon a favorable award. Moreover, the guarantee that it says would be provided to employees is only listed as an advantage and does not form an actual part of the proposal.

[120] While I accept that it makes eminent business sense to make the kind of proposal as the Company has done, as a general principle to be followed in pursuit of elusive premium cost savings, it could not realistically expect that the Unions would accept it unless it was explained to them how it would be done, without which it is impossible to assess it against any scale of acceptability. Because we are engaged in a process of contract formation, it could hardly meet the test of replication if it fails to achieve at least a grudging degree of acceptance from the Unions. The initiative itself is bold and worthy of serious consideration but only if it is clothed with essential detail on how it would be done. Chief amongst what has to be considered is how the Unions would be involved in the management of the plans, as they do now through boards of trustees. One thing that is eminently clear to me is that it would not be acceptable to the Unions to simply turn over the entire administration of the plans to Seaspan, even if it guarantees substantially the same benefits and that they continue to be paid by the Company, if no provision is made for their participation on some level.

[121] The Unions have vigorously argued that to extract the Seaspan employees from the industry plans would necessarily have a detrimental effect upon them. Because they make up a substantial proportion of both plans I accept the general proposition to be worthy of analysis, although I am not prepared to accept that it would be inevitable that they would collapse, as Captain Gerak suggested. He said that if Seaspan employees were to leave the plan, other employers would follow suit and it would eventually fold. The problem with it is that there are innumerable examples of small group plans that are operating independently of any commercial trading groups that are viable and effective for their members.

[122] In fact, as Mr. Leenheer argues, there is evidence to suggest that there could even be some benefit to any remaining members if Seaspan were to withdraw from the industry plans. It is to be recalled that the evidence was that the benefits that Seaspan employees receive are disproportionate to their contributed premiums. If that is true, the other employers in the plan are effectively subsidizing Seaspan. Mr. Weitzel confirmed that there is a current imbalance in the CMSG plan where Seaspan represents 45% of enrolment but the cost of claims is 78% of the total. However, he said that situation should only be seen to be snapshot at this point in time and is not necessarily an indication of a trend. In fact, on a statistical basis I think it is unlikely that the claim history of Seaspan employees would continue to be disproportionate over an extended period of time. Even if it were a permanent state of affairs, I would not consider it to be compelling in any sense.

[123] On the other hand, just because Seaspan was in a bargaining group many years ago as a result of which it ended up in industry wide health plans, is no reason to compel it to stay in if it is no longer mutually advantageous to do so. I understand the Unions' wish to keep everyone together where they have organized the other employers but in the cold light of day, there is no business case to be made for it in the circumstances. While Seaspan continues to be a member of the Council of Marine Carriers it has long since ceased to bargain collectively with the other employers who are members of the group. Indeed, many of them are fierce competitors. It is not in the interests of Seaspan to stay in the industry plans if it is able to achieve significant cost savings outside of the plans which permits it to compete better against them.

[124] By the same token, the Unions ought to be fully prepared to accommodate the Company to make reasonable organizational changes that will contribute to its goal of financial stability, particularly where it does not seek to reduce the benefits available to its employees. Long term sustainability must be seen to be not just within the mutual interests of all the parties but a critically important aspect of their relationship. In that respect, I agree with Mr. Leenheer that the scope of my jurisdiction is confined by the boundaries of the collective agreements which bind the parties, to resolve differences between them. It is not to preserve external relationships. While I agree that I may properly have regard to interests outside of those boundaries, to say that I should not make a decision that I consider to be otherwise sound just because it may have an impact on other employers or employees in the industry would, in my view, constitute an error of jurisdiction. In fact, it is within everyone's interests, most particularly the employees to take whatever steps are required to make the Company sustainable to preserve jobs and working conditions. To make an organizational change to facilitate both significant cost savings and preserve substantially all existing health benefits can in no way be described as a race to the bottom.

[125] I agree with Mr. Matthews to this extent that if it were likely that the costs savings achieved by setting up a new plan would be merely temporary and that premiums would rise to the same level that they are at now upon expiry of the initial term of any new policy of insurance, the disruption attributable to pulling the Company out of the industry plans and setting up a new administrative organization arguably may not be worth the trouble. The Company takes the position, however, that the savings Seaspan would receive as a consequence of adopting a lower cost plan would be in excess of $1.63 million in the first year alone and that would be repeated for the entire term of the policy, whatever that may be. On that point, Mr. Weitzel testified that the lower costs could be locked in for a period of at least 16 months in respect of experience-rated benefits but 28 months in respect of pooled benefits. It may even be possible to negotiate a longer term for the policy depending on the insurer selected.

[126] Even then, Mr. Weitzel did not agree that the premium costs are likely to rise to the same level they are at today upon renewal. When he was asked what he would predict when the policy came up for renewal he said that the advice he would give to his clients is that they should expect increases year by year based solely on inflationary pressures. For example, Pacific Blue Cross shows average annual cost increases in the range of 5½% - 6%. He agreed that for virgin plans the insurers may bid low for

marketing purposes but, as he said “Not too low”. He agreed that a better reflection of the true cost of the plan would be on renewal but he referred to the case of Jones Marine that similarly negotiated out of the industry plan which he understood did not experience overwhelming increases on renewal.

[127] The position taken by Mr. Matthews on this issue can be best illustrated by his comment that if it was such a good idea, the parties would have agreed to it long ago, as if to say that it does not meet the replication test because the parties did not reach an agreement on it. Of course, that is circular. The test can never be whether the parties reached an actual agreement, but rather involves a speculation about what they would have agreed to had the circumstances been different.

[128] That aside, the emotion used to describe the position of the CMSG on this issue, whether an attempt should be made to see if longer term savings can be realized is telling. If nothing else, it is clearly indicative of just why the parties were not able to reach an agreement on this issue even in circumstances where the Company had pledged to provide the same benefits, which in ordinary bargaining would have been an extraordinarily important concession. Yet the parties were unable to take that premise and build a structure around it to capture the available cost savings.

[129] His argument postulated that because we could not know whether longer term savings can be realized until the first renewal of the contract of insurance, we are left with what he called “huge uncertainty” over this most critical issue. In other words, the point he was making was that in the absence of certainty about it, no attempt should be made. In the opinion of the Union, none of the offers made in response to the RFP by Mr. Weitzel should be accepted. In fact, he said it would be “reckless” to do so when we know the rates will go up after a few months. Indeed, he says that the best evidence of the real cost of providing the same benefits with the experience of these employees is what the insurers are charging the industry plans. In effect, he says that should be seen to be the prevailing standard which the majority of employers in this industry are paying.

[130] I agree with him that the test is not whether a proposal of one or the other of the parties is reasonable, which was the position taken by Mr. Leenheer. If that were the case, it would mean that arbitrators would be making decisions based on their own particular perspective of social justice, a proposition that has been almost universally rejected by the authorities. For example, in *Board of School Trustees, School District No. 1 (Fernie) and Fernie District Teachers Association* 8 LAC (3d) 157 Arbitrator Dorsey said @p. 159 that:

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

[131] Arbitrator McPhillips more recently adopted the principle in Nelson *(City) v. Nelson Professional Fire Fighters’ Assn. (Wage Grievance)* [2010] BCCAAA No. 174 @ pp.3-4 in which he also enumerated numerous other awards in which it was accepted as a foundational precept: *Vancouver Police Board and Vancouver Police Union* [1997] BCCAAA No. 621 (Lanyon); *City of Burnaby and Burnaby Fire Fighters*

Union, Local 23 [2008] BCCAAA No. 220 (Gordon); *Beacon Hill Lodges of Canada* 19 LAC (3d) 288 (Hope); *Corporation of City of Calgary and IAFF, Local 255* December 22, 1999 (Tettensor); *City of Regina and Fire Fighters Association, Local 181* September 21, 2005 (Paus-Jenssen); *City of Richmond and Richmond Fire Fighters Association* [2009] BCCAAA No. 106 (McPhillips); *City of Vancouver and Vancouver Fire Fighters Union, Local 18* [2008] BCCAAA No. 182 (Korbin).

[132] On a somewhat different point, relating to the status of tentative agreements made in the course of bargaining, I attempted to provide clarification on how the principle is to be applied in practice in the *FortisBC Inc. Case* (supra) at para 98 where I said:

> "… Interest arbitration is not a conceptual exercise. It requires arbitrators to attempt to determine terms that in reality would be mutually acceptable to the parties to govern their relationship in the future based on objective criteria and while a tentative agreement may properly be a factor in that determination, it is only one of many such criteria that ought to be considered."

[133] For my most immediate purposes, with reference to the requirement to use objective criteria by which to determine what the parties to a collective agreement would likely have agreed to, the corollary of it is that it is essentially immaterial for a party to declare, as happened in this case, that they were prepared to sustain job action or otherwise say that they are opposed to a proposal. The resolution does not normally lie in their opposition to a proposal or even the degree to which a proposal is opposed although Arbitrator Ready concluded in *Re K Mart Canada Ltd. and United Food & Commercial Workers, Local 1518* [1993] 37 LAC (4th) 412 that if the parties in that case had continued to freely negotiate, they likely would have agreed to the inclusion of a union security provision, given the tenacity with which the union pursued the demand.

[134] The answer must be found in objective criteria independent of the subjective positions of the parties. As was said by Arbitrator Korbin in *Skidegate Band Council and Hospital Employees Union* [2002] CLAD No. 642 @ para 45 referring to the Beacon Hill Lodges Case (supra):

> Put another way, an interest arbitration board must put itself in the position of the respective parties and seek to arrive at the bargain the parties would have reached on their own. Necessarily, this includes due consideration to matters such as the parties' historical bargaining pattern, the use of comparators, the prevailing economic context, etcetera. At different times in a collective bargaining relationship, different factors will be prominent in shaping an outcome. It remains the task of an interest arbitrator to be sensitive to the prevailing bargaining reality of the parties and make a decision consistent with what they themselves would have bargained.

8. **Decision**

[135] In spite of the obvious differences between the parties on matters of detail relating to this issue, it is important that in my view a consensus was established on three matters of general principle that

provide a basic framework for an agreement that will meet all the requirements of the doctrine of replication. These are:

(1) that substantially all the benefits that are currently being provided to employees as part of the two industry health care plans should continue to be required to be provided in any renewal collective agreement;

(2) that consequent upon a request for proposals through the auspices of Weitzel & Associates, there are, subject to verification, currently offers of coverage available from three reputable insurance companies at various cost points depending upon the bargaining unit on the following ranges:

CMSG	$526.70 to $721.30
ILWU	$347.62 to $488.21

These rates compare to the current premium contribution rates being paid by the Company in respect of employees in each Union as follows:

CMSG	$920/mo
ILWU	$1093/mo

(3) that the risk of an increase in the premium cost of a policy of insurance that provides such benefits over the term of a renewal collective agreement should be borne by the Company.

[136] It is my view that the commitment by the Company to provide employees with health benefits in substantial compliance with benefits specified in the respective industry health benefit plans provides a major anchor around which a renewal collective agreement can be properly constructed. The proposal by the Company, however, that it will assume responsibility for the administration of the plans does not meet the replication standard. It is unlikely that the Unions would agree to such a structure in the ordinary course of events. Nevertheless, I accept that it would be appropriate to establish a new system for the administration of the plans outside of the current industry plans but with the participation of the Unions in the management of them through a board of trustees. There will continue to be two separate plans for each Union, as there is now, although I would expect that at some point, no later than the next set of negotiations, consideration will be given to whether they could be usefully merged into a single plan.

[137] In the circumstances, it is my view that where the only thing that is changed is the organizational structure by which the benefits are administered, it could not be seen to be a radical change in any ordinary sense. Essentially the same benefits will continue to be provided but outside of the current industry plans and should meet both the condition described by Mr. Weitzel for the establishment of a virgin plan and the requirements of the jurisprudence that interest arbitrators should generally follow bargaining trends developed by others and not set them, as Arbitrator Hope said in

Okanagan Mainline Municipal Labour Relations Association and IAFF Locals 953, 1399 and 1746 (1997) 6 LAC (4th) 323. Interest arbitrators are mandated to prescribe agreements using objective criteria, by reference to existing standards and other appropriate comparative criteria, including the ability of the Company to compete in an environment that is increasingly dominated by quasi-union contractors: *Construction Labour Relations Association of British Columbia and Plasterers Section of the Operative Plasterers and Cement Masons International Association Local 919* [2002] BCCAAA No. 438 @ para 7.

[138] It does not require arbitrators to lock the collective agreement into a system that does not provide for long term sustainability. In my view, it makes sense to consolidate the administration of the health plans into a focused system that is integral to the parties. The employees will continue to have substantially the same benefits which they currently enjoy and an equivalent role in the management of the plans. The difference is that it will provide substantial savings to the Company, certainly in the initial term of the contract of insurance with an opportunity to extend the savings over the longer term. The quid pro quo of providing that opportunity to the Company is that it will assume the risk that it will not work and that the premium costs will rise, as the Unions have argued, to approximately the same level as they are currently. The one thing that was missed in all this, however, is that it is highly unlikely that they will go up higher than the current levels, certainly at the time of the first renewal.

[139] The assumption of the risk by the Company will be guaranteed by continuing the obligation in both of the current collective agreements that the Company shall pay the entire cost of the premiums of insurance for each employee, including the BC Medical Services Plan. It goes without saying that the Company proposal to simply contribute $500/mo/employee to each plan is inconsistent with its guarantee. Out of an abundance of caution, I reject that part of its proposal. Similarly, the current level of benefits will be guaranteed in both agreements by adopting provisions equivalent to those in the collective agreement with the ILWU Local 400 which deal with the type and level of benefits as follow:

- Weekly Indemnity - Article 1.13(1) (a) (i);
- Long Term Disability – Article 1.13(1)(b) (i)(ii) and (iii);
- Dental – Article 1.13(1)(c)((i)(ii)(iii) and (iv);
- Extended Health – Article 1.13(1)(d)(i)(ii)(iii)(iv)(v)(vi) and (vii);
- Life Insurance – Article 1.13(1)(e)(i);
- Health Plan Booklet – Article 1.13(1)(f);
- Board of Trustees – Article 1.13(1)(g) except that each Union will appoint three trustees for their respective plans and the Company an equal number. Each trustee shall have one vote. In addition, an independent chairperson shall be appointed by the arbitrator to generally manage the plan and preside over meetings of the trustees. The chairperson shall be entitled to participate fully in the discussions but without a vote except in the event of a tie in which case he/ she will cast the deciding vote; and
- BC Medical Services Plan – Article 1.13(2).

[140] The proposals of the Unions to be paid lay days and to top off weekly indemnity benefits (Article 1.13(1)(a)(ii) and (iii) are deferred and will be addressed in subsequent proceedings, either in mediation

or arbitration. On the other hand, all of the proposals of the Unions to change the level of coverage are rejected.

[141] Out of an abundance of caution it should be noted in passing, that if the type and level of benefits is to be guaranteed in the form of language equivalent to that of the ILWU Local 400 agreement it will be necessary to restructure Section 1.08 of the CMSG collective agreement. Not only will the premium contribution no longer be paid to the Guild but rather to the new plan and equivalent language to that of the ILWU agreement shall be introduced to specify the type and level of benefits that the Company will provide. The proposals by the Company to amend Article 1.08 (12) and (13) are reserved to be dealt with subsequently either in mediation or a later arbitration. The language of the agreements required to achieve the above purposes is subject to the mutual agreement of the parties, in default of which it must be accepted by the arbitrator.

[142] While that might be sufficient to deal with these issues in ordinary circumstances, because the quotations submitted by the insurance companies apparently expired on February 18, 2015 one cannot be absolutely certain that they are prepared to extend the expiry date or even that the type and level of benefits that they propose are entirely consistent with the requirements of the collective agreements. The Weitzel Report added a number of caveats all of which must be rendered certain without which the new system cannot be implemented. I must know precisely what benefits will be provided and at what costs. The caveats are as follow:

- The costs provided in the premium analysis represent an approximate overview of direct insurance costs; and
- The insurance proposals are based on the insurers' standard contract wording currently in use which may not coincide with legacy benefits. He gives the example of the current CMSG plan which provides brand name drugs whereas most insurers are now moving to mandatory generic substitution. He says there may be other differences once one gets into the analysis.

[143] Mr. Weitzel says that the quotes could change somewhat from what has apparently been offered although if that is the case it does not coincide with the legal model of tendering. In the ordinary course of events a tender constitutes an offer which if accepted becomes immediately binding upon the parties. Having said that, I do not take his comments to be at odds with that model but rather leaves it open for the parties to negotiate changes to the benefits being offered which could then generate changes to the premium costs.

[144] The consequence is that there are two possible approaches that one could take to deal with those conditions. On the one hand, one could enter into negotiations with the selected insurers on the basis that the prescribed type and level of benefits must be provided without any modifications and request a precise cost quotation for them. On the other hand, one could analyze what benefits are being offered for the price quoted and compare them to what is being sought in the collective agreement. It would not be appropriate to purport to prescribe terms that cannot ordinarily be secured in a standard

contract of insurance or alternatively to accept an offer of coverage without knowing precisely what benefits it provides, yet that is the conundrum that the caveats present.

[145] Prior to the hearings I urged the parties to provide me with a detailed analysis of the insurance proposals by which I would be able to determine conclusively whether they could be said to reasonably provide the benefits that are required by Article 1.13 of the ILWU agreement. If they do not it would leave us open to negotiate another price with the insurers, if necessary, and determine whether that is acceptable. Alternatively, we could take the position that the offered price is what we want and adjust the collective agreement to provide only the benefits that are contained within the offer. That evidence was not provided to me with the result that I am unable to make a decision one way or the other. I am, therefore, left with no alternative but to make my decision on this issue subject to a number of conditions.

[146] Firstly, it must necessarily be subject to a condition that the offers by the three insurance companies will be extended for acceptance and that the initial term during which the contributed premiums are guaranteed is similarly extended to the satisfaction of the arbitrator. Assuming that the offers are extended to my satisfaction, I will determine which of them should be accepted, if any.

[147] Secondly, my decision is subject to an analysis being done of the three extant proposals to determine more precisely whether each or any of them meet or exceed the benefit package currently prescribed by Article 1.13 of the collective agreement with the ILWU Local 400 or alternatively, if some modification of the benefits package would be mutually acceptable in order to minimize the contributed premium cost of the insurance. That issue is referred back to the parties for a determination but I retain jurisdiction over the matter in the event they cannot agree.

[148] Finally, my decision is subject to whether the parties have the right to withdraw from: (a) the current industry plans, (b) the trust agreements, if any, and (c) any other agreements by which the plans are administered. If any such current agreement is determined to prohibit the withdrawal or would create a liability to the parties which, in the opinion of the arbitrator would be unreasonable, an opportunity will be given to the parties to make submissions on how the withdrawal might otherwise be handled. I shall also need to know what other agreements, if any, may be required to implement new plans, such as a new trust agreement. My inclination would be to make it as simple as possible by having the successful insurer administer it, if possible. Are the insurance companies prepared or able to administer the entire package of benefits, including the experience-rated benefits, or will those benefits have to be separately administered? The administration will obviously be somewhat complicated by the fact that I have provided for a Board of Trustees to exercise administrative oversight over the plans. Will an administrator have to be appointed with a new administration agreement? In that event, who should be appointed and what form should the agreement take? I retain jurisdiction over those issues subject to the parties coming to a mutually acceptable agreement.

[149] For those purposes, I direct Counsel to meet together as soon as possible and, in any event, no longer than fifteen (15) days from the date of this award or such further period as the arbitrator shall determine, to take such action as may be required to meet the above conditions. In particular, I expect

Counsel to collaborate together to (a) contact the three insurance companies directly, or indirectly through Weitzel & Associates, to obtain extensions of their offers and longer periods during which their initial premium costs shall be locked in; (b) analyze the proposals to determine if any or all of them substantially meet the benefit requirements of Article 1.13 and to come to an agreement, if possible on that issue or alternatively, agree on what level of benefits would be acceptable. If no agreement can be reached the matter may be referred back to me for a binding decision; and (c) determine whether any legal impediments exist as a result of commitments made in any other agreements that would prevent or otherwise restrict the implementation of my decision to withdraw from the industry plans and to establish two new plans between Seaspan and each of the two Unions. Any new agreements that may be required for the proper administration of the plans will have to be drafted, the terms of which are subject to my review and approval. If Counsel are able to come to an agreement on the results of these actions, a single report in writing may be made to me to that effect in the absence of which separate reports shall be made, all within the prescribed period.

[150] Once I have a report from Counsel I will issue my final award. If the conditions cannot be met I will give consideration to alternative arrangements, including a continuation of the existing health plans in each of the respective collective agreements.

It is so awarded.

Dated this 29th day of April, 2015 at Vancouver, British Columbia.

Dalton L. Larson
Arbitrator