IN THE MATTER OF AN ARBITRATION UNDER SECTION 48
OF THE LABOUR RELATIONS ACT, 1995 (as amended)

BETWEEN

Kingston Typographical Union Local 30204 ("the Union")

AND

The Kingston Whig-Standard ("the Employer" or "the Company")

And in the matter of a dispute about whether certain employees in the bargaining unit are entitled to receive "overtime pay"

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BEFORE:	R.O. MacDowell	(Sole Arbitrator)

APPEARANCES:

For the Union:	Sean Fitzpatrick	(Counsel)
	David Wilson	
	Debbie Newton	
	Glen O'Donaghue	
For the Employer:	Jonquille Pak	(Counsel)
	Liza Nelson	
	Darren Murphy	
	Cherie Steward	
	Susan Landry	

A hearing in this matter was held in Kingston Ontario, on January 15, 2014.

AWARD

I – Introduction: what this case is about

1. The issue in this case is whether eight employees of the Kingston Whig Standard are entitled to "overtime pay" under the terms of their Collective Agreement. The employees in question ("the claimants") are in 2 different job classifications**: (1) "*Multi-Media Retail, Events and Promotions Outside Sales Representative*"** and **(2)** "***Multi-Media Inside/Outside Sales Representative***. The claimants are all sales personnel who get a salary plus commission. There is another "outside sales" classification called the **(3)** ***Multi-Media Outside Sales Representative***. She is paid 100 % on commission; and *it is agreed* does not get "overtime pay".

2. The Union says that the employees in sales **classifications (1)** and **(2),** above, are all entitled to "overtime pay" for any extra work that they do beyond 7.5 hours per day; while the Employer says that they are not entitled to "overtime pay". The Collective Agreement deals with "hours of work" and "overtime" as follows (emphasis added):

> **SECTION 20 – HOURS OF WORK**
>
> 20.01 The workweek will consist of 37.5 hours per week within a seven-day week.
>
> 20.02 The workday will consist of a shift of 7.5 consecutive hours within the workweek (excluding unpaid meal period).
>
> 20.03 A shift will consist of any consecutive 7.5 hour period within a calendar day (excluding unpaid meal period).

SECTION 22 - OVERTIME

22.01 Overtime will be worked as required by the Company.

22.02 All overtime must be approved *in advance* by an employee's supervisor.

22.03 Employees will be *paid* overtime at the rate of time-and-one-half for hours worked in excess of 7.5 hours per day.

22.04 Employees required to work on an off day will be paid at the rate of time-and-one-half for all hours worked that day, with a minimum of three hours.

22.05 An employee may request time off in lieu of a cash payment for overtime. Such requests may be granted at a mutually agreed upon time.

22.06 Time owing in lieu of overtime will not exceed 37.5 hours in any month and will not be carried forward from one month to the next.

22.07 ***Outside sales representatives will not be paid overtime in any circumstances***, nor will such employees receive time off in lieu of overtime.

SECTION 23 / OVERTIME RECORD

23.01 *The Company shall cause a record of all overtime to be kept*. In the event of a dispute concerning overtime payments, the Company shall provide the Union with a copy of the overtime record of the person or persons involved.

3. The Union's claim is based upon Section 22.03 of the Collective Agreement. However Section 22.03 is qualified by Section 22.07 which states that "*outside sales representatives*" will not be paid overtime "*in any circumstances*". Accordingly, this case turns on the meaning of that "exemption": whether the claimants - the *Multi-Media Retail, Events and*

Promotions Outside Sales Representatives" and the **"***Multi-Media Inside/Outside Sales Representatives* - are "***outside sales representatives***" for the purposes of Section 22.07.

4. The Union submits that when the Collective Agreement is read as a whole (and in light of an "Addendum" that was recently changed) I should conclude that the claimants are not caught by Section 22.07 since they are not "*outside sales representatives*" for the purposes of that clause - despite having the words "*outside sales*" in their job title. In the Union's view, the only person excluded from overtime pay is "Debbie Newton": the one "***Multi-Media Outside Sales Representative"*** whose income is derived 100% from commissions.

5. The Employer replies that the claimants do not get "overtime pay" and that over the years they have never claimed or been paid for "overtime". Nor have they ever engaged the administrative requirements of Section 22 or Section 23. They are commission salesmen who control their own hours; the Employer has never kept track of them; and "overtime" has never been requested or paid. The overtime/lieu time rules have no application.

6. As the Employer sees it, the claimants are all "*outside sales representatives*" who fall within the Section 22.07 exemption which applies to the whole "sales team" - not just to Debbie Newton, the one *Multi-Media Outside Sales Representative*. In the Employer's submission, all three "*outside sales*" classifications are caught by Section 22.07, and the "***outside sales representatives***" mentioned in Section 22.07 are the same three "***Outside Sales Representative"*** jobs that are listed in Section 21 ("Classifications - Rates of Pay"). Moreover, in the Employer's submission, the past practice not only supports that interpretation, but it also

provides the basis for an "estoppel" – an argument that (according to the Employer) is bolstered by what was said (or not said) in bargaining. The grievance should therefore be dismissed.

II - Some Mechanics

7. A hearing in this matter was held in Kingston Ontario on January 15, 2014. The parties were agreed that I have been properly appointed under the terms of the Collective Agreement and that I have jurisdiction to hear and determine the matters in dispute them. The parties were further agreed (initially at least) that if I find that the Employer has breached its legal obligations in some way, I have jurisdiction to fashion an appropriate remedy.

8. However I put it that way ("*initially at least")* because in the course of argument it turned out that the parties were *not* agreed on the remedial options available if the Union's position were accepted – and in particular, whether a dispute that was initiated by a single complainant ("Glen O'Donoghue") that raised general interpretation issues, could generate a remedy for other similarly situated employees. Accordingly the parties were agreed that for the time being I would simply issue a "declaration" interpreting the language in dispute and should remain seized to receive further submissions should it become necessary to do so.

9. This hearing proceeded on the basis of some documents and some agreed facts. I heard no oral evidence. Both parties said that the language of the Collective Agreement was "clear"; but both parties also said that if there were any "ambiguity, the factual background supported their own proposed interpretation.

10. I will look at that background in a moment. However I think it worth emphasizing, at the outset, that the issue before me is a "pure question of interpretation" and that it pertains only to the entitlement to overtime *pay* under Section 22.03 of the Agreement. It not about job classifications as such, or about the propriety of work assignments, or about the permissible content of jobs, or about the hours of work more generally. Nor did either party refer to the *Employment Standards Act* or any other employment-related statute. I was simply asked to determine whether the Agreement, *as written*, contemplates "overtime pay" [per Section 22.03 and 22.07] for the 8 claimants in the 2 classifications noted above; and as a subsidiary issue, whether, in the circumstances, the Union is "estopped" from advancing that claim.

III - Background

11. The Employer operates a newspaper business in Kingston Ontario. The Union is the bargaining agent from a number of employees who work at that facility. The parties have had a bargaining relationship for many years and have negotiated a number of collective agreements. The most recent collective agreements cover the periods 2006-2009, 2009-2012 and 2012-2015.

12. The Company's employees are grouped into several different "*departmental*" bargaining units - each of which has its own collective agreement. There are four collective agreements in all, which are typically bargained at the same time. The Collective Agreement in this case pertains to the "Advertising Department" and (per Section 21) covers the following 7 full-time "job classifications" (emphasis added):

Classification	Payment Method	Number of Employees

Multi-Media Outside Sales Representative	[100% commission] per "COMMISSION PLAN"	1
Multi-Media Inside Sales Representative	salary only	[disputed: 0 or 2]*****
Jr. Creative Artist	salary only	0
Sr. Creative Artist	salary only	0
Page Assembler	salary only	0
Multi-Media Retail Events & Promotions Outside Sales Representative	salary + "Plus Commission"	6 [claimants]
Multi-Media Inside/*Outside Sales Representative*	salary + "Plus Commission"	2 [claimants]

** see paragraphs 23-26 of this Award where this dispute is explained*

13. In the 2006-2009 Collective Agreement and the 2009-2012 Collective Agreement there were 12 employee classifications listed in Section 21. Now there are only 7 classifications listed and at least three of them are empty. There has been an evolution of the business and the way in which work is done; and in consequence, the "Advertising Department" bargaining unit is smaller than it used to be and the salespersons now dominate it.

14. In the current (2012-2015) Collective Agreement there are 3 employee classifications with the words "*Outside Sales Representative*" in their job title and all three of those job classifications pertain to sales personnel who get commissions. In this respect, the pattern is the same as it was in prior collective agreements, which also covered different kinds of "*Outside Sales Representatives*". As things now stand though, there is only one person in the *Multi Media Outside*

Sales Representative position. Her name is "Debbie Newton"; so for convenience, the parties sometimes referred to her job classification – the *Multi Media Outside Sales Representative* - as "the Debbie Newton job". I will do so as well.

15. The *Multi Media Outside Sales Representative* [the Debbie Newton job] is paid 100% "on commission" in accordance with a corporate "Commission Plan"; while the "*Multi-Media Inside/Outside Sales Representatives"* and the "*Multi-Media Retail Events and Promotions Outside Sales Representatives"* are all paid (per Section 21) a salary plus commission. I am told that the COMMISSION PLAN [Tab 12 of the Employer's Document Book] is not part of the Collective Agreement; moreover, the one that was filed with me, pertains only to the *Multi Media (Outside) Representative* [the Debbie Newton job].

16. This COMMISSION PLAN document covers the period from January 2009 until December 2012; it is signed by Ms. Newton; and it stipulates a number of conditions of employment (like Holiday Pay and Vacation Pay), in addition to explaining the commissions structure. It is common ground that the "100 % Commission persons" [the Debbie Newton Job] have always been treated differently and have never been paid "overtime" and are exempted from many of the provisions of the Collective Agreement. That is recorded, *inter alia*, in an "Addendum" to the Collective Agreement, which deals with sales staff.

17. The format of the "Addendum" has remained the same over the last three collective agreements (2006-2009, 2009-2012 and 2012-2015). It begins by identifying the various sales employees to whom it applies; then there is a listing of clauses in the body of the Agreement that

do not apply to those sales employees; then there are several pages of provisions that apply instead: vacation pay, holiday pay, rebates and commissions, sales territories, auto allowance, compassionate leave, and jury duty, and so on. In effect, the Addendum establishes alternative terms of employment for these sales personnel – terms that are different from those that apply to other employees in the bargaining unit.

18. The opening words of each version of the Addendum are set out below (with emphasis added); and as will be seen, they have changed from agreement to agreement.

2006-2009

The following administrative matters pertain to *Outside Sales Representatives* *including* *Multi-Retail Outside Sales Representatives*

Notwithstanding any provision in the collective agreement, the following sections do not apply to *Outside Sales Representatives*: Section7 Compassionate Leave, Section 9-Jury Duty, Section 20 – Hours of Work, Section 21 Classifications – Rates of Pay, Section 22-Overtime, Section 23 –Overtime Record, Section 26 Holidays, Section 27 – Vacations, Section 31 – Sick Leave/WSIB pay/Personal Leave, Section 32. 3 and 32.04 Long Term disability.

In addition certain parts of the *Employment Standards Act* do not apply to *Outside Sales Representative* (sic), since sales are normally made away from the Company premises.

2009-2012

The following administrative matters pertain to *Multi-Media Outside Sales Representatives and Multi-Media Retail, Events and Promotions Outside Sales Representative*

Notwithstanding any provision in the collective agreement, the following sections do not apply to *Outside Sales Representatives*: Section7 Compassionate Leave, Section 9-Jury Duty, Section 20 – Hours of Work, Section 21 Classifications – Rates of Pay, Section 22-Overtime, Section 23 –Overtime Record, Section 24 Call Back, Section 25 Replacement Pay, Section 26 Holidays, Section 27 – Vacations

In addition certain parts of the *Employment Standards Act* do not apply to *Outside Sales Representative* (sic), since sales are normally made away from the Company premises

2012-2015

The following administrative matters pertain to *Multi-Media Outside Sales Representatives.*

Notwithstanding any provision in the collective agreement, the following sections do not apply to *Multi-Media Outside Sales Representatives* : Section7 Compassionate Leave, Section 9-Jury Duty, Section 20 – Hours of Work, Section 21 Classifications – Rates of Pay, Section 22- Overtime, Section 23 –Overtime Record, Section 24 Call Back, Section 25 Replacement Pay, Section 26 Holidays, Section 27 – Vacations

In addition certain parts of the *Employment Standards Act* do not apply to *Outside Sales Representative* (sic), since sales are normally made away from the Company premises.

19. I will return to the Addendum again later. At this point, I simply note that it applies to various categories of "outside" sales personnel, but the words identifying who it "*pertains to*" are different in each version of the Addendum. It starts off, some years ago, applying to "*Outside Sales Representatives*" more generally then it ends up applying to the Debbie Newton job [*Multi-Media Outside Sales Representatives*] only. There are also some differences over the years in the list of "general" collective agreement provisions that do not apply to the classifications of "*Outside Sales*" personnel covered by the Addendum.

20. However, the overall thrust of the Addendum is clear: it identifies certain "*Outside Sales*" personnel who are exempted from some of the general provisions of the Agreement (and also, purportedly, from the *Employment Standards Act*); and who are governed, instead, by the provisions of the Addendum. These sales personnel are treated differently than other bargaining unit members – no doubt because their jobs are different.

21. However, the Addendum is not always a model of clarity. For example, the 2009-2012 version of the Addendum clearly "*pertains to*" the "*Multi-Media Retail Events and Promotions Outside Sales Representatives*" whose job is specifically mentioned in the opening words of the Addendum; and the Addendum then goes on to say that Section 21 does not apply to them. Yet that very job classification also appears in Section 21 itself, which prescribes a three year salary progression for these salesmen, beginning at $734.97 and ending "after three years" at $933.52. So Article 21 certainly does seems to "pertain to" the *Multi-Media Retail Events and Promotions Outside Sales Representatives*" even though the Addendum says that it doesn't. The parties have created a framework in which rights and limitations for sales persons are found in two different places in the Agreement, but it is not entirely clear how the two fit together – linguistically and in actual operation.

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22. The Collective Agreement contains no job descriptions and there is nothing in the Agreement that either defines or limits the permissible "work content" of each job. Nor are the job titles very helpful in that regard. No doubt the nomenclature is familiar to the parties, but it has no intrinsic meaning for an outside reader; and all that can be inferred is that salesmen "sell" and probably do things ancillary to selling and they are often "away from the premises". I am also told (and this is not disputed) that the salespersons routinely regulate their own hours.

23. I am told by the Union that the "*Multi-Media Inside Sales Representative*" is really a "receptionist" with administrative responsibilities, who works on salary and does not get commission. As the Union describes it, s/he is not a "salesman" at all.

24. The Employer does not disagree with the Union's description of what these workers *do* from day to day; but the Employer says that the "*Multi-Media Inside Sales Representative*" classification is actually *empty* and the two "receptionists" are really in a different job category that is not mentioned in Section 21 at all. Their job "should" be listed there; but it isn't.

25. According to the Employer these office workers are in the bargaining unit because they are "employees" in the "Advertising Department" to which the Collective Agreement applies (i.e. they are caught by the recognition clause, Article 3); but they are not "*Inside Sales Representatives".* On the other hand, (again according to the Employer and not contradicted by the Union) they get paid in a manner that is similar to a *Multi-Media Inside Sales Representative* and they do not get "commissions" – unlike all of the "*Outside*" sales representatives.

26. I do not need to resolve this question, because regardless of how the "receptionists" are classified or paid, they are not part of the claimants' group and no one suggests that they are being denied "overtime pay". Indeed, in the Employer's view, they are the only employees in the Advertising Department who are *now* eligible for overtime pay; because the other eligible classifications are empty, and, as the Employer sees it, the "*outside sales representatives*" – the "sales team" who earn commissions – are excluded from overtime pay by virtue of Section 22.07. Nevertheless, it is difficult to resist the conclusion that this controversy about the "receptionists"

is like the linguistic oddity discussed in paragraph 21, and is symptomatic of a relationship where the parties have not been – and perhaps have not had to be – as careful and consistent in their use of language as they could have been.

27. The Union acknowledges this. Counsel points out, for example, that "the Debbie Newton job" is described in different ways in different parts of the Collective Agreement – sometimes using her proper job title as found in Article 21 (i.e. "*Multi Media Outside Sales Representative*") but sometimes using the words "*100 % Commission*" as a modifying phrase to distinguish her sales job from the other "*Outside Sales*" personnel who get a salary plus commission.

28. For example, Section 26 of the Collective Agreement refers to the "*100 % Commission Outside Sales Representative*" - which is capitalized, as is the parties' custom when they are referring to classification titles. Instead of using the Section 21 job title, the parties have used this modifier to identify the Debbie Newton job: she is the "*100 % Commission*" "*Outside Sales Representative*" as opposed to the other "*Outside Sales Representatives*".

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29. I am told that the present controversy arose as a result of some operational changes at the newspaper and in the shadow of the departure of some managers and some employees from the bargaining unit. These events had the effect of shifting work around, and resulted in the claimants taking on more and different work than they had done in the past. And because they were doing more work and it was harder to get that work done in a "normal" 7.5 hour work day,

they decided to make a claim for overtime. They thought they were underpaid for the volume of work they are now doing.

30. In the course of this proceeding there was no challenge to these work assignment as such, nor does anyone argue that anything turns on the nature of the work that was added to the claimants' responsibilities and that makes it harder for them to "get their work done" in a "7.5 hour work day". Nor was there any evidence about the mix of duties that the claimants have historically done on an average day, or what proportion of their work effort "earns commissions" directly, or what functions are inextricably linked to "commission sales".

31. But in any event, according to the claimants, they are now working more 'hours' than they did before, so in their opinion, they should get more pay. As they see it: they can no longer get "their work" done in a "standard" 7.5 hour work day, so they should get paid for the extra hours that they are now putting in. They should get the advantage of Article 22.03.

32. The claimants do not get a stipulated hourly rate; so according to the Union, (at least as I understand it) any overtime amounts payable to the claimants for "extra hours-worked" in a "day" should be calculated on the basis of a pro-rated hourly rate, *derived* from the salaries set out in Article 21, but exclusive of any earnings from commissions attributable to the standard hours in Article 22 – in other words, the "time and a half" overtime formula should use the salary as a basis for calculation. To do otherwise would require the parties to factor in commission earnings (sales success for hours directly selling) in some way that is not addressed in the Collective

Agreement and might result in different employees in the same classification getting different amounts per individual "hour" of "overtime" (i.e. beyond 7.5 hours).

33. The Employer protests that there is no such pro-rating formula in the Collective Agreement; and that this has never been done before. The Employer also protests that the salesmen don't really have a "shift" or standard work day like other employees do; and that this has never been raised or discussed in bargaining; and that this is the kind of change to the remuneration formula (affecting three quarters of the employees in the bargaining unit) that "ought" to be bargained and is not just a matter of interpretation. It is no minor adjustment.

34. In the Employer's view, this proposed "interpretation" of Section 22 not only ignores the specific wording of Section 22.07, but it also introduces into the economic equation an entirely novel "hourly wage at premium-pay element" which is inconsistent with way in which the claimants' income has traditionally been calculated. The Employer reiterates that for years, no one paid any attention to the actual hours of work that these outside sales personnel put in, nor did anyone ever claim for "overtime" work or seek permission to work overtime, or get authorization for "lieu time" to compensate for extra hours worked. Likewise, the Employer never got involved with keeping overtime records or lieu time monitoring or the ceilings contemplated by Section 22 and Section 23.

35. In practice Sections 20 and 22 and 23 were not applied to any of the claimants <u>at all</u> – which in the Employer's submission is precisely what Section 22.07 contemplates. As the Employer sees it, these employees have never had a fixed "shift" from which there were permitted

departures; they worked their own hours; and they never sought or got overtime "*in any circumstances*". Nor was it ever "intended" that they get overtime pay.

36. On the other hand, as the Union fairly points out, the last two iterations of the Addendum [see paragraph 18 above] provided that Section 22 did not apply at all to at least two of the "Outside Sales" classifications, so it is hardly surprising that the issue didn't come up. Because the Addendum and Section 22.07 both produce exemptions for "Outside Sales" jobs to which the Addendum applies.

37. The Employer is not in a position to contradict the Union's assertion that in the shadow of organizational change and a reduction in the number of workers available [e.g. one employee who was on sick leave] the claimants have had to work "harder" or put in more hours than they have done in the past. Since the Employer has never monitored the actual hours of work for these salesmen, the Employer cannot contradict the Union's assertion that they are working more hours or that it is harder to keep up in a "standard" 7.5 hour work day.

38. It is not disputed that all three "*Outside Sales*" classification are rewarded for their sales efforts and not (or not just) for the "hours" that they put in; and in some instances at least, they are rewarded quite handsomely. Employer counsel pointed out, for example, that one of the "*Multi-Media Inside/Outside Sales Representatives"* made well over $100, 000 – more than any of the Company' managers and more than the Publisher. Accordingly (based upon the base salary numbers in Section 21) a substantial portion of that individual's annual earnings were for sales/commissions that do not appear to be mechanically or arithmetically linked to the precise

number of hours put in, or to the salary numbers in Section 21. The commission rewards sales efforts, "salesmanship skills" and (probably) the vagaries of the market place – including timing and good luck. It is not like an hourly wage.

39. It is not disputed that the language of Sections 20, Section 22 and Section 23 has remained the same for a number of years, and the Union also concedes that, in the past, the claimants *did* work beyond the stipulated number of hours (7.5) in a day. In other words, they have worked what they now claim to be compensable "overtime".

40. The Union further agrees that none of the claimants in the two target categories ever sought permission to "work overtime", or claimed overtime pay, or otherwise triggered any of the regulatory arrangements pertaining to overtime. They managed their own time; no one kept track of their hours or worried about deviations; no one worried about "over time" or "lieu time"; and no one tried to "synthetically" derive a "premium rate/hour" for overtime purposes.

41. However, the Union says that the claimants past "overtime work" was never very extensive; and since the claimants' hours were flexible and unmonitored, they regulated their own hours, individually, and simply took compensatory time off when they felt like it. They never paid any attention to the provisions in the Agreement pertaining to overtime – either the way it was supposed to be authorized or tracked, or the way in which it was (as the Union now claims) "supposed" to be paid for.

42. In summary then, in the past, the Union, the Employer and the employees have historically acted as if the overtime threshold had no application. Historically, no one has claimed

overtime pay "*in any circumstances*" – which, as the Employer points out, is what Section 22.07 says as well. And so does the Addendum for those sales classification to whom it applies: all "*Outside Sales Representatives*" in 2006- 2009; the *Multi-Media Outside Sales Representatives and Multi-Media Retail, Events and Promotions Outside Sales Representative* (but not it seems the *Multi Media Inside/Outside Sales Representative)* in 2009-2012; and the *Multi Media Outside Sales Representative* [the Debbie Newton job], only, in 2012-2015.

43. That changed in 2013 when the claimants got tired of working beyond 7.5 hours in a day without additional "overtime" compensation. That is what prompted the grievance from Mr. O'Donaghue that led to the present controversy. They thought that the commissions that they can get were insufficient to make up for the extra hours that they were now putting in.

44. In the most recent round of bargaining the parties were negotiating all four of the Whig Standard collective agreements together, and in the course of that bargaining the issue of "overtime" did come up. For example, the Employer wanted to raise the "overtime trigger" to 8 hours for all of the employees at the newspaper entitled to overtime pay and the Union refused to countenance any change of that kind. Accordingly the overtime issue did surface in bargaining; moreover, according to the Employer (and not disputed by the Union) this was discussed more specifically in respect of the "Editorial" unit (covered by another collective Agreement). But there was no consideration of the overtime entitlements for sales personnel in the Advertising

Department bargaining unit – not the proposed change in the trigger (which was dropped) and not the entitlement or exemptions or the lieu time options either.

45. On the other hand, the parties did change the Addendum, narrowing its application to the *Multi-Media Outside Sales Representative*. Henceforth, the 2012-2015 Addendum would apply only to the "Debbie Newton job"; and anyone else formerly covered by the Addendum would now be covered only by the body of the Agreement – including section 22.

46. That evolution of the Addendum language is tracked in paragraph 18 of this Award. The Union described the most recent change to the Employer as a "*housekeeping*" amendment. There was no discussion of its operational impact. It was accepted and the parties moved on.

47. In the course of bargaining the parties also moved the salesmen's "auto allowance" from the Addendum into the body of the Collective Agreement. It is now Section 35. All three outside sales classifications are mentioned in the auto allowance clause; however, the "*Multi-Media Outside Sales Representative"* and the "*Multi-Media Retail Events and Promotions [Outside] Sales Representative* are treated differently than the "*Multi-Media Inside/Outside Sales Representative"*. So for this clause at least, the parties distinguished between the various "Outside Sales" job titles and they referred to them specifically, using the wording in Section 21. And all three "Outside Sales" classifications are mentioned – presumably because, as "Outside Sales" personnel, they are alike in their use of an automobile in connection with their work. They are all "*Outside Sales*" personnel and they are treated as a distinct sales group.

48. Back in April 2010 while the parties were bargaining for the 2009-2012 Agreement a Union representative sent an email to his Employer counterpart complaining about the escalating workload and asserting that the salesmen would be seeking permission to work overtime and would be claiming overtime pay for time worked in excess of 7.5 hours. But there is no indication of any Employer response nor was the matter pursued in bargaining; and there is no evidence that any of the Outside Salesmen made any overtime claims during the 2009-2012 Agreement. And as noted above, the issue of "overtime pay" for *Outside Sales* personnel did not surface in the next round of bargaining either.

49. With that background, then, I return to the issue before me: are the *Multi-Media* ***Outside Sales Representative****"* and the "*Multi-Media Retail Events and Promotions* ***Outside Sales Representative*** entitled to overtime pay under Section 22.03? Or are they "***outside sales representatives*****"** who are excluded from overtime pay, by virtue of Section 22.07?

V – Aside on "the general law" and the "arbitral case law"

50. I am grateful for the thorough and thoughtful submissions of counsel. However I do not think that it is necessary to burden these reasons with a recitation of the **"**rules**"** for the construction of "contractual documents" – "rules" that apply, *mutatis mutandis*, to the interpretation of collective agreements. Those "rules" have been reviewed in arbitration cases such as *Communications Energy and Paper-workers' Union, Local 777 and Imperial Oil Strathcona (Policy Grievance)* (2004) 130 L.A.C (4th) 239 [which is relied upon here by the Employer] and in Court cases such as *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, *Re Viterra and*

Grain Services Union an Arbitration Board chaired by William Hood (2011), SKQB 439, *Dumbrell v. Regional Group of Companies Inc.,* [2007] ONCA 59 (CanLII) and *Salah v. Timothy's Coffees* [2010] ONCA 673 (CanLII); and I do not think that it is necessary to repeat them here. It suffices to say that I have taken these principles into account when considering the particular language under consideration in this case.

51. Similarly, I do not think that it is necessary to compare and contrast the several arbitration decisions to which I was referred. It is well established that there is no principle of "*stare decisis*" in the arbitration world; one arbitrator is not "bound" to follow the decisions of another arbitrator even in similar circumstances [see *Hydro Ottawa Limited vs. International Brotherhood of Electrical Workers, Local 636* (2007) ONCA 292 (CanLII) and compare *Laurent Isabelle et. al. vs. The Ontario Public Service Employees Union* (1981) 81 CLLC p. 59 (S.C.C.) where the two arbitrators were interpreting the same collective agreement]; and, more importantly, I do not think that any of the decisions to which I was referred is sufficiently close in wording or in context to provide a reliable guide to interpreting the particular mix of contract language that has to be interpreted in this case.

52. No doubt unions and employers negotiate language in the shadow of the existing arbitral jurisprudence, so that it may sometimes be useful to look at the way in which other arbitrators have grappled with similar verbal formulations – especially if the clause in question is a recognized generic "type" with well-defined variations, or there is a well-settled understanding about the way in which particular words or phrases should be understood in a labour relations

context. In those circumstances it is quite plausible to say that the parties "must have meant" what is typically meant when that kind of collective agreement language is used.

53. But that is not the case here, where the problem arises from the rather unique way in which the parties have expressed themselves – describing different payment entitlements for different classes of employees, along with exemptions that are recorded in both the body of the Collective Agreement and also in an Addendum. In the result, it seems to me that this is a purely "domestic problem" that has to be resolved by analyzing the *particular mix of language* that the parties have created in this instance; and for that purpose "the cases" don't help very much.

VI - Discussion

54. It is trite law that parties' obligations are to be determined from the words that they have used, read in their factual and contractual context; and that the legal "onus" is on the Union to establish, more probably than not, that the disputed language bears the meaning that the Union ascribes to it – which is to say: to demonstrate that the Employer has "breached" the Collective Agreement. The Union bears the onus of proof and the burden of persuasion in this case.

55. It is also well established that if there is any "ambiguity" in the contract language (i.e. if it is open to plausible alternative interpretations), then it may be helpful to look at "extrinsic evidence": past practice, previous versions of the Agreement, what was said at the bargaining table, and so on. Such "extrinsic evidence" can sometimes provide guidance about what the parties' ***shared*** intentions may have been, even if the words themselves are unclear – particularly when the parties have a long term relationship and the language reflects the peculiarities of their domestic

environment (the local jargon, so to speak). The law also recognizes the possibility of a "latent ambiguity" – one that is not obvious on the surface, but may emerge when the parties try to apply the language to particular (often unforeseen) circumstances.

56. However, even *assuming* that it is permissible for the parties to refer to "extrinsic evidence", it seems to me that there is no reliable extrinsic evidence about what the parties agreed they were accomplishing for the claimants positions by the particular wording found in Section 22, except what is obviously intended by the words themselves: which exclude "*outside sales*" personnel from the overtime regulations. Moreover, there was no change to Article 22 in the most recent round of bargaining and there was no discussion about Article 22 either.

57. The Union *did* make changes to the Addendum – which it described to the Employer as a "*house-keeping*" amendment. It narrowed the application of the Addendum to the "Debbie Newton job" only. But there was no change to the wording of Section 22; and if the Union *believed* that changing the opening words of the Addendum had the effect of automatically creating an entitlement to overtime pay for the claimants, then that belief was never communicated to the Employer or followed up with any examination of Section 22 to see whether this *belief* was actually "correct" (i.e. that no change to the body of the Agreement was necessary). Moreover, the phrase "housekeeping amendment" would not normally be used to describe a significant change to a payment formula that was applicable to three quarters of the bargaining unit. It bespeaks maintaining the status quo – not a material change; and the "status quo" is consistent with the Employer's proposed reading of Section 22.07.

58. Likewise, the Union's email back in 2010 complaining about the amount of "overtime" that sales personnel were putting in, did not lead to any dialogue about Article 22 or produce any *shared understanding* of how that provision should be interpreted and applied; and the Addendum to the 2009-2012 Agreement still "excluded" two of the three "Outside Sales categories" (i.e. quite apart from 22.07). And there was no later claim by the third one.

59. An overtime complaint was flagged in 2010; but it was not discussed in a way that is helpful for the underlying "interpretation issue" that is raised in this case. In fact, it was not even discussed *at the bargaining table* in 2009/2010; because the email referred to above, was, by its own terms, an afterthought that was not raised at the table. Nor is there any evidence that it led to any changes in practice respecting any of the three "Outside Sales" personnel. As before, they and the Employer acted as if the overtime rules had no application to any of them.

60. In the result, (and assuming for the moment that the Collective Agreement is arguably "ambiguous" so that extrinsic evidence is permissible), these bits of extrinsic evidence do not demonstrate the parties' mutual intention with respect to the meaning or application of Section 22.07 – which, on its face, exempts "*outside sales representatives*" from entitlement to overtime pay "*in any circumstances*". They do not support the Union's proposed interpretation of Article 22; and if anything, they mildly support the interpretation proposed by the Employer.

61. I am, of course, mindful of the difficulty of trying to reconstruct some *presumed shared intention*, after the fact, when such intention may not be clear from the words of the Agreement itself – especially where, as here, the parties were ostensibly negotiating four different

collective agreements at once, and there is no evidence that overtime was an issue that was explored for salesmen. For as I have already noted, I have no bargaining history that focuses on Article 22.07 and there was certainly no evidence of any "meeting of the minds" about how that clause should be interpreted or applied – or, indeed, whether merely modifying the Addendum was "enough" to achieve the objective now asserted by the Union in this proceeding. Moreover, as Doherty J.A. sagely observed in the *Dumbrell* case (cited above - emphasis added):

> In my view, when interpreting written contracts, at least in the context of commercial relationships, it is not helpful to frame the analysis in terms of the subjective intention of the parties at the time the contract was drawn. This is so for at least two reasons. First, emphasis on subjective intention denudes the contractual arrangement of the certainty that reducing an arrangement to writing was intended to achieve. This is particularly important where, as is often the case, strangers to the contract must rely on its terms. They have no way of discerning the actual intention of the parties, but must rely on the intent expressed in the written words. Second, many contractual disputes involve issues on which there is no common subjective intention between the parties. ***Quite simply, the answer to what the parties intended at the time they entered into the contract will often be that they never gave it a moment's thought until it became a problem*:** see Kim Lewison, *The Interpretation of Contracts*, 3d ed. (London: Sweet & Maxwell, 2004) at 18-31.

62. It seems to me that that is what most likely happened in the instant case. The Union and the Employer have expressly altered the language of the Addendum, so as to confirm that the "Debbie Newton job" - the "*100 % Commission"* job - was not governed by many of the general provisions of the Collective Agreement; and the parties have also clearly agreed, I think, that the other sales personnel were therefore subject to whatever was in the body of the Agreement. However it appears that the parties did not dwell on what the rights of those other salesmen *actually were,* or how those rights were defined or limited in the body of the Agreement, or the specific

wording or effect of the limitation on overtime in Section 22.07 – which was left in the Agreement in the same form as before.

63. In other words, despite the modification to the Addendum which clarified that henceforth it applied only to Debbie Newton, and that the other "*Outside Sales*" staff (whoever they were) were now covered by the "general provisions" of the Collective Agreement, no one reviewed those "general provisions" one by one – and in particular Section 22, which has been part of the collective bargain for many years and which quite clearly exempted "*outside sales representatives*" quite apart from whatever was in the Addendum from time to time. By contrast, the parties did give specific consideration to the "auto allowance" provisions that were moved to the body of the Agreement; and they re-jigged that provision so as to clarify that it applied, in different ways, to all three "*Outside Sales*" jobs. They were treated as a group.

64. To be clear: I am not being critical of the parties here. For as Justice Doherty noted in the *Dumbrell* case, this kind of problem is actually quite common. Because hammering out an agreement is a human endeavor; the parties are not clairvoyant; they may not always be careful or thorough in their use of language; there may be misunderstandings or mistaken assumptions that are not apparent at the time of bargaining; and what one party or the other (i.e. unilaterally) *intends* or *expects* to accomplish by particular wordings may not be realized in the result. Moreover, the participants in collective bargaining are typically laymen; and if they don't overtly grapple with a particular issue so as to tease out their potential differences, then it is hardly surprising that such differences may arise later on – as Doherty J. correctly described in *Dumbrell.* Indeed it is just such differences that provide grist for the arbitral mill.

65. Nevertheless, as Gale J. said almost 50 years ago, in Re *Massey-Harris Limited* (1953) 4 L.A.C. 1579, in the very early days of labour arbitration:

> … [we] must ascertain the meaning of what is written into a clause and give effect to the intention of the signatories to the Agreement as so expressed. If, on its face, the clause is logical and is unambiguous, we are required to apply its language in the sense in which it is used notwithstanding that the result may be obnoxious to one side or the other. In those circumstances it would be wrong for us to guess that some effect other than that indicated by the language therein contained was contemplated or to add words to accomplish a different result.

And as Arbitrator Paul Weiler said some 20 years later, in *Re Howden & Parsons* (1970) 21 L.A.C. 171:

> Though the arbitrator is not confined to an overly literalistic or legalistic reading of contract language, he must base his decision on the sense or purpose of the original understanding of the parties, as reflected in the language they have used. He cannot override the meaning which he finds they have agreed to, and thereby deprive one party of the rights to which he is entitled, simply because he [the arbitrator] feels that the exercise of these rights works undue hardship on the other side, and thus, perhaps, should not have been claimed in the circumstances.

And as Justice Iacobucci said even more recently in the *Eli Lilly* case (*supra*):

> "*The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time*".

66. In the end, the parties' rights have to be determined by the words that they have used, interpreted in their ordinary way, unless there is some compelling reason to do otherwise; and what one party or the other "hoped" to accomplish at the bargaining table (i.e. its unexamined assumptions or expectations) does not necessarily govern the result. It is what was actually *agreed*

to that matters as evidenced by the text of that agreement and not what one side or the other *expected* (at least in the absence of evidence of a ***mutual*** mistake).

67. Finally, it seems to me that when an adjudicator is interpreting language that was drafted in a particular business setting, s/he must be careful not to import *assumptions* from some other business setting, unless those assumptions are supported by the language of the collective agreement itself. S/he should not, for example, assume that sales personnel working for a newspaper and earning commissions (payment by results) must be treated like hourly-rated employees working on an assembly line, or in a regular "office day-job" on a "shift". Because the fact is: the wage-work bargain can be fashioned in a variety of different ways (piece-work, bonuses of various kinds, minimum guarantees, gains-sharing formulas, commissions, premium pay arrangements, split shifts, overtime averaging etc.); and so long as there is no breach of any regulatory statute, that negotiated mix of work and rewards should be respected, even if it produces what might seem, at first glance, to be an unusual outcome (here, working more hours but not getting more pay). That is what Gale J. was getting at in the *Massey Harris* case.

68. With those observations in mind, then, let me begin by restating the three classifications that are involved in the current controversy. Those three "*Outside Sales*" classifications are listed in Section 21 this way (emphasis added):

- Multi-Media ***Outside Sales Representative***;
- Multi-Media Retail Events and Promotions ***Outside Sales Representative***
- Multi-Media Inside/***Outside Sales Representative***

Then in the very next clause of the Agreement one finds the following exemption which specifically ousts the overtime formula in Sections 22.03 and 22.05 and 22.06:

> 22.07 "***Outside sales representatives*** *will not be paid overtime in any circumstances nor will such employees receive time off in lieu of overtime*".

69. This language has remained the same over at least three collective agreements; and given the similarity of the bolded wording and the juxtaposition of Section 21 and Section 22, there is obviously considerable attraction to the Employer's "plain meaning argument": that when the parties were referring to "***outside sales representatives***" in Section 22, they were referring back to the specific ***Outside Sales Representative***" jobs listed in Section 21 – particularly when the "linguistic convention" of this Collective Agreement seems to be that when specific job classifications are being discussed, they are capitalized (which is what we see, for example, in Section 21 and in Section 35 and in the Addendum and is even what the parties did in Section 26 when they used other capitalized words to describe the Debbie Newton job).

70. From that perspective, therefore, the ordinary English words "*outside sales representatives*" refer back to the three kinds of "*Outside Sales"* jobs mentioned in the previous clause. It makes perfect linguistic sense and it also fits together rather well on the written page.

71. There is nothing odd (let alone "absurd") about reading the words this way or in dealing with the hours of work or remuneration of commissioned sales personnel differently than for non-sales staff; because that is not only what Section 22.07 quite clearly says, but these employees also derive a considerable benefit from commissions, as the other employees may not.

Their pattern of work is different (which is why they get an "auto allowance" for work away from the office while other employees do not); and no doubt that is why, for a number of years, some "*Outside Sales*" jobs were dealt with in a separate "Addendum".

72. In other words, there is nothing incongruous about treating the claimants differently than other employees in the bargaining unit, because their work and their reward system are different too. The "plain meaning" proposed by the Employer leads to no absurdity. On the contrary, it comports rather well with the overall structure of the Agreement and with the different setting in which salesmen work. Indeed, it accomplishes the same "general objective" as the Addendum used to do: it recognizes that, in a number of ways, the jobs of salesmen are different, and thus they should be treated differently under the Collective Agreement - just as the parties have done for the auto allowance, which applies to all three "*Outside Sales*" jobs.

73. Against that background it is difficult to resist the conclusion (which is what the Employer argues in this case), that the phrase "***Outside sales representatives*****"** in Section 22.07 refers back to the "***Outside Sales*****"** classifications that are listed on the preceding page, in Section 21. Indeed that is the most obvious meaning to be given to those words; and it has the effect of treating all commission earners in the same way, in so far as "overtime" is concerned.

74. In addition (to the extent that intrinsic evidence is permissible), that is the way that these employees have always been treated; so the words and the practice point in the same direction. And it is also consistent, in result, with the Union's assertion at the bargaining table

(which the Employer accepted at face value) that the recent modification to the Addendum was just a "house-keeping" amendment that didn't really change anything very much.

75. By contrast, the Union's proposed interpretation significantly alters the way in which the majority of bargaining unit members have traditionally managed their work day and been paid; it is not just a "house-keeping change"; and it generates administrative and calculation issues that have never been addressed before and are not obviously answered by looking at the Collective Agreement itself.

76. Finally since the new Addendum to the Collective Agreement clearly provides that "*Notwithstanding any provision of the collective agreement…Section 22…does not apply to the* "*Multi-Media Outside Sales Representatives*" (the Debbie Newton position), then what other '*outside sales*" personnel are left for Section 22.07 to apply to, if not the claimants? What other "***outside sales***" personnel are there, if not: (1) the "Multi-Media Retail Events and Promotions ***Outside Sales Representative***" and (2) the Multi-Media Inside ***Outside Sales Representative***?

77. The Union's contends that phrase "*Outside sales representatives*" used in Section 22.07 applies only to the Debbie Newtown job – the "*Multi-Media Outside Sales Representative*" job – and not to the other "*Outside Sales*" jobs listed in the previous clause. Or to put the matter another way: that removing some other "*Outside Sales*" job(s) from the Addendum automatically confirms that the 22.07 exclusion does not apply to the classifications dropped from the Addendum - without actually saying that or having to change the words of Section 22 itself.

78. But that is not an attractive argument from a linguistic perspective and it makes Section 22.07 redundant; because the Addendum clearly says that Section 22 has no application to the Debbie Newton job (the "*Multi-Media Outside Sales Representative*") *AT ALL* (…."*Notwithstanding any provision of the collective agreement*…"). So schematically the Union's argument requires me to accept the following assertion:

- Section 22 does not apply to the Debbie Newton job at all [because that is what the Addendum says];
- Section 22.07 is only about the Debbie Newton job, and applies to none of the other "*Outside Sales*" positions - despite the failure to use her job title specifically as has been done in the Addendum, or to use some other modifying phrase like "*100 % Commission*" to show that the Debbie Newton job is being singled out.

It seems to me that that is a curious proposition.

*

79. The dispute between the parties in this case centers on whether the phrase "*outside sales representatives"* in Section 22.07 embraces several "*Outside Sales*" classifications, or just the one job, the Debbie Newton job; so with that question in mind, it is interesting to note that when the words "*Outside Sales Representatives"* have formerly been used in the Addendum, unmodified, they have never been confined to a single classification. On the contrary, the words "***Outside Sales Representatives***" in the Addendum have always denoted more than one "outside sales" classification – the very kind of plurality that one sees in Section 21 and that the Employer argues is *still* captured by the words "***outside sales representatives***" when used in Section 22.07.

80. For example, in the 2006-2009 Collective Agreement, the Addendum begins this way (emphasis added)

> The following administrative matters pertain to ***Outside Sales Representatives***, ***including*** Multi-Media Outside Sales Representatives….Notwithstanding any provision in the collective agreement the following sections do not apply to the **Outside Sales Representatives** [sections listed].

Thus, the phrase "*Outside Sales Representatives*" in the 2006-009 Addendum clearly "*includes*" more than one job classification. The *Multi Media Outside Sales Representatives* [the Debbie Newton job] is part of a broader category of "*Outside Sales*" personnel.

81. Similarly, in the 2009-2012 version of the Addendum, the phrase "*Outside Sales Representatives*" is meant to encompass two different "*outside sales*" classifications, which are specifically mentioned: *Multi-Media Outside Sales Representatives and Multi-Media Retail, Events and Promotions Outside Sales Representative.* Once again, that phrase is not confined to the "Debbie Newton Job". And that is the thrust of the phrase "Outside Sales Representatives" in the Index, too: it covers several different "outside sales" job classifications.

82. It is not until the 2012 – 2015 version of the Addendum that the phrase "*Outside Sales Representative*" disappears from the text of the Addendum altogether and is replaced by the reference to a single specific classification, using the same wording as in Section 21 where the "Classifications" ostensibly covered by the Agreement are specifically listed.

83. Accordingly, from a historical perspective, when the parties have used the phrase "*Outside Sales Representatives*" it has always covered more than one "*outside sales"* classification. And that is also the case in the Letter of Understanding on Layoffs - where, once again, the words "*outside sales*" encompass several sales classifications.

84. So why would those same words mean something different in Section 22.07 - particularly when that provision is read in light of the previous Section 21, where the several "outside sales" jobs are listed and the wording of Section 22 has remained unchanged? Why should one take a usage that has historically encompassed several "*outside sales*" classifications, and confine it to a single job, just because those very words "*Outside Sales Representatives*" have been removed from the Addendum but have not been removed from Section 27.07 ? In fact, is it "likely" that the "*Outside sales representatives*" in Section 22 are not the "*Outside Sales Representatives*" in Section 21?

85. To put the matter another way: what justification would there be for an arbitrator to take the words "*Outside sales representative*" in Section 27.07 and interpret them as if Article 22.07 said "*Multi-Media Outside Sales Representative*" – thus accomplishing through "interpretation" what the parties did specifically in the Addendum, by removing those words from the Addendum altogether and putting in a single specific classification instead?

86. Indeed, it seems to me that the very fact that the parties have done that, explicitly, in the course of bargaining the new Addendum, makes it more difficult for an arbitrator to do the same thing as exercise of "interpretation" – particularly when the words themselves, in their

historical and contractual setting (looking at section 21 and 22 together), seem to support a contrary view. Moreover, there is no evidence here of a "mutual mistake" or the kind of situation that might call for "rectification" - essentially "blue penciling out" the exemption in Section 22, on the assumption that both parties meant to do that, but just didn't get around to it themselves.

87. Not to put too fine a point on it, which of the following alternatives is easier to accept: **(a)** that the words "*outside sales representatives*" in Section 22 mean the kinds of "*Outside Sales Representatives"* listed in the preceding Section 21 …**OR… (b)** that the words "*outside sales representatives*" really mean the *Multi-Media Outside Sales Representative*" only (yet without using the modifying phrase "*100 % Commission*" that the parties have sometimes thought necessary to single out the Debbie Newton job for special treatment and contrary to the plural meaning ascribed to those words in the past)? Quite frankly alternative **(b)** smacks of "*amending*" the Collective Agreement not interpretation - something that the parties *might* have done at the bargaining table had they thought about it, but which they did not actually do.

88. There is also something to be said for the Employer's submission that if there is going to be a significant change to the economic equation and administrative machinery, applicable to the majority of employees in the bargaining unit, then one would expect clear evidence of a shared understanding in that regard. And there isn't. In fact, the wording and the juxtaposition of the two clauses and the historical use of the phrase "*Outside Sales Representatives*" all point in the opposite direction.

VII - Disposition

89. To be clear once again: there is also something to be said for the Union's observation that the parties have not always been consistent in their use of language and that it is unusual for employee to put in extra hours without commensurate extra pay. In this respect, the outcome proposed by the Employer is atypical – it cuts across the "normal" labour relations grain. Nevertheless it is the language of the Agreement that dictates the result in this case; the onus is on the Union to establish, more probably than not, that its proposed interpretation of Section 22.07 is the one to be preferred; and in my view, it has not done so.

90. On the contrary, in my opinion, the wording of Section 22.07 – read linguistically and contextually - more strongly supports the Employer's position; and to the extent that it is permissible to look at the practice or context, they too point to the same conclusion: that the words "*outside sales representatives*" in Section 22.07 refer to the three kinds of "*Outside Sales Representatives"* mentioned in the preceding provision, Section 21, and not just one of those "outside sales" classifications.

91. In the result, Article 22.07 applies to the claimants and that provision blocks access to overtime pay in any circumstances.

92. The grievance is therefore dismissed. It is unnecessary for me to consider the Employer's alternative argument based upon the doctrine of estoppel.

Dated at Toronto, this 17th day of March 2014

"R.O. MacDowell"

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R.O. MacDowell, Sole Arbitrator