CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3891

Heard in Montreal, Tuesday, 13 April 2010

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

The Union contests CP's new policy that will cease providing Quebec drug insurance benefits and apply the Health Spending Account Plan (HSA) to individuals in Quebec.

UNION'S STATEMENT OF ISSUE:

On July 1, 2009, CP informed the Union having members in Quebec that although it had voluntarily provided benefits equal to those offered by Quebec's Act Respecting Prescription Drug Insurance, this practice would cease on December 31, 2009, and that in the future these employees would only be entitled to Health Spending Account Plans (HSA). CP maintains that the *Quebec Act Respecting Prescription Drug Insurance* does not apply to CP employees because they are federal employees.

The Union contests the Company's position of applying the HSA to all employees retiring after December 31, 2009 because, although the HSA constitutes a private plan, it is nonetheless not an adequate replacement plan under Quebec law. Furthermore, the Union submits that the Company acted in bad faith and violated article 69.05 of the collective agreement and Appendix 6 of the 2007 memorandum of settlement. It requests in particular that the arbitrator direct the Company to reach an agreement with the Union to modify the plan or develop a new one that complies with the law, the provisions of the collective agreement and Appendix 6.

CP denies the Union's request.

COMPANY'S STATEMENT OF ISSUE:

In concluding the last round of bargaining, the parties signed a memorandum of settlement dated December 5th, 2007, which included Letter of Understanding #6 that stated the Company and Union would meet within 6 months of the ratification date, being February 13, 2008, to adapt the Health Spending Account Plan (HSA) for retirees in Quebec, That meeting did not take place.

On July 1, 2009, the Company provided written advice to the Union that effective December 31, 2009, the negotiated HSA benefits would apply to all Quebec employees retiring after that date.

The Union grieved the Company's action alleging a violation of the collective agreement and Letter of Understanding #6, and that the Company's actions were discriminatory.

The Union requests that the arbitrator: sustain the grievance and declare that the Company has violated the collective agreement and Letter of Understanding #6 and declare the Company's decision to impose the HSA option on all bargaining unit employees retiring after December 31, 2009 is illegal and discriminatory.

The Company disagrees with the Union's position and maintains that the Company's position is fully compliant with the negotiated provisions of the collective agreement.

FOR THE UNION:
(SGD.) D. GÉNÉREUX
GENERAL CHAIRMAN

FOR THE COMPANY:
(SGD.) A. AZIM GARCIA
FOR: VICE-PRESIDENT, OPERATIONS

(SGD.) T. BEAVER
GENERAL CHAIRMAN

There appeared on behalf of the Company:
R. Hampel – Counsel, Calgary
J. Cuddihy – Counsel, Montreal

And on behalf of the Union:
D. Lavoie – Counsel, Montreal
D. Généreux – General Chairman, Montreal
T. Beaver – General Chairman, Oshawa

AWARD OF THE ARBITRATOR

The Union objects to the decision of the Company to cease providing to retirees in Quebec, between the ages of fifty-five and sixty-five years, prescription drug protection at least equivalent to the protection provided under Quebec's **Act Respecting Prescription Drug Insurance**, R.S.Q., c. A-29.01 ("the **Drug Act**").

The background facts to this dispute are not contested. It seems that historically the Company provided to retirees a traditional form of fixed program health benefits, the

purpose of which was to provide protection for such things as prescription drugs, eye glasses, physiotherapy and other services not covered under provincial health insurance plans. In the early years of the current decade the Company experienced rising costs under the traditional plan. With a view to restricting the risk of open-ended costs for itself and providing a new measure of flexibility for employees, the Company proposed to establish a system of health spending accounts (HSA). The concept of the Health Spending Account is to create a monetary account for each individual employee. The money placed in the account, on an annual basis, is calculated on the basis of $33 for each year of an employee's service. For example, a retiree of thirty-five years of service would receive an HSA of $1,155 per year. However, the accumulation of the account only extends for a period of two years and, it does not appear disputed, any monies not utilized within the two year period are returned to the Company, albeit the cycle then starts again for the ensuing two year period.

In addition to the flexibility which the HSA provides, it allows employees to have an alternative to limiting factors such as life-time caps on coverage that are found in traditional plans. It appears that the Company first introduced the HSA system for its non-unionized employees in July of 2002, to have effect for non-unionized employees who retired after July 1, 2004. In December of 2004 the Company and the Union reached an agreement to implement the HSA for all employees in Canada retiring after January 1, 2007. It appears that the agreement between the Company is similar to that agreed to by all of the other unions representing the Company's employees. It seems that in the ensuing round of bargaining, which commenced in September of 2006, the

Union tabled a demand for an enhancement of the HSA, which demand was ultimately unsuccessful.

When the program came on stream effective January 2007, problems were encountered with its implementation in Quebec. It does not appear disputed that the HSA does not provide the full equivalent of protections which are available to all Quebec residents under the **Prescription Drug Insurance Act** of that province. As the Company relates it, there were difficulties identifying a provider to administer the plan. Consequently, the Company voluntarily agreed to provide the previous Blue Cross coverage to Quebec retirees under the age of sixty-five as of January 1, 2007. In its view that undertaking was only until such time as it was able to arrange for a provider to administer the HSA on a national basis.

During the 2006-07 negotiations for the renewal of the collective agreement the parties agreed to the terms of a letter of understanding, referred to as LOU No. 6. That letter of understanding reads as follows:

> Dear Sirs,
>
> This refers to our discussions surrounding your concerns regarding the inability to provide Health Spending Account (HSA) benefits to retirees in Quebec under the age of 65 due to Quebec provincial regulations.
>
> To address this concern, it was agreed that within 6 months of ratification, the parties would explore either modifying the current Blue Cross plan or designing a new plan to be offered to Quebec retirees under the age of 65. Any modification or new plan will be guided by the following principles:
>
> – Greater flexibility will be provided regarding choice of benefits.
>
> – The plan must meet the minimum applicable regulatory requirements.

– The cost of the plan will not exceed the cost associated with the provisions of HSA benefits under the current collective agreement provisions.

It is further recognized that should the regulations in Quebec or their application change that would permit the current HSA plan for retirees under the age of 65 to be put in place, the current HSA plan would be implemented.

If this accurately reflects our conversation, please indicate your concurrence by signing below.

Yours truly,

J. Bairaktaris
Director, Labour Relations

The concurrence with the terms of the letter was executed by the General Chairpersons of the Union representing both locomotive engineers and trainmen in Eastern Canada.

The background to the Company's action with respect to providing Blue Cross coverage is well explained in a memorandum which the Company prepared for the Union for their discussions during the 2006-07 round of negotiations. The Company's memorandum reads as follows:

Health Spending Account in Quebec
(Background Briefing Note)

Issue — Why cannot the Health Spending Account (HSA) at CPR be offered to pensioners residing in Quebec until age 65?

Executive Summary

The Quebec provincial government implemented a universal drug program in the late 1990's and legislated that companies which offer a private health plan to their employees or retirees must provide at least the same level of prescription drug coverage as is described in the Act. In addition, if a resident does not have coverage under a company plan they can apply to the province for coverage but failing this, application for coverage is only available at 65 years of age. CPR's HSA is considered a private plan and in and of itself, does not provide for prescription drug coverage It is simply an account from which the retiree can extract eligible medical expenses Therefore, our retirees in Quebec both union

and management are provided with the Blue Cross plan which has been in place for the past 25 years and is in compliance with the Quebec regulations. When pensioners reach 65 years of age they are automatically enrolled in the provincial plan and it is at that point in time that they are also eligible for the HSA plan.

Specific Issues

Quebec's Universal Drug Program

The Public Prescription Drug Insurance Plan is a government insurance plan offering basic prescription drug coverage administered by the *Régie de l'assurance maladie du Québec* (RAMQ) It was established in 1997 primarily to cover all Quebecers who have no access to private group insurance. However, the plan also stipulates that for private group insurance plans must mirror the prescription drug coverage included within the provincial plan. In summary, the coverage is as follows; include all the drugs on the Quebec formulary; a minimum of 71.5% of the cost of the drug to be covered by the insurer, a deductible may be imposed, a maximum annual contribution of $857 per person

The following excerpts are provided as information from the RAMQ website (http://www.ramq.gouv.qc.ca/index_en.shtml)

> "Coverage provided may vary from one private plan to another, depending on the agreement entered into between the group plan sponsor and the insurance company or plan administrator. However, in Québec, all private insurers offering prescription drug insurance must fulfill minimum conditions regarding the coverage they provide and the financial participation they require of the persons they insure"
>
> "Everyone under age 65 who has access to a private plan is required to obtain at least the prescription drug coverage provided by that plan. Most private plans (often called *health insurance plans*) offer prescription drug coverage along with other healthcare coverage, but some offer prescription drug coverage only. Persons who turn 65 and who have access to a private plan that offers basic prescription drug coverage may either retain their private plan coverage or join the public plan, administered by the *Régie de l'assurance maladie du Québec*."

Application to CPR

In 1996, prior to the legislation coming into force, CPR communicated with the provincial government and stated that although our opinion was that the legislation did not apply to the Company (as a federal employer), we agreed to voluntarily comply. However, we also stated that our decision was not binding.

That said, it should be noted that all federally regulated employers in Quebec (banks, transportation and communication companies) have complied with the legislation. A legal review in respect to our voluntary compliance is currently underway.

> *Current Process — Union & Non-union*
>
> Given the regulations in Quebec, currently, employees applying for pension who have the HSA option (either by agreement or under the management plan) and are not yet 65 years of age are forwarded a letter prior to their retirement advising them of the benefits available to them under the Blue Cross plan upon retirement. This letter also indicates that upon age 65, such employees will be either be given the option of remaining in the Blue Cross plan (depending upon the agreement) or will be participating in the HSA at that time. At age 65, another letter is sent to the pensioner providing them with their options (where applicable) or outlining the details concerning the HSA plan.

The current grievance arises because the Company unilaterally put an end to the adjusted treatment of Quebec pensioners. In a letter dated July 1, 2009 it advised all unions that effective January 2, 2010 it would no longer provide to Quebec pensioners the equivalent protections of the Quebec legislation, referred to as RAMQ coverage. That letter, signed by the Company's Assistant Vice-President, Industrial Relations, reads as follows:

> Calgary, Alberta, July 1, 2009
>
> **Re: Revised administration of HSAs for Quebec Pensioners**
>
> Dear Sir/Madam:
>
> As you are aware, notwithstanding that RAMQ is not applicable to Canadian Pacific, nor to its employees and pensioners, Canadian Pacific has, on a strictly voluntary basis, been extending to Quebec employees and pensioners certain benefits that are equivalent to coverage provided by RAMQ (*Régie de l'assurance maladie du Québec* to Quebec residents who are not covered by a private plan.
>
> Please be advised that Canadian Pacific will no longer provide Quebec pensioners who retire on or after December 31, 2009 with benefits that are equivalent to RAMQ.
>
> After that date, all employees retiring from the Company will be provided the same Health Spending Account (HSA) benefit on a consistent application that reflects the nationally negotiated arrangement.

No pensioner currently receiving *Medavie*/Blue Cross benefits will be impacted by this change. If you have any questions, please feel free to contact me.

Yours truly,

Rick Wilson
Assistant Vice President
Industrial Relations

It is common ground that the terms of LOU No. 6 were never fulfilled. No meaningful bargaining resulted from the letter and no "modification or new plan" was ever forthcoming.

The Union alleges that the Company's unilateral departure from the adjusted treatment of Quebec employees by providing Blue Cross protection, by the change to the strict application of the HSA system, violates the collective agreement as well as LOU No. 6. It argues that the Company's decision effectively violates its obligation to pursue the good faith administration of the collective agreements governing locomotive engineers and trainmen, reflected in articles 31.05 and 69.05 of their respective collective agreements. Alternatively the Union argues that the Company's decision is in violation of the collective agreement as it effectively imposes a benefit plan for Quebec retirees during the closed period of the collective agreement, without an opportunity to address the question in bargaining, in a way that would raise an estoppel against the Company. Its counsel submits that the Company's decision is inequitable as it applies to Quebec retirees and further argues that the Company's decision is, in any event, in violation of Quebec's **Prescription Drug Insurance Act**. The Union's position is that the HSA system is a benefit plan which, contrary to the law, fails to provide the minimums available under the provincial statute. Its counsel notes, among other things,

that the HSA system is recognized under federal tax legislation as involving a private insurance scheme, as a result of which it receives a form of preferential tax treatment. Most fundamentally, the Union submits that in its view it is clear that the HSA system does constitute a private benefit plan within the meaning of article 4 of the Quebec statute and is therefore required to provide protections equivalent to those of the program established under the provincial legislation.

In support of its position the Union points to a preliminary opinion issued by the actuarial branch of the Quebec Health Insurance Commission. That letter, dated December 22, 2009, addressed to the Company, effectively advises the Company that it is subject to the Quebec legislation and that its HSA plan (CDS in French) does not comply with the Quebec law and must be adjusted to give not less than the equivalent of the provincial plan to Company retirees in the Province of Quebec. That letter reads as follows:

REGISTERED MAIL December 22, 2009

Mr. Robert V. Horte
Canadian Pacific Railway
401 9th Avenue S.W., Suite 920
Calgary;, AB, T2P 4Z4

Subject: Subjection of Canadian Pacific to the *Prescription Drug Insurance Act*
Our file: 1171.2009-08913

Dear Sir:

The *Régie de l'assurance maladie du Québec* has recently been informed of the changes that Canadian Pacific intends to bring to the employee benefit plan applicable to its Quebec employees who will retire as of January 1, 2010. For the following reasons, the *Régie* is of the opinion that these changes will contravene the *Prescription Drug Insurance Act* (R.S.Q., c. A-29.01).

On the basis of information held by the *Régie*, Canadian Pacific has reportedly recently announced to its employees that health care coverage subsequent to retirement would be provided to all unionized employees through a health spending account (HSA), and offered throughout Canada. Until this announcement, retired Quebec employees under age 65 could continue to benefit from the basic Blue Cross plan previously offered by Canadian Pacific to all its retired employees, which plan included coverage at least equal to that of the basic prescription drug insurance plan established under the *Act Respecting Prescription Drug Insurance*. While the basic Blue Cross plan is in conformity with this Act, the same is not true regarding the new coverage Canadian Pacific intends to provide to its new retirees.

Specifically, section 39 of the *Act Respecting Prescription Drug Insurance* stipulates that no person may establish or maintain in force an employee benefit plan including coverage for accident, illness or disability for a group of persons referred to in section 16 **unless, for the period of application of the plan, coverage at least equal to the coverage given under the basic prescription drug insurance plan is provided to the group.**

Considering the nature of the employee benefit plan that Canadian Pacific will offer to its new retirees as of January 1, 2010, **Canadian Pacific must include, in the plan being offered, coverage at least equal to the coverage given under the basic prescription drug insurance plan** – at a minimum for its retired employees who are eligible for the basic prescription drug insurance plan under the *Act Respecting Prescription Drug Insurance*.

In this respect, we wish to remind you that the provisions of the **Act** *Respecting Prescription Drug Insurance*, by the *Health Insurance Act* (R.S.Q. c. A-29), are of public order and that **Canadian Pacific, although incorporated under the laws of Canada, remains subject to the *Act Respecting Prescription Drug Insurance*.** Moreover, this position is consistent with the applicable law with regards to the subjection of federal undertakings to the provincial laws of general application, in view of the fact that the *Act Respecting Prescription Drug Insurance* in no way affects their federal specificity.

For the previously mentioned reasons, and considering the foreseeable and important consequences stemming from the modifications that Canadian Pacific intends to bring to the employees benefit plan provided to its new Quebec retirees, we invite Canadian Pacific to comply with the *Act Respecting Prescription Drug Insurance* by adding to its new employee benefit plan coverage that is at least equal to the coverage given under the basic prescription drug insurance plan. Otherwise, the cost of the services assumed by the Régie on behalf of the new retirees of Canadian Pacific who are eligible for coverage under the basic prescription drug insurance plan could be claimed from Canadian Pacific where applicable.

We hope this letter will provide sufficient grounds to demonstrate the importance of offering your new Quebec retirees an employee benefit plan in compliance with the basic prescription drug insurance plan.

Yours truly,

Guy Simard
Actuarial services and program analysis manager
[translation – emphasis in the original]

There can be little doubt but that the Company's unilateral decision to place all Quebec retirees under the HSA system effective January 1, 2010 constitutes a change from its previous practice, as well as an obvious change from the situation which existed under the Company's Pensioners Health Care Plan which preceded the HSA alternative. In that regard, a document dated 2001 issued by the Company to employees to explain the prescription drug protections available under its then Pensioners Health Care Plan included the following statement:

Special Note for Residents of Quebec

The *Régie de l'assurance-maladie du Québec* (the *Régie*) introduced Its public Prescription Drug Insurance Plan effective January 1, 1997.

As an Individual covered under a private group health care plan (the Canadian Pacific Pensioners Health Care Plan – the CP Plan), it is important that you understand what the new provisions mean for you, which will differ depending on your age. Please refer to the section that applies to you'

Section A – Pensioners Under Age 65

I Q. How will the Quebec Prescription Drug Insurance Plan affect you?

A. In practice, the Quebec Prescription Drug Insurance Plan will not affect you. You are covered under the CP Pensioners Health Care Plan and so enjoy coverage equivalent to that provided by the Quebec Prescription Drug Insurance Plan. Therefore you do not need to enroll in the government plan.

…

Section B – Pensioners Age 65 or Older

1 Q. How will the Quebec Prescription Drug Insurance Plan affect you?

A. As a resident of Quebec who is age 65 or older, you will be automatically enrolled by the Régie In the Quebec Prescription Drug Insurance Plan.

> However, you will be required to pay to the Régie an annual premium that will range from $0 to $385 per person per year, depending on your family income. The premium will be calculated and collected by the Ministère du Revenu du Québec,

The Company submits that it has not violated the collective agreement, LOU No. 6 or the Quebec legislation, which legislation it submits cannot govern it as federally regulated enterprise, in any event. It submits, in part, that the HSA is not a "benefit plan" and cannot therefore be compared to or made to conform to the requirements of the Quebec **Prescription Drug Insurance Act**, which it refers to for convenience as "the **Drug Act**". Its representative submits that to qualify as an employee benefit plan under the **Drug Act** there must be two conditions satisfied: firstly there must be a plan (*régime*) established and, secondly, that plan must provide coverage which could otherwise be obtained under an insurance contract. In the Company's view the HSA is merely a monetary account which can be drawn upon for the purchase of health benefits. The HSA cannot, in the Company's submission, be compared to a contract of insurance, a concept which is defined as follows, in part, under section 2389 of the **Civil Code of Quebec**:

> 2389. A contract of insurance is a contract whereby the insurer undertakes, for a premium or assessment, to make a payment to the client or a third person if an event covered by the insurance occurs. …

The Company stresses that under the HSA system there is no risk assumed by the Company and that the HSA is not an employee benefit plan within the meaning of the **Drug Act**.

The Company further argues that the Union's present grievance is premature and moot. It submits that following the opinion letter of the RAMQ reproduced above, the Company responded by a letter dated February 11, 2010. That letter articulates the position of the Company, stated to the RAMQ, that as a federal undertaking the employer is not subject to the **Quebec Drug Act**. The following excerpt from that letter well summarizes the Company's position with respect to the applicability of Quebec's **Drug Act**, or more precisely the Company's view that the **Act** is not applicable to it:

> 1 – Applicability of the Drug Act to a federal undertaking such as CPR
>
> As explained before, CPR is a federal undertaking. The Drug Act has been adopted by the Parliament of Quebec and, for the purpose of this letter, we assume the Drug Act is within its constitutional jurisdiction. Provincial legislation may apply to a federal undertaking but not if it impairs a vital part of that undertaking. It has long been recognized by the courts that conditions of employment are a vital part of an undertaking.
>
> The Drug Act, as stated in its Sections 1 to 3, has been enacted to establish a basic drug insurance plan. The purpose of the basic plan is to ensure that all persons in Quebec have reasonable access to the medication required for their state of health, Coverage under the basic plan shall be provided by RAMQ or by the insurers carrying group insurance or the administrators of private sector employee benefit plans.
>
> However, the Drug Act imposes an obligation on all employers who maintain group health plans for their employees, whether insured or self-insured and whether administered by a third party or the employer itself, to provide the drug basic plan. Employers have an obligation to include such obligation in the contracts of employment (either individual or collective) with their employees. By requiring insurers and plan administrators not to maintain an insurance or benefit plan without providing the drug basic plan, and making non compliance with that obligation an offence subject to penal provisions, the Drug Act forces employers, whether directly or indirectly, to offer to their employees and retirees a specific drug insurance plan, notwithstanding any difference individual or collective agreement they may have entered into. By doing so the provincial legislator has entered into the field or working conditions and labour relations, a field that is of the exclusive jurisdiction of the Parliament of Canada as regards federal undertakings such as CPR.
>
> Considering that the Drug Act imposes conditions of employment on CPR which impairs CPR's labour relations and the management of its activities, it is consequently inapplicable to CPR.

The Company's letter also articulates for the RAMQ the employer's view that the HSA is not a "benefit plan" within the meaning of the **Drug Act**, in any event. At the arbitration its representative advised the Arbitrator that no response has been received from the RAMQ. The Company submits to the Arbitrator that the Union's grievance is premature, and should not be entertained until such time as the discussion between the Company and RAMQ leads to some form of resolution.

The Arbitrator has some difficulty with that submission. Firstly, it should be noted that the Company's letter of February 11, 2010 is clearly a statement of position articulated by the Company's independent legal counsel who is, in fact, the signatory of the letter. In other words, the letter itself does not come directly from the employer, but rather from its legal counsel, although there is no doubt that it was issued on the instructions of the Company, as the letter itself declares. More importantly, the Arbitrator can find no indication within the letter that the Company seeks to enter into any particular discussion or negotiation with the RAMQ. The letter provides an extensive and articulate presentation of the Company's legal position, essentially drawing the conclusion that it is not subject to the **Drug Act**. The final paragraph of the letter simply states:

> Please do not hesitate to contact the undersigned should you require any further information or should you wish to discuss this matter further.

The Arbitrator has some difficulty accepting that this arbitration should not be heard on the basis that there may or may not be further discussions with RAMQ or a

possible settlement fashioned between the Company and the Quebec authority at an administrative level. There is, very simply, no clear process now under way for the resolution of any difference between the recorded positions of the RAMQ, on the one hand and the Company, on the other. This is plainly not a situation where the issue before the Arbitrator is presently pending adjudication in some other tribunal or, alternatively, is the subject any meaningful ongoing settlement discussions with the provincial authority. I cannot, therefore, accept the suggestion of the Company's representative that the current dispute is somehow premature or moot and should therefore not be arbitrated at present.

What of the fundamental position of the Company that, as a federally regulated enterprise, it cannot be subject to the terms of the **Drug Act**? After careful review of that question the Arbitrator has some difficulty accepting the Company's position. As a starting point, it is critical to recognize that health care, including health care insurance of various kinds, is manifestly within the jurisdictional competence of the provinces. The administration of provincial health care can, I am satisfied, occasionally touch upon the world of employment without necessarily encroaching improperly upon the field of federal employment law or industrial relations. For example, it would seem well settled that a province can implement a payroll contribution system whereby employers might deduct or contribute health care premiums under a provincial plan which covers their employees in a given province. The fact that the mechanics of health care protection might operate through the payroll system of a federally regulated enterprise does not remove the matter from proper provincial jurisdiction or encroach on the very distinct

jurisdiction of the federal government to regulate industrial relations and collective bargaining in the federal sector. A parallel example of the involvement of federal enterprises within provincial programs which touch upon the workplace is the relatively large field of workers' compensation protection.

The notion that provinces can properly regulate, within their sphere of constitutional competence, federally regulated enterprises was clearly confirmed by the Supreme Court of Canada in **Canadian Western Bank v. Alberta** [2007] 2. S.C.R. 3. That decision, which exhaustively reviews the jurisprudence, confirmed that banks in Alberta which sought to enter the field of providing insurance were not, as federal enterprises, immune from the application of the **Alberta Insurance Act**, R.S.A. 2000, c. I-3 and the regulations made pursuant to that statute. In essence the Supreme Court concluded that provincial insurance laws and regulations did not impact the financial institutions in their essential nature as banks under federal regulation.

How can it be said that the establishing of minimal health insurance provisions within a province, including a provincial plan for prescription drugs, would undermine or offend the essential nature of an employer that is a federal undertaking which operates within that province? The argument of the Company, which is that the enhancement of the HSA by the effect of the **Quebec Drug Act** would amount to imposing terms and conditions of employment is, I think, less than responsive to the reality of what is occurring. In my view, just as the Company could not object to its employees in any given province being covered by the terms of a province's laws governing health

insurance, the same should logically be true for the extension of a province's health care to encompass the cost of prescription drugs for residents of the province. It would appear to the Arbitrator that such programs are manifestly within the jurisdiction of the province over the administration of health care. To require federally regulated enterprises which act as employers within the province to respect provincial laws and regulations governing health care does not amount to an encroachment in an area of exclusive federal jurisdiction. In the Arbitrator's view it would be no more open to the Company to object to provincial regulation of drug insurance plans than to the introduction of payroll deduction requirements by a province as a means of funding all or part of a provincial health insurance program. In the result, I am satisfied that the Company's position with respect to its asserted immunity from the provisions of the **Quebec Drug Act** cannot be sustained.

Identifying that the Company is subject to the provisions of the provincial legislation is, of itself, an important finding for what can fairly be characterized as the scope of the collective agreement. As enunciated by the Supreme Court of Canada in its decision in **Re Parry Sound (District) Social Services Administration Board v. O.P.S.E.U. Local 324**, [2003] S.C.R. 42, the minimum provisions of employment related statutes are to be deemed to form a part of the terms of a collective agreement, and to be enforceable through arbitration rather than through the courts. In the result, the question then becomes whether the Company is, as the RAMQ has asserted, an employer which has established an employee benefit plan through the implementation of the HSA system. If it is, and that plan is inferior to the protections of the **Quebec**

Drug Act, the Company is obliged to make such adjustments as are necessary to provide to its Quebec retirees protections equivalent to those which would be available to them under the provincial legislation.

Section 4 of the **Act** provides a definition of what is an employee benefit plan. It provides as follows:

> "**Employee benefit plan**" means a funded or unfunded uninsured employee benefit plan that provides coverage that may otherwise be obtained under an insurance contract of insurance of persons.

Sections 15 and 15.1 of the **Act** are pertinent to the issues before the Arbitrator. They provide, in part, as follows:

> **15.** The Board shall provide coverage for the following eligible persons:
>
> (1) persons 65 years of age or over who are not members of a group insurance contract or employee benefit plan that is applicable to a group with private coverage within the meaning of section 15.1 and that includes basic plan coverage, and who are not beneficiaries under such a contract or plan.
>
> …
>
> (4) all other eligible persons who are not required to become members of a group insurance contract or employee benefit plan applicable to a group with private coverage within the meaning of section 15.1, and in whose respect no person is required, in accordance with section 18, to ensure coverage as beneficiaries under such a contract or plan.
>
> **15.1** For the purpose of this Act, a "**group with private coverage within the meaning of section 15.1**" means a group formed for purposes other than contracting insurance coverage for its members and composed of persons eligible for the basic plan who
>
> (1) are part of the group on the basis of current or former employment …
>
> (emphasis added)

The requirement of "equivalence" under private benefit plans, in other words that they provide no less than the basic plan coverage of the provincial plan, is expressed in section 16 of the **Act** which reads:

> 16. All persons who are eligible for the basic plan, other than those referred to in paragraphs 1 to 3 of section 15, and who are part of a group with private coverage within the meaning of section 15.1 must become members under the group insurance contract or employee benefit plan applicable to the group for coverage at least equivalent to the basic plan coverage.

As noted above, the Company forcefully argues that the HSA system which it has established is not an "employee benefit plan within the meaning of the **Quebec Drug Act**". With that assertion the Arbitrator has some difficulty. When regard is had to the fundamental nature of the HSA, it is obviously something more than a simple discretionary bank account. A retiree cannot draw funds from his or her HSA save for the express purpose of privately purchasing some form of drug protection plan or other extended health benefit plan, or to pay directly for drugs or other extended health benefit costs. The HSA is plainly not, in other words, an undifferentiated pool of money available to a retired employee at his or her discretion. It is expressly provided for the limited purpose of giving a form of coverage of the kind otherwise available under an insurance contract for extended health care benefits.

In the Arbitrator's view the fact that the HSA provides benefits obviously does not answer the question as to whether it is a "plan". In my view that question must also be answered in the affirmative. The HSA is established under very clear terms which plainly involve a number of objective factors. Those include the age and retirement

status of the individual protected, the number of years he or she worked for the Company and the resulting formula which determines the sum of money which will be available to the retired employee within his or her HSA account. Additionally, the account, as noted above, must be exclusively devoted to the purchase of extended health care benefits, whether in the form of insurance or actual drugs and services. Finally, in accordance with the organization of the HSA system, any funds unused in the account after a period of two years are returned to the Company. How can such an arrangement be considered anything less than a “plan”? It clearly has a set of rules which govern an identified body of beneficiaries for whom the benefit of certain monies is made available in accordance with set of clearly established conditions. I am satisfied that, having regard to the essential nature of the HSA, it is an employee benefit plan as that concept is understood within the **Quebec Drug Act**. It is no surprise, therefore, that in LOU No. 6 the parties themselves refer to “the current HSA plan.”

For the purposes of this grievance, it should be stressed that there is no dispute before the Arbitrator that the HSA does not, in fact, provide to the Company’s Quebec retirees between the ages of fifty-five and sixty-five the same level of benefits as is available under the general terms of the **Drug Act**, meant to apply to all residents of Quebec. This is something which it cannot do, under the law properly applied.

In the result, the Arbitrator is compelled to allow the grievance and to declare that the Company’s HSA system is in fact an employee benefit plan within the meaning of the **Quebec Drug Act**. As its provisions do not provide protections equal to those

available to all Quebec residents under the **Act**, the Company is compelled to make such adjustments as are necessary to rectify that situation.

While this award does not turn on it, in the Arbitrator's view the foregoing conclusion and declaration does not amount to any substantial departure from what, in my view, is clearly shown within the evidence before me as the parties' own understanding and general intention. While I would be prepared to conclude that LOU No. 6 is little more than an agreement to agree, and that it is arguably less than an enforceable recognition that the parties intended to import the standards of the **Quebec Drug Act** into their contractual arrangement, it is obviously clear from the language of the letter itself that the Company and the Union agreed in principle that their discussions during the closed period of the collective agreement should lead to an adjustment in the HSA benefits system which would satisfy the following statement drawn from the letter itself: "The plan must meet the minimum applicable regulatory requirements." Additionally, as noted above, within the body of LOU No. 6 the parties openly refer to the HSA as: "the current HSA plan", indicating that in their view it is in the nature of a benefit plan, even though there may be express statements to the contrary to be found in other documentation generated by the parties.

The Arbitrator makes an alternative analysis. If I should be incorrect in my conclusion that the HSA is a benefit plan within the meaning of the **Quebec Drug Act**, I would nevertheless be compelled, on the material before me, to conclude that the Company is estopped, at least for the balance of the term of the current collective

agreement, from unilaterally imposing the HSA on retirees within Quebec. The evidence would indicate that before and through the negotiations of 2006-07 for the renewal of the collective agreement, it was known to both parties that the HSA did not provide the equivalent of protections available to Quebec residents under the **Quebec Drug Act**. To that end the Company undertook to provide equivalent protections in the form of Blue Cross coverage for the Quebec retirees between the ages of fifty-five and sixty-five.

I am satisfied that the Union entered into the current collective agreement in reliance on the fact that that higher level of protection would continue. The Company's unilateral announcement, effective July 1, 2009, that any adjustment for Quebec employees would cease of January 1, 2010, must be viewed as a departure from the legitimate expectation and reliance generated by the Company through an estoppel by conduct. The Union, having entered into the current collective agreement with the knowledge and understanding that the Company recognized the difficulty in Quebec and was providing to Quebec retirees the greater benefits of Blue Cross protection, should not be faced with the inequitable result of the withdrawal of that protection, without notice and without the opportunity to bargain its renewal, as is obviously the case during the closed period of the collective agreement. That is especially so in light of the overall understanding of the parties of the need to top up benefits in Quebec, which is clearly reflected in LOU No. 6. At a minimum, therefore, the Arbitrator would find and declare that the doctrine of estoppel applies and that the Company is not free to withdraw the Blue Cross protection it has given to employees, or its equivalent, until such time as the current collective agreement expires, apparently on December 31,

2011, at which time the parties are returned to their respective opportunities to negotiate a renewal or amendment of the HSA plan.

In its request for relief the Union has asked for an extensive list of orders and directions by the Arbitrator. However, I believe that it may be more constructive, for the time being, to simply provide to the parties the declarations and conclusions of this award, giving them the first opportunity to discuss together the most appropriate means of fashioning remedial relief for the Quebec retirees who are the subject of this dispute. Should they be unable to agree on all terms of the appropriate remedy, the matter may be returned to this Office, and I retain full jurisdiction with respect to the ultimate fashioning of any remedy or remedies, if necessary.

May 17, 2010

(signed) MICHEL G. PICHER
ARBITRATOR