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Public Service Labour Relations Act Before an adjudicator

BETWEEN

FEDERAL GOVERNMENT DOCKYARD TRADES AND LABOUR COUNCIL (EAST)

Bargaining Agent

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as
Federal Government Dockyard Trades and Labour Council (East). v. Treasury Board (Department of National Defence)

In the matter of a group grievance referred to adjudication

Before: Augustus Richardson, adjudicator

For the Grievors: Raymond Larkin, QC, and Jillian Houlihan, co-counsel

For the Employer: Sean Kelly, counsel

Heard at Halifax, Nova Scotia,
January 6, 2015.

I. Grievance referred to adjudication

[1] The Federal Government Dockyard Trades and Labour Council (East) ("the Council") is the bargaining agent for employees who are members of 10 affiliate unions working at Fleet Maintenance Facility Cape Scott ("FMF CS"), in Halifax, Nova Scotia. At all material times, the Treasury Board (Department of National Defence) ("the employer") and the Council were parties to an agreement between them with an expiry date of December 31, 2011 ("the collective agreement") (Exhibit U1 – English and French versions). The parties agreed that this was the agreement relevant to the grievance before me.

[2] On May 14, 2013, the bargaining agent presented a group grievance on behalf of Michael Jessome, Anthony Reeves and Bruce Ellis ("the grievors"). The grievance arises out of work performed by the grievors on the HMCS *Athabasca* at the Fleet Maintenance Facility–Cape Scott ("FMF-CS") in Halifax, Nova Scotia in April and May 2013. In order to gain access to the work site, the grievors were taken by a Rigid-Hulled Inflatable Boat (an "RHIB") to a barge tied to the side of the ship. The barge was being used as a work platform. The grievors claimed an allowance for each trip to and from the barge pursuant to clause 23.05 of the collective agreement, which provides as follows:

> ***23.05 Transfer at Sea Allowance***
>
> *When an employee is required to transfer to a ship, submarine or barge (not berthed) from a helicopter, ship's boat, yardcraft or auxiliary vessel, the employee shall be paid a transfer allowance of ten dollars ($10.00) except when transferring between vessels and/or work platforms which are in a secured state to each other for the purpose of performing a specific task such as deperming. If the employee leaves the ship, submarine or barge by a similar transfer, the employee shall be paid an additional ten dollars ($10.00).*

[3] The employer denied the claim: hence the grievance.

[4] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the new Board") to replace the former Public Service Labour Relations Board ("the former Board") and the former

Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 396 of the *Economic Action Plan 2013 Act, No. 2*, an adjudicator seized of a grievance before November 1, 2014, continues to exercise the powers set out in the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") as that *Act* read immediately before that day.

II. The hearing

[5] The facts were not contested. The issue to be resolved turns instead on the interpretation of clause 23.05 and its application to those facts. At the hearing on January 6, 2015, the only witness called by the bargaining agent was Mr. Jessome, one of the grievors. A number of photographs, a diagram of the dockyard and three earlier versions of Article 23 (Allowances) were put into evidence.

III. The facts

[6] The *Athabasca* had sustained hull damage on its port side, near the waterline towards its bow. The grievors were welders who worked on the outside of the ship to repair the damage. The work involved removing the damaged part of the hull, and then installing new hull plates.

[7] The work took place in a wide slip to the north side of a building in the dockyard designated as D200. The slip was in the shape of an open "U", with its mouth facing roughly to the east. The starboard side of the ship was tied, bow out, to the dock that ran along the south side of the slip. The north side of the slip (or the "U") consisted of a long and high jetty. The sides of the slip–the dock and jetty–were high in order to accommodate the rise and fall of the sea level because of the tides. (The slip within the overall context of the dockyard was depicted in a diagram entered as Exhibit E5).

[8] The hull damage was on the port side of the *Athabasca*, closer to the bow than the stern. Mr. Jessome testified that the damaged area was too close to the water line for the work to be carried out from the docked side of the ship. (This is because the level of the wharf was higher than the sea level, even at its highest level.) He also

testified that the repair work had to be carried on from the outside of the ship. The damage was to an area in the hull that was opposite the cramped galley. It would have been too difficult if not impossible to carry on the repair work in such a restricted space.

[9] Mr. Jessome went on to explain that a barge (his term) was pulled alongside the water side of the ship. As the photo introduced as Exhibit U9 demonstrates, the barge was lashed to the port side of the ship. The grievors would stand on side of the barge closest to the hull to carry out their work.

[10] In order to gain access to the barge, the grievors first went to the western, or dock, side of the slip–that is, the closed end of the "U." Another barge was lashed to that side of the slip. One or two RHIBs were tied alongside the barge. The grievors would descend a ladder fixed to the side of the dock down to the barge. They then crossed the barge to an RHIB. Sometimes, they first clambered over one RHIB that had been tied to the side of the barge to get into the RHIB (which was alongside the first RHIB) that would take them to the ship. The transporting RHIB was operated by two navy personnel. The grievors were required to wear life jackets while in the RHIB. The RHIB then motored about 75-100 metres across the slip, travelling outwards towards the barge that was lashed to the side of the Athabasca. The trip took about two minutes, though the time might vary with the surface and weather conditions. Once at the barge (the level of which was about a metre above the top of the transom of the RHIB) the grievors would stand and then clamber up onto the surface of the barge. This step could be a little tricky, since the RHIB and the barge moved up and down with the swell, the degree of which depended on the weather or wakes created by water traffic in the harbour. Mr. Jessome testified that, on one occasion, one of the sailors in the RHIB fell into the water. The grievors then crossed over to the other side of the barge, which was butted up against the side of the ship. There they would commence their repair work to the hull. The sequence of the trip was reversed when the grievors went for lunch or left for the day.

[11] Mr. Jessome kept a list of the transfers over the period April 18, 2013 to June 2013: Exhibit U14.

[12] During cross examination, Mr. Jessome was questioned about a document issued on April 10, 2013, titled "Boarding Naval Ships at Sea": Exhibit E15. Two methods were depicted in the document. The first was a "jumped ladder method," which appears to consist of a long, flexible ladder lowered down the side of a ship so that someone in a small vessel alongside the ship could climb up it to the ship deck. The other, called the "Billy Pugh method," consisted of a wired platform to which the person or people to be transferred could cling, and which would then be raised or lowered by a crane to the ship. He explained that he had never done either; nor had he ever transferred to a ship in the open ocean.

[13] The issue then became this: was the transfer from shore to ship a transfer at sea within the meaning of clause 23.05?

IV. Submissions of the parties

A. For the grievors

[14] Counsel for the bargaining agent opened his submissions with three points:

a) clause 23.05 applied to ship transfers that took place within the confines of Halifax harbour, and not just in the open ocean beyond harbour limits;

b) the grievors had transferred by RHIB (a "yardcraft") to HMCS *Athabasca* (a "ship"), and so were entitled to the allowance provided under clause 23.05; or, in the alternative,

c) they had transferred to a barge that was "not berthed," and so were entitled to the allowance.

[15] The first point concerns the scope of clause 23.05. Counsel for the bargaining agent noted that one of the positions of the employer was that the clause was only intended–as its heading suggested–to apply to transfers that took place "at sea"–that is, in the open ocean beyond the limits of Halifax Harbour.

[16] Counsel for the bargaining agent submitted that the employer's interpretation was incorrect.

[17] First, he noted that the word "sea" did not appear in the clause itself. It appeared only in the clause's heading or title–"Transfer at Sea Allowance." He submitted that, while in ordinary course, a title or heading can be considered when interpreting the clause in question, it cannot control its full meaning. The heading informs the meaning of the clause, but it does not define it: see, for example, *Kenora Roman Catholic Separate School Board v. OECTA* (1993), 37 L.A.C. (4th) 28, at para. 71; *Southern Railway of British Columbia v. CUPE, Local 7000* (2010), 198 L.A.C. (4th) 283 at para 26.

[18] Counsel then contrasted the wording of clause 23.05 with that of clause 23.04, which I reproduce here:

> ***23.04 Sea Duties Aboard Surface Vessels***
>
> *When an employee is required to go to sea (i.e. beyond the harbour limits) in a vessel for the purpose of conducting trials, repairing defects, dumping ammunition, etc., the employee shall be compensated, from the time he/she reports aboard until one (1) hour after reaching the harbour limits on the final return, as follows:*
>
> *(a) for the first twelve (12) hours aboard or less, at the applicable rate of pay;*
>
> *(b) for all hours aboard in excess of twelve (12) hours, at the applicable rate of pay for all hours worked and at the regular rate of pay for all unworked hours.*
>
> *For the purpose of this clause, an employee is considered to be working if he/she is actually performing or assisting in the performance of the duties of the job or has received specific instructions to remain available for work at the specific location where the work is being performed.*

[19] Counsel pointed out that clause 23.04 expressly limited "sea" to an area "beyond the harbour limits." That, he suggested, indicated an understanding on the part of the parties that at least, as between them, the word "sea," if not otherwise qualified, had a broader meaning. That meaning, he submitted, could be found in the *Oceans Act*, S.C. 1996, c. 31. He pointed to sections 4, 5(1) and 5(4) of the *Act*, which provide as follows:

> ***Territorial sea of Canada***
>
> *4. The territorial sea of Canada consists of a belt of sea that has as its inner limit the baselines described in section 5 and as its outer limit*
>
> *(a) subject to paragraph (b), the line every point of which is at a distance of 12 nautical miles from the nearest point of the baselines; or*
>
> *(b) in respect of the portions of the territorial sea of Canada for which geographical coordinates of points have been prescribed pursuant to subparagraph 25(a)(ii), lines determined from the geographical coordinates of points so prescribed.*
>
> ***Determination of the baselines***
>
> *5. (1) Subject to subsections (2) and (3), the baseline is the low-water line along the coast or on a low-tide elevation that is situated wholly or partly at a distance not exceeding the breadth of the territorial sea of Canada from the mainland or an island.*
>
> ***Low-tide elevations***
>
> *5. (4) For the purposes of this section, a low-tide elevation is a naturally formed area of land that is surrounded by and above water at low tide but submerged at high tide.*

[20] Counsel for the bargaining agent submitted that, within the definition established by the *Oceans Act*, Halifax Harbour was clearly within the "territorial sea" of Canada. Hence, in ordinary course, the word "sea" would have been understood by the parties as applying to Halifax Harbour as well as the open ocean beyond its limits-unless, as in clause 23.04, they expressly limited that otherwise extensive definition.

[21] Counsel also referred to the history of collective bargaining with respect to the transfer at sea allowance. No such allowance existed in the collective agreement that expired on June 30, 1982: Exhibit U2. A version of the allowance made its appearance in the agreement that expired on September 19, 1987: Exhibit U3. At that time, clause 23.05 was worded slightly differently, as follows:

> ***23.05 Transfer at Sea Allowance***
>
> *When an employee is required to proceed to a ship by helicopter, ship's boat, yardcraft or auxiliary vessel and is required to transfer from the helicopter, ship's boat, yardcraft or auxiliary vessel to the ship, he shall be paid a transfer allowance of five dollars ($5.00). If he leaves the ship by a similar transfer he shall be paid a further five dollars ($5.00).*

[22] The wording of this clause was changed to its current version (with the exception that the allowance was $5.00 rather than $10.00 and the use of the gender neutral term "employee") in the agreement that expired on December 31, 1990: Exhibit U4. Counsel submitted that this history represented a fine-tuning as well as an expansion of the provision. All of this spoke to the sophistication of the parties and supported a conclusion that their understanding of the word "sea" was similarly sophisticated.

[23] Counsel also noted that the parties had consistently used the word "yardcraft." He submitted that the ordinary meaning of yardcraft, at least in the context of dockyards, was primarily focussed on the types of surface vessels used in a harbour and not in the open ocean. This too supported a conclusion that clause 23.05's intended meaning was on all transfers, not just those that took place beyond the limits of Halifax Harbour.

[24] Counsel then turned to his second and third points: that the transfer in question was one "to a ship" or, in the alternative, to a "barge (not berthed)."

[25] Counsel for the bargaining agent pointed first to the fact that clause 23.05 was part of a series of allowances under Article 23 (Allowances):

a) clause 23.01 (Dirty Work)

b) clause 23.02 (Height Pay)

c) clause 23.03 (Submarine Trials)

d) clause 23.04 (Sea Duties Aboard Surface Vessels)

[26] Counsel submitted that all of these allowances were, as suggested by their titles), paid in situations that could be said to be unpleasant, out of the ordinary course of work, or more risky. A transfer from one vessel to another (as opposed to simply walking onboard a docked ship) was similarly unpleasant or risky or, at least, out of the ordinary. He also pointed to the difference between the 1987 version–where the reference was to an employee being required "to proceed to a ship"–and the 1990 version–where the wording was changed to an employee being required "to transfer to a ship." This change tightened the focus on what he submitted was at the heart of the clause–the act of transferring from one vessel to another. The actions involved in transferring from one vessel to another are different from–and out of the ordinary from–the actions involved in simply walking onto a ship tied up at a pier or jetty.

[27] Counsel then submitted that what happened here was a transfer to a ship. The barge that the grievors walked across to get to the side of the *Athabasca* was simply their path to the ship. Their destination–the place where they had to perform their work–was the ship, not the barge. The act of crossing the barge to get to the ship was, in concept, no different than climbing a ladder to get on board a ship. In both cases, the result was the same.

[28] Counsel submitted that the fact that the ship was berthed (that is, tied up to the pier or jetty) did not take the situation outside of clause 23.05. The normal rules of grammar dictated that the word "berthed" in parenthesis applied only to the word "barge." It did not apply to, modify or otherwise restrict the words "ship" or "submarine." He submitted that support for this conclusion could be had by reference to the French text of the collective agreement since "[b]oth the English and French texts of this Agreement shall be official": clause 4.02. The relevant wording of clause 23.05 in the French text is as follows: "Lorsqu'un employé doit être transbordé sur un navire, un sous-marin ou une péniche (non accostée) par hélicoptère...." Counsel submitted that, in French, a barge is feminine but a ship and a submarine are masculine. Hence the use of the feminine form of "accoster" signalled an intent to limit the word to "une péniche." Had the parties intended it to apply to all three types of craft, they would have used the masculine version instead: see *Chisholm v. Treasury Board (Transport Canada)* PSSRB File Nos. 166-2-21524 to 27 (19920703). (I note here that counsel for the employer agreed with what the rules of French grammar required,

but did not agree that those rules had any application in this case for reasons that will be developed later).

[29] Counsel also pointed out that, in the earlier versions of clause 23.05, the word "berthed" had not been used. It had shown up only when the word "barge" was introduced in the 1990 version: Exhibit U4. That too supported the conclusion that the issue of whether the craft to which employees were transferring was berthed or not was applicable only in the case of barges.

[30] Counsel then turned to his alternative submission. In the event that I found that the transfer in question was to a barge rather than to a ship, the barge in this case was not "berthed." Counsel submitted that the barge was tied to the side of the *Athabasca*. It was not tied to a jetty or a wharf. A barge tied to the side of a ship is more subject to movement. It is not as secure as it would be if it were berthed to the side of a wharf or a jetty. In this he relied in part on the exception contained in clause 23.05, which applied "when [the employee was] transferring between vessels and/or work platforms which are in a secured state to each other for the purpose of performing a specific task such as deperming." A barge that is berthed is similarly in a "secured state." A barge that is tied to the side of ship is not. Since the mischief–or perhaps the out-of-the-ordinary–that is addressed by the clause is the risk associated with transfers between vessels, one must interpret the word "berthed" narrowly, and limit it to only those situations where the barge is secured to a wharf or jetty (that is, to land).

[31] Counsel concluded by submitting that the grievance ought to be allowed, and that I should retain jurisdiction with respect to the computation of the number of transfers (and allowances to be paid) against the possibility that the parties were unable to work it out themselves.

B. <u>For the employer</u>

[32] Counsel for the employer commenced his submissions with some general observations regarding the scope of the employer's power under both the *Financial Administration Act* and its management rights to set policy, and to organize and manage the public service, subject to any express restrictions contained in a collective agreement: see, for example, *Babcock v. Canada (Attorney General)* 2005 BCSC 513; *PSAC v. Canada (Canadian Grain Commission),* [1986] FCJ No. 498 (TD); *Peck v.*

Canada (Parks Canada), 2009 FC 686 at para 33; *PSAC v. Treasury Board (Department of Veterans Affairs),* 2013 PSLRB 165 at para 83; application for judicial review dismissed in 2014 FC 1152. Provisions in a collective agreement must be interpreted within the context of the agreement as a whole: *Chafe et al. v. Treasury Board (Department of Fisheries and Oceans),* 2010 PSLRB 112 at para 50-51; *Wamboldt v. Canada Revenue Agency,* 2013 PSRLB 55 at paras 25-26. Provisions that impose a monetary cost on an employer must clearly and expressly do so: *Wamboldt* at para 27.

[33] Turning then to clause 23.05, counsel for the employer submitted that the bargaining agent had to establish a breach–and that, to do so, five elements had to be established:

a) there was a transfer;

b) the transfer took place at sea;

c) the transfer was made to a large craft, such as a ship, a submarine or a barge that was not berthed,

d) the transfer was from a smaller craft, such as a helicopter, yardcraft or auxiliary vessel; and

e) the exception–that is the transfer between secured vessels–did not apply.

[34] Counsel agreed by way of introduction that the Athabasca was a ship within the meaning of clause 23.05, but stated that the transfer in this case was to a berthed barge. He then submitted that the events in question did not take place at sea. He noted that the allowance was titled or called a "transfer at sea allowance." Headings are important factors in the interpretation of a clause in an agreement, and serve as evidence of the application intended by the parties: *Canada Post Corp. v. CUPW (Maccoll Grievance, CUPW 600-07-00053)* [2010] C.L.A.D. No. 167 at para 7 and 10; *Sensient Flavors Canada Inc. (Halton Hills) v. USW, Local 3950 (Holiday Scheduling and Payment Grievance),* [2011] O.L.A.A. No. 17 at para 33.

[35] The focus of clause 23.05 is not just on any transfer–rather, it is transfers at sea, and by sea the parties must have intended the sea beyond the limits of Halifax Harbour, given that they had in clause 23.04 made clear that the sea they were

concerned with was the sea beyond the Halifax Harbour limits. The parties, having once defined the meaning of a word within an article, are not required to repeat the definition again and again. The parties, having turned their mind to the definition of a word, are presumed to have intended to use the same definition thereafter: *Kreway v. Canada (Customs and Revenue Agency),* 2004 PSSRB 172 at para 67. To come to a contrary conclusion–to read clause 23.05 as applying to any transfer between vessels wherever it took place–would render the use of the word "sea" in the title redundant or superfluous. However, each word in a collective agreement must be given some meaning: *Stevens v. Treasury Board (Solicitor General Canada–Correctional Service),* 2004 PSSRB 34 at para 21. Even if clause 23.05 applied within the limits of Halifax Harbour, it could not have been intended by the parties to apply to vessels that were tied up at the dockyard. To accept the bargaining agent's submission on this point would produce the absurd result that transfers to a ship or submarine that was berthed–that took place at the grievors' normal place of work at the dockyard–would qualify for the allowance.

[36] Turning to the third element, counsel for the employer submitted first that clause 23.05 applied to transfers to a large vessel (that is, a ship or submarine or a barge that was not berthed), but that is not what happened here. What happened here was a transfer to a work platform–that is, the barge that was tied to the side of the ship. Counsel noted the exception in clause 23.05 that applied when the transfer took place "between vessels and/or work platforms which are in a secured state to each other." The barge in this case was a work platform, and that is what the grievors had transferred to–not a ship and, since the transfer was to a work platform, the exception in clause 23.05 applied and the allowance was not payable.

[37] Counsel then submitted, second, that the word "berthed" in clause 23.05 had to apply to all three vessels–ship, submarine and barge–and not just to the last. He submitted that there was no rational reason to hold otherwise. A transfer between vessels was conceptually the same whether they were berthed or not. Why should it make a difference that a barge was berthed but a ship or submarine was not? As already noted, counsel agreed with the point about the French text, but submitted that it must have been a mistake in translation. The restriction contained in the French text did not make any rational sense. It was contrary to logic to suggest that there was a difference between a berthed barge and a ship that was not berthed, at least insofar as

transfers to them was concerned.

[38] He accordingly submitted that the grievance be dismissed.

C. Reply on behalf of the grievors

[39] Counsel for the grievors submitted that the observation in *Wamboldt* that provisions that impose a monetary cost on an employer must be clear was to some extent overstated. With respect to the issue of headings, he noted that, in the *Canada Post* case the heading was found to be harmonious with the text of the clause. He emphasized that the focus of clause 23.05 was what he called "the unusual way of getting on a ship." In normal course in the dockyard, employees in the position of the grievors would simply walk aboard. They would not be lowered from a helicopter, or have to clamber up a ladder up the high side of a ship that loomed over their yardcraft. Clause 23.05 was clearly intended to recognize that, in the latter situations, an employee was being required to transfer to a ship or submarine in an unusual, out-of-the-ordinary manner. Finally, with respect to the supposed absurdity of differentiating between a berthed barge and a ship or submarine that was not berthed, counsel submitted that that was simply the product of collective bargaining. The parties had their reasons for agreeing as they did, and if the wording–if the grammar–was clear, then I was bound to apply it. He also submitted that in any event, on the facts, there was a difference between transferring to a ship or submarine, on the one hand, and a barge (whether berthed or not) on the other hand.

V. Analysis and decision

[40] When interpreting provisions in a collective agreement, an adjudicator must consider them in context. He or she must take the ordinary meaning of the words, unless to do so would produce an absurd result. I think it also fair to say that the parties to a collective agreement, as a general rule, draft their agreement with the ordinary or usual or common situation in mind. In ordinary course, the parties choose their words carefully, and do not intend to use words that add nothing to the meaning of the clause in which they are found, or which do not assist in the interpretation or application of what has been agreed.

[41] Having considered the submissions of the parties and the wording of

clause 23.05, both on its own terms and in context, it is my view that the first issue is this: as a matter of interpretation, does the parenthetical phrase "not berthed" in clause 23.05 apply only to barges, or does it also apply to ships and submarines?

[42] The answer in my view is that the phrase applies to the words ship and submarine as well as to a barge. I come to this conclusion by considering the circumstance under which an employee might be expected to have to transfer to a ship or submarine by means of a helicopter, ship's boat, yardcraft or auxiliary vessel. Surely, in ordinary course, that would not be when the ship or submarine was berthed at a wharf or jetty. In those cases, the employee would simply walk on board. They would not require the assistance of a helicopter, ship's boat, yardcraft or auxiliary vessel to transfer to the ship or submarine.

[43] Second, and perhaps to put it in another way, an employee in ordinary course would need to be transported by helicopter, ship's boat, yardcraft or auxiliary vessel because the ship or submarine was not accessible by walking on board–in other words, when they were not berthed but were instead stationed in the water away from land.

[44] These two observations suggest to me that the words "not berthed" must have been understood and intended by the parties to apply to ships and submarines as well as to barges.

[45] This conclusion is in my view strengthened by the clause's heading. I agree that a heading cannot control the meaning of the words used in a clause, but it can shed light on the intent or understanding of the parties in agreeing as they did. Here, the heading is "Transfer at sea." A berthed ship or submarine is not a ship or submarine that is at sea. Vessels that are at sea are vessels that are not connected to a wharf or a jetty. They are not berthed, and precisely because they are not berthed–or at least, not tied to a dock or wharf–access to them could only be gained through a helicopter, yardcraft and so on. The heading–and in particular the phrase "at sea"–thus reinforces or, perhaps better, clarifies the concept already contained in the clause itself.

[46] On this point, I was not persuaded that the French text's use of the feminine form supported a conclusion that "berthed" was intended by the parties to apply only to barges.

[47] In considering counsel for the grievors' submissions on this point, I acknowledge that the collective agreement provides that "… both the English and French texts of this Agreement shall be official", article 4.02. All that means, however, is that when an adjudicator is determining what the parties have actually agreed to he or she cannot give precedence to one version of the agreement over the other. Both are official. Both may be considered by an adjudicator in interpreting the agreement. Both may assist in interpreting the agreement. But neither is entitled to more weight than the other, particularly where (as was the case here) there was no evidence as to whether the agreement was negotiated in French or in English. And even if the negotiations and the drafting had been carried out in French, there would still be the contextual problem created by the observation that, in normal course, employees would not need to transfer to a ship or submarine that was berthed by any means other than walking.

[48] Taking these observations into account, and in the absence of any evidence on the point, I concluded that the French text could not provide any assistance with respect to the interpretive task I faced.

[49] The next question is this: were the *Athabasca* or, alternatively, the barge that was tied to it and off of which the grievors worked berthed? On the facts, it is clear that the ship was berthed. Was the barge?

[50] The *Merriam-Webster Online Dictionary* defines the noun "berth" as follows: "a place in the water near the shore where a ship stops and stays." As a verb: "to bring (a ship) into a place where it can stop and stay: to bring (a ship) into a berth." The *Dictionary of English Nautical Language* (www.seatalk.info) provides one definition of the noun as follows: "A place where a ship docks or lies alongside a dock." As a verb: "To bring a ship alongside a wharf; as in 'Berth the ship at dock five'." With these definitions in mind I am satisfied that, had the barge been tied directly to the wharf or jetty (as was the barge off of which the grievors started their transfer by RHIB to the *Athabasca*), it would be considered to be "berthed."

[51] Did it make any difference that the barge onto which the grievors stepped after getting out of the RHIB was tied to the side of the *Athabasca* and not to the wharf? I think not. Two vessels are sometimes tied side to side at a berth, the first being lashed

to the wharf and the second lashed to the first. (As was the case, for example, with the two RHIBs depicted in Exhibit U7.) The fact that one vessel is tied directly to the wharf or jetty, and the other is tied to the first, does not mean that the second is not berthed. Both are alongside a wharf. Both are at a place where they can be said to have "stopped and stayed."

[52] Given my conclusion that clause 23.05 applies only to transfers to ships, submarines or barges that are not berthed it is clear that the grievance must fail. Whether the transfer was to the ship or to the barge, it remains the case that, in either event, it was a transfer to something that was berthed.

[53] It may be objected at this point that on the facts the men did not walk onto the ship or barge. They were instead transferred to it by yardcraft (that is, the RHIB). That being the case they were "required to transfer ... from a ... yardcraft" within the meaning of clause 23.05.

[54] There are two responses to this objection. First, as already noted, the clause requires not just a transfer from something, but also a transfer to something. In this case the requirement is that the transfer be to a ship or barge that is not berthed. And as I have found, both the ship and the barge were berthed.

[55] Second, clause 23.05 imposes a direct cost on the employer. It requires the employer to make a payment in addition to the normal wage under certain circumstances. Such obligations must be expressly and clearly established: *Wamboldt*, supra at para.27. That requirement cannot be satisfied if one of the elements required to trigger the obligation does not exist. The parties have clearly carefully negotiated the requirements necessary to trigger the payment. The clause has been tinkered with - and expanded - over time over the course of various agreements. It is not then for me to ignore one of the required elements simply because others might be satisfied.

[56] It is not then necessary for me to consider the question of whether clause 23.05 applies inside as well as outside of the Halifax Harbour limits. There are certainly arguments in favour of either interpretation, but in this case–perhaps because the situation was unusual–the evidence of practice that would have been helpful in the interpretive task was lacking. For example, there was no evidence as to whether employees in ordinary course were transferred to ships or submarines after the latter

had left their berths; or, if so, how the employees were transferred, and whether it made any difference if such transfers took place in the harbour as opposed to outside the harbour limits.

[57] For these reasons, I make the following order:

(The Order appears on the next page)

VI. Order

[58] The group grievance is dismissed.

April 10, 2015.

Augustus Richardson,
adjudicator