IN THE MATTER OF AN ARBITRATION, PURSUANT TO THE
LABOUR RELATIONS CODE, RSBC 1996 c. 244 (the "*Code*")

BETWEEN:

RIO TINTO ALCAN

(the "Employer" or "RTA")

AND:

UNIFOR, LOCAL 2301

(the "Union")

(*DISABILITY INDEMNITY PLAN GRIEVANCE*)

AWARD

ARBITRATOR:	JULIE NICHOLS
COUNSEL for the EMPLOYER:	STEPHANIE GUTIERREZ
COUNSEL for the UNION:	WILLIAM CLEMENTS
DATES of HEARING:	SEPTEMBER 16, 17 & 18, 2020 and FEBRUARY 4 & 5, 2021
DATES of SUBMISSIONS:	MARCH 22 and APRIL 16 & 29, 2021
DATE of AWARD:	JUNE 24, 2021

INTRODUCTION:

This dispute raises a number of issues related to the administration of the Disability Indemnity Plan ("DIP") that is addressed in the parties' Collective Agreement. The DIP provides for wage loss protection where an employee is disabled due to non-industrial injury or illness. The Employer has, historically, administered the DIP through its Occupational Health Department ("OHD"). OHD functions separately from the rest of RTA's operations to protect the privacy of employee personal and medical information.

On February 1, 2019, Manulife began carrying out certain administration and case management tasks related to the DIP, on behalf of OHD. Employees were asked to complete specific Manulife forms and provide information to Manulife case managers in relation to DIP claims.

The Grievance alleges that the arrangements with Manulife and the manner in which Manulife carried out its services are contrary to the Collective Agreement and privacy legislation. In the Union's view, Manulife required employees to provide information that was overly broad and the claims management process was overly intrusive. It also takes issue with RTA's (and Manulife's) retention practices for medical files.

The Employer takes the position that decision-making authority for DIP claims remained with OHD and it properly exercised its management rights to contract with Manulife for certain Absence Management Services ("AMS"). It also maintains the nature and scope of personal/medical information required for the DIP claims process has not changed. It says the Manulife forms are necessary for the provision of AMS to OHD. However, it acknowledges that OHD's retention practices require some review.

This matter was originally scheduled to be heard in March 2020. Those hearing dates were adjourned over the objection of the Union. At that point, RTA agreed (on a without prejudice basis) to stop using Manulife with respect to DIP claims for unionized staff (with two exceptions) until this dispute has been determined.

The evidentiary portion of the hearing proceeded virtually, further to the terms of a Virtual Hearing Order. The Union called three witnesses: "AB", a bargaining unit employee; Cliff Madsen, Union Business Agent; and, Martin McIlwrath, Union President. The Employer called seven witnesses: Lise Lapointe, past Human Resources Director for RTA Kitimat (who testified via an interpreter); Helen Yuen,

past Benefit Manager for RTA's Canadian population; Amanda Martins, Occupational Health Team Lead; Melinda Balfour, Manulife Associate Manager Absence Management Consultation Department; Lise Bibaud, RTA Senior Advisor Benefits; Madison Pereira, RTA Kitimat Workers Compensation Administrator; and, Christl McCracken, Human Resources Manager RTA Kitimat.

Legal arguments were made through written submissions. Given the evidence included sensitive employee medical information, the parties agreed to anonymize employee names in this Award.

There is an outstanding dispute as to costs relating to the adjournment. That issue will be addressed at the end of this Award.

THE COLLECTIVE AGREEMENT:

The parties referred to the following provisions of the Collective Agreement, with particular focus on Article 37:

> Article 5 - RIGHTS RESERVED TO MANAGEMENT
>
> 5.01
>
> The Union understands and agrees to recognize that the Company has the right to manage and operate its Plants. This right includes but is not limited to: the hiring and directing of the working forces, the right to retire, promote, demote, transfer, discipline, lay-off, suspend and discharge employees for just cause; the determination of job content, the evaluation of jobs, the assignment of work and the determination of the qualifications of an employee to perform work; the methods and processes and means of manufacturing; the making, publication and enforcement of rules for the promotion of safety, efficiency and discipline and for the protection of the employees and the Company's Plants, equipment, products and operations.
>
> 5.02
>
> The Company understands and agrees that the exercise of its rights in this Article does not relieve the Company of its obligations arising out of any other provision of this Agreement, or limit the rights of the Union or employees arising out of any other provision of this Agreement.
>
> Article 37 – RIO TINTO ALCAN DISABILITY INDEMNITY PLAN (D.I.P.)
>
> 37.01
>
> (a) The Company will continue the BC Works Disability Indemnity Plan (D.I.P.) for the duration of the Collective Agreement. The regulations of the Plan are set forth as follows.

(b)

(i) The purpose of the Disability Indemnity Plan is to protect an employee from total loss of wages as the result of disabilities caused by non-industrial illness or injury.

(ii) How do I join?

D.I.P. provides automatic coverage. There is no enrolment card for you to complete. Coverage starts after you accumulate ninety (90) consecutive calendar days of employment with the Company.

(c) An employee is considered "disabled" when in the opinion of the Company Occupational Health Department, in consultation with the employee's personal physician, they are unable to perform their regular job or any other meaningful job assigned to them as a result of non-industrial illness or injury.

(d) Except as otherwise provided in this section, an employee qualifies for payment of benefits for each of their regularly scheduled hours they are unable to work because they are considered disabled and the Company has not assigned other work to them which they are capable of performing.

37.02

APPLICATION

(a) To apply for and receive benefits, an employee must:

(i) have visited a physician and obtained a Physician's Report within five (5) working days of the start of their disability.

(ii) have submitted a completed D.I.P. Employee's Application form as well as the completed Physician's Report to the Company's Occupational Health Department. Failure to do so may result in a delay of benefits.

37.03

CONTINUATION OF BENEFITS

(a) For continuation of benefits, an employee must:

(i) provide further medical evidence of disability upon request from the Company's Occupational Health Department.

(ii) be under the regular and personal care of a physician and be actively following any prescribed program of treatment or rehabilitation.

(iii) the Company will pay for Physician's Reports necessary for the employees to comply with these requirements.

(iv) the Union agrees that employees will reimburse the Company for D.I.P. benefits received, should they receive wage loss benefits from other insurers or organizations for the same time period.

37.04

WAITING PERIOD

(a) There is a twelve (12) working hour waiting period before benefits commence. The waiting period applies even in cases where you are hospitalized immediately for illness or for a non-industrial injury.

(b) An employee will be reimbursed eight (8) hours of the waiting period if the employee has been unable to work, due to their disability, for more than forty (40) hours of their regular shift.

37.05

LEVEL OF BENEFITS

A qualifying employee will receive the greater of:

(a) a benefit equal to seventy percent (70%) of their basic hourly wage rate at the time they become disabled, exclusive of overtime or premium pay, times the number of hours in their regular shift;

(b) or fifty-five percent (55%) of the employee's normal weekly insurable earnings as that term is defined by the regulations of the Employment Insurance Act.

37.06

DURATION OF BENEFITS

(a) A qualifying employee may receive benefits for each disability for up to one thousand five hundred and sixty (1,560) hours if they have less than one year of continuous service at the time they became disabled and up to two thousand and eighty (2,080) hours if they have one or more years of continuous service at the time they became disabled.

37.07

RECURRENCE

(a) If an employee returns to work and is forced to stop work again due to the recurrence of the same or a related condition within fifty (50) days of their return to work, the Company will consider the recurrence to be a continuation of the same disability and the employee will be eligible for payment of benefits upon their first regularly scheduled shift on which they are disabled.

(b) Should an employee require further medical treatment, (e.g. surgery) for the same condition but is unable to obtain the required treatment within fifty (50) days of their return to work, the Company will consider this to be a recurrence and a continuation of the same disability and the employee will be eligible for payment of benefits upon their first regularly scheduled shift on which they are disabled.

(c) When an employee who is receiving benefits under the plan, suffers from a different illness or injury which would also qualify them for receipt of benefits, the Company will consider this (these) different condition(s) as the same disability unless the employee has returned to work and completed at least one regular shift before the onset of this (these) other condition(s).

37.08

INELIGIBILITY FOR BENEFITS

An employee is not qualified for payment of benefits:

(a) while they are laid off unless notice of lay-off has not been given prior to the occurrence of the illness or injury or the illness or injury occurs two (2) months or more before the date of lay-off in which case benefits will be paid up to the termination of their illness or injury or fifteen (15) weeks beyond the date of lay-off, whichever is less.

(b) while they are on vacation.

(c) while they are on strike or locked out unless the injury or illness occurred prior to the strike or lockout.

(d) for a disability commenced during a strike or lockout for the duration of the strike or lockout but shall qualify for payment of benefits when called back to work.

(e) while they are suspended for disciplinary reasons.

(f) while they are on any approved leave of absence including but not limited to maternity leave, service with the armed forces, compassionate leave, bereavement leave, and jury duty leave.

(g) if they are disabled as the result of illness or injury which is intentionally self-inflicted.

(h) if the employee is disabled as the result of illness or injury due to their illegal act or attempted illegal act.

(i) if they are disabled as a result of illness or injury which is due to wilful participation in disorderly conduct.

37.09

TERMINATION OF BENEFITS

Payment of benefits ceases automatically upon the earliest occurrence of one of the following events:

(a) The employee is no longer disabled in the opinion of the Company's Occupational Health department in consultation with the employee's personal physician.

(b) The employee has been paid their full entitlement as provided in 37.06(a), Duration of Benefits.

(c) The employee is assigned by the Company to do other work which is meaningful and they are capable of performing.

(d) The employee has been discharged for just cause and has received a total of fifteen (15) weeks of benefits.

(e) The employee is no longer available for employment with the Company.

(f) The employee has found employment with another employer.

(g) The employee has terminated their employment with the Company.

(h) Once the employee is receiving retirement benefits from the Company retirement plan.

(i) The employee has failed, refused or neglected to follow a program of treatment or rehabilitation prescribed by their personal physician in consultation with the Company's Occupational Health department.

(j) The employee has died.

37.10

GENERAL REGULATIONS

(a) The Company reserves the right to have the employee examined by a physician of its choice. The decision of the Company's Occupational Health Department (in consultation with your attending physician) regarding whether an employee is disabled is final.

(b)

(i) Special benefits will be paid for time lost, to a maximum of twenty-four (24) hours, while attending to a medical referral under the terms of the Medical Travel Benefits Plan, where such referral is the second or subsequent in a series of treatments or examinations for a specific medical condition. The waiting period will be waived for this twenty-four (24) hour benefit. A copy of the physician's referral card must be included with your application.

(ii) For those employees electing to use ground transportation, the waiting period will be waived, where such referral is the first treatment or examination for a specific medical condition. A copy of the physician's referral card must be included with the employee's application.

(c) Statutory Holidays will be considered scheduled hours not worked for the purpose of the waiting period and the calculation of benefits where:

(i) the employee is disabled

(ii) the employee is scheduled to have the Statutory Holiday off under the provisions of Article 14.04

(iii) the employee does not qualify for Statutory Holiday pay under the provisions of Article 14.07(a).

(d) If the Company assigns other temporary work to an employee, the employee will be paid at the rate of their regular job or the rate of the current job, if that rate is higher.

(e) Employees losing time from work as a result of ongoing treatment will receive D.I.P. for all hours of work missed to a maximum of twelve (12) hours, provided the waiting period has already been served for this particular non-industrial illness or injury. This payment shall be subject to the approval of the Company's Occupational Health Department.

(f) The Union agrees that employees will reimburse the Company for D.I.P. benefits received, should they receive wage loss benefits from other insurers or organizations for the same period.

Letter of Understanding 22-LU-#1 addresses the Medical Placement Program and provides for a Joint Medical Placement Committee that "directs the placement of temporarily and permanently disabled employees into meaningful work throughout Kitimat and Kemano which has been identified as falling within the disabled employee's restrictions."

Letter of Understanding 26-LU-#4 provides for the Joint Benefits Committee as follows:

A Benefit Committee will be established and maintained by the Company and the Union.

1. Purpose

This Committee will provide a forum for:

- the communication of the benefits program;
- the communication of related information;
- each party to raise issues related to the benefits program.

2. Authority

(a) The Committee will have the authority to discuss, negotiate and recommend changes to the Collective Agreement, as they specifically relate to the benefits program.

(b) Where a matter is being addressed by the Benefits Committee, the matter will not be dealt with in another committee, unless so directed by the Committee.

(c) The Parties agree issues will be resolved on their merits. Where fair independent standards exist, they will be used wherever possible to resolve disputes in a principled manner.

(d) For bargaining unit employees, the Joint Benefits Committee shall, as part of their mandate review the master policies of benefit plans, financial reports and the past financial history. The Committee shall meet with the carriers of the benefits plan no less than annually to review all aspects and services provided.

3. Composition

(a) There will be six (6) members of the Committee. Three (3) members will be appointed by the Company, and three (3) members will be appointed by the Union.

(b) Representatives from the Rio Tinto Alcan Pension Plan and other carriers of the current benefits plan may attend the meetings.

4. Meeting Frequency

The Committee will meet on a quarterly basis.

…

<u>OHD and the DIP:</u>

DIP claims are paid by RTA. Historically, OHD has managed DIP claims internally. It operates at arms' length from the rest of the Kitimat operations (including Human Resources) to maintain confidentiality of employee personal and medical information. Medical information is kept in a secured file room in the health building.

It was generally agreed that OHD has formed a degree of trust with employees and the Union, which is important for the provision of health care. Mr. Madsen has worked at RTA Kitimat for 39 years. He is the Union Business Agent who is the

primary contact for benefits issues. He testified that Article 37 has "always been there" and he could not remember a time when the OHD was not in place.

Amanda Martins is a Registered Nurse. At the time of hearing, she was the OHD Occupational Health Team Lead and oversaw RTA Kitimat's Medical Clinic. She testified that medical Services in Kitimat include access to family doctors, but access to specialists is limited and often requires long wait times. She explained that RTA Kitimat has contracted with different individuals and companies over the years to perform OHD work. Occupational Physicians, Medical Consultants, Doctor's Assistants and Nurses have worked under contract. Some have worked remotely and are not physically situated within OHD. They are employed by and report to their own organizations, not to RTA.

More specifically, from late 2014 to mid-2016, she worked in OHD as a contracted occupational health nurse through a company called KVI (although she was known as the "OHD Nurse"). She then became an employee of RTA. There was no change in her duties, although she now reported to RTA management. Additionally, Dr. Galbraith and Dr. Davis are independent medical consultants who provide services, including: medical consulting; employee assessment; treatment plans; support for referrals; and, communication with family doctors. RTA does not manage their work. They invoice RTA for services. Both doctors had previously worked on staff at RTA and provided the same services. Both are well-known in the workplace, employee and physician communities and have an intimate level of knowledge of the workplace.

The Union Executive was aware of the contracted and consulting relationships. Mr. Madsen indicated that, in his view, there was a different between services that were integrated in and indistinguishable from OHD (i.e., contracted in) and services that were contracted out (i.e., to Manulife).

Mr. Madsen testified that Article 37.02 references the DIP Application and Physician's Report, which are assessed by OHD. The Physician's Report has been provided to local doctor's offices and has been used for years. He indicated that OHD works in conjunction with the employee's doctor to obtain medical information. OHD may request clarification from the employee or their doctor. OHD comes to a conclusion about entitlements to DIP benefits.

Ms. Martins agreed that a DIP claim is initiated with the DIP Application and a Physician's Report (which have taken a number of forms over the years). The most recent form of these documents is as follows:

RioTinto

D.I.P. Application

To apply for and receive benefits, an employee must have visited a Physician within five (5) working days of the start of the disability **and** have submitted a completed D.I.P. Employee's Application form as well as the completed Physician's Report to the Company's Occupational Health Department. **Failure to do so may result in a delay of benefits.**

Employee name:	Employee #:
Mailing address: _____	Phone #: _____
_____	Postal Code: _____

Describe nature of disability:
(Do not provide diagnosis)

This absence is due to: Occupational ☐ Non-Occupational ☐

If injury, where and how did it happen? _____

_____

Date of initial examination for current absence: _____

- I hereby apply for benefits under the Rio Tinto Disability Indemnity Plan.

"I agree that if I receive loss of wage benefits from the Workers' Compensation Board, the Canada Pension Plan. the Insurance Corporation of British Columbia or other insurance companies or organizations for the same period of disability, I must reimburse Rio Tinto the whole value of these benefits, but in no amount greater than the Disability Indemnity Plan benefits I received for that period."

- I hereby certify that the information given above is true and understand that the presentation of false information will invalidate my claim and may result in disciplinary action being taken against me.

_____ Date _____ Signature

NOTE: The applicant must sign "Patient's Authorization" on Physician's report.

FOR OFFICE USE ONLY

Date entered in First Aid (Stamp):	**Supervisor:** _____
	Dept./Org.: _____
	MDP: _____
	Received by: _____
Case #: _____	**Date received:** _____

Mills Office Form L1101

RioTinto

Physicians Report - Initial
CONFIDENTIAL

Patient's name: Employee #:

Is this case being reported to the W.C.B.? Yes ☐ No ☐

First visit for this condition: _____

Diagnosis:

Subjective:

Objective:

Plan (treatment):

Is this person **totally** disabled from all work duties?

Yes ☐ No ☐

If yes, as of what date: _____

1. Worker can return to normal work as of: _____
*2. Worker can perform modified or alternate work as of: _____
3. Are you aware of any modified/alternate work offered to your patient by their supervisor?

Yes ☐ No ☐

Estimated duration of restricted capabilities: _____

Next appointment: _____

Rio Tinto & C.A.W. support Work Accommodation

Complete the following only if #2 above is applicable

Work Positions/movements: (check any restricted activity)

A = Avoid I = Intermittent

A	I		A	I	
○	○	Sitting	○	○	Awkward Positions
○	○	Standing	○	○	Stoop/bend/twist
○	○	Walking	○	○	Squatting/kneeling
○	○	Climbing Stairs	○	○	Work above Shoulder
○	○	Climbing Ladders			

Is occasional change of position required? Yes ○ No ○

Comments: _____

Motion: (check restricted body part)

A	I		A	I	
○	○	(R) Hand	○	○	(L) Hand
○	○	(R) Wrist	○	○	(L) Wrist
○	○	(R) Elbow	○	○	(L) Elbow
○	○	(R) Arm	○	○	(L) Arm
○	○	(R) Shoulder	○	○	(L) Shoulder
○	○	(R) Knee	○	○	(L) Knee
○	○	(R) Ankle	○	○	(L) Ankle
○	○	Lower Back	○	○	Neck/Upper Back
○	○	(R) Hip	○	○	(L) Hip
○	○	Vibration: _____ Part of body			

Comments: _____

Hours of work:

Type of shift: _____ # of hours/day: _____

Comments: _____

Physical Capabilities: (check one)

Lifting, carrying, pushing/pulling to max:

○ <5kg ○ <10kg ○ <20kg

Comments: _____

Working Environment/Exposure:

(check any environment/exposure that should be avoided)

A	I		A	I	
○	○	Tar Fumes	○	○	Extreme Heat
○	○	Welding Fumes	○	○	Extreme Cold
○	○	Pitch Dust	○	○	Others _____
○	○	Nuisance Dust			

Comments: _____

Restricted from:

○ Vehicle operation ○ Others (please specify): _____

_____ Physician's signature

Physician's name (print or stamp please) _____ Date

I hereby authorize my physician to release to Rio Tinto Occupational Health Department the above information.

_____ Employee's signature

_____ Date

EMPLOYEE MUST RETURN THIS FORM TO THE OCCUPATIONAL HEALTH DEPARTMENT

Ms. Martins testified that OHD's role is to assess the information provided in the DIP Application and Physician's Report and to decide if the employee is eligible for DIP benefits. Depending on the individual case (including the length of the absence), further information may be needed. If so, OHD may follow-up with the employee or their doctor and request information, which could include: the treatment plan (or information respecting adherence); dates of specialist appointments; images or diagnostics; and, medication information. OHD may consider whether an independent medical examination, functional capacity evaluation, or a specialist referral is necessary. OHD may also consult with an employee's doctor about return-to-work issues, the employee's status and assisting with specialist referrals.

OHD retains medical files (in their entirety) indefinitely. It may use the information for follow-up on treatment plans, job transfers, or the assessment of new or continuing disabilities. Ms. Martins noted there are obligations/guidelines in the medical profession that may apply to retention. For example, she believed the College of Nurses requires record retention for no less than 16 years from the last entry. In cross-examination, she acknowledged there is no file review process currently in place.

ARRANGEMENTS WITH MANULIFE:

Helen Yuen was the Benefit Manager for the RTA Canadian population from 2014 to November 2018 and was responsible for overseeing benefit and pension plans for all product groups. She testified that Manulife had been used for Absence Management Services ("AMS") at two operations (one in Newfoundland and one in Quebec) within another of RTA's product groups, Iron Ore Canada ("IOC"). Manulife AMS has been in place in those operations since 2013 for non-unionized staff and 2015 for unionized employees and provides administrative and support services. After Manulife gathers medical information and advises whether there is support for a short term disability claim, RTA makes the decision on the claim. RTA may decide to pay a claim, even where Manulife does not support it. In her view, Manulife offers extra support and an active approach to AMS. She confirmed there were positive results at IOC (i.e., a reduction in claims and absenteeism) for both union and non-union employees. Manulife has not been implemented across all RTA operations. Given the additional cost, it has been considered for a number of operations but has only been implemented where it makes sense to do so.

Ms. Yuen testified that Manulife AMS was considered for RTA Kitimat in 2014, but was put on hold because the location was undergoing modernization and reorganization. However, absenteeism at RTA Kitimat was later identified as a "bleeding point" (i.e., in 2016 it was 9.88%). In mid-2017, RTA had internal discussions about absenteeism management, including Manulife AMS services. By May 2017, there was a plan to look at the feasibility of and details involved in providing AMS for RTA Kitimat. By May 2018, there was a project "charter" in place and a plan to go ahead with implementation requirements. In 2018, Ms. Yuen arranged to have IOC results data shared with the Kitimat medical centre team.

Lise Lapointe, was the Human Resources Director for RTA Kitimat from January 2018 until March 2019. She testified that there was a directive to evaluate Manulife as one solution to managing absenteeism in all RTA plants. In March 2018, she recommended using Manulife for AMS to the Director of RTA Kitimat given the need to address high absenteeism. From experience in another RTA division, she understood Manulife could: offer access to a wide network of health specialists; accelerate the management of absenteeism; and, provide online services to support the resources in Kitimat. In her view, there were advantages for employees, including access to a wider network of health providers that could shorten delays and to different opinions that could assist with treatment of a case. She testified that the advantage was not to "challenge doctors", but noted a different opinion can assist with treatment. Once her recommendation was agreed to by Kitimat senior management, she mandated Lise Bibauld and Helen Yuen to begin the implementation. Ms. Lapointe was involved in high level project discussions and reviewing and approving plans, but not the details of the implementation.

Ms. Yuen explained that AMS is a support service (i.e., gather and assess medical information and provide the information to OHD with confirmation of whether a claim is medically supported) as well as a consultative service (i.e., provide access to a wider network of health care services, expertise and resources) to assist employees with faster recuperation and return to work. She negotiated the fees for AMS and for ad hoc services for RTA Kitimat unionized employees. This was a pre-planning step so Manulife could plan and train staff resources and RTA had price guidelines when it determined what services it needed. She also negotiated a general AMS contract ("General AMS Contract") with Manulife for Canadian operations (not specific to Kitimat), which sets out details about services, definitions, roles and responsibilities.

She testified that OHD determines what services (within the General AMS Contract) are needed for a specific case.

The General AMS Contract establishes Manulife as a service provider (not an insurer) and addresses a number of issues, including services, privacy/confidentiality, etc. For example, Article 2.1 provides:

> 2.1 **Engagement of Manulife** Subject to the terms and conditions of this Agreement, and during the Term, the Employer hereby engages Manulife to provide the Services, which are more particularly described in Schedule "A" hereto. The Parties agree that in providing the Services, Manulife is acting solely as a service provider in relation to certain aspects of the Plan, and that the Employer is solely liable for the payment or non-payment, as the case may be, of Claims in accordance with the terms of the Plan.

Schedule "A" sets out a description of services which include: Absence Assessment and Recommendations (i.e., determining the cause of an employee's absence whether it is strictly medical or is driven by or influenced by non-medical factors; actively gathering of information by a case manager and review; identifying the anticipated duration of the absence; and, making recommendations to promote safe and timely return to work); Case Management/Treatment Facilitation (i.e., a communication process designed to co-ordinate the functional, financial and vocational needs associated with a worker's return to productivity, including identifying treatment options and facilitating referrals to medical specialists or other specialized resources within Manulife's provider network); Return To Work Facilitation; Reporting; and, Administration.

In cross-examination, Ms. Yuen confirmed that RTA Kitimat is covered by the General AMS Contract for all AMS services in Schedule A. OHD triggers AMS, depending on the language of the Collective Agreement. Thus, general AMS services are contacted for and then regional "rules" are applied. Manulife has more resources to follow-up with employees and may seek medical information from the employee's doctor (including test results). Manulife would gather information on matters relevant to the absence (including other issues in the employee's life). Manulife may discuss a case with their internal specialists, without advising OHD or the employee. Manulife then brings the information (including recommendations for additional services (e.g., physiotherapy, etc.)) to OHD. Additional ad hoc services have an additional cost.

She indicated that OHD makes the decision as to how to proceed with a claim. Manulife is not involved in deciding what claims get paid or not. If an employee

refuses to proceed with a recommendation, Manulife reports that to OHD and OHD decides what to do about the situation. If Manulife makes a recommendation that differs from a doctor's recommendation (e.g., a change in treatment), there may be further dialogue between the employee, the employee's doctor, Manulife and OHD. She noted that AMS support for an employee may continue once they are back to work. OHD may decide to engage Manulife to assist if further services are required, including gathering further medical information.

Ms. Yuen had discussions with Manulife about its role at RTA Kitimat, including confirming it was acting as an extension and in support of OHD. She testified that, in order for OHD to carry out its role, employee consent was required to allow Manulife to provide medical information back to OHD. This was an unusual arrangement for Manulife. RTA negotiated changes to the Manulife Employee Declaration to include two signatures authorizing the provision of information to Manulife and, then, from Manulife back to OHD. Employees are required to sign the Declaration to allow Manulife to access the medical information and provide a recommendation to OHD.

Ms. Yuen confirmed that Manulife obtains a broad authorization for access to information at the start of the claim and, during follow-ups, employees may provide Manulife with information that is not necessary for the Employer to have. She believed that, without changing the breadth of the authorization, OHD could flag parameters on the information that should be gathered on specific cases, depending on whether Manulife could provide the requested service with reduced information. A request to change the Declaration would have to be discussed between RTA's legal department and Manulife; individual changes were unlikely. If an employee refused to release medical information to Manulife, the situation would be reported and OHD would decide whether to stop DIP benefits or try another process.

Ms. Yuen confirmed that Manulife retains employee information in their files for their own purposes (e.g., audits etc.) for as long as needed, noting it complies with privacy and confidentiality requirements. Employee concerns about the storage of their information must be addressed through Manulife.

Lise Bibaud, a RTA Senior Advisor for Benefits, was involved in implementing AMS at RTA Kitimat beginning in the Fall of 2018. She worked with OHD, Human Resources and Manulife to oversee the AMS rollout and address communications. In October 2018, the focus was implementing AMS for non-unionized employees. The

AMS roll-out for that group occurred in November 2018 and the Manulife contract for that group became effective in January 2019. The implementation of Manulife AMS for unionized employees occurred on February 1, 2019.

Ms. Bibaud was involved in preparing communications, Question & Answers and Information Sheets. The Information Sheets were based on documents that had been used in previous AMS roll outs and were tweaked for RTA Kitimat, with approval from OHD and Labour Relations. Ms. Bibauld testified that the Information Sheet for unionized employees indicated that, if an employee refused to sign the Manulife Employee Declaration, their DIP benefits would be affected. However, that did not occur. After the Grievance was filed and progressed, DIP claims continued to be managed by OHD.

Ms. Melinda Balfour is an Associate Manager in Manulife's Absence Management Consultation Department and is involved in serving RTA, including RTA Kitimat. Manulife case managers report to her. She confirmed that the General AMS Contract covers AMS services for RTA Canada, including services that can be offered at RTA Kitimat. Schedule "A" includes all of the AMS that Manulife offers, but the services actually provided are determined on a case-by-case basis. Generally, Absence Assessment and Recommendation services are provided on all cases, subject to the employee signing an Employee Declaration form. Case Management/Treatment Facilitation may be provided on a case-by-case basis, but are additional services (for an additional cost) that would need to be approved by OHD. Manulife is not providing Return to Work Facilitation at RTA Kitimat.

Ms. Balfour indicated that, generally, Manulife works with OHD to communicate with employees and collect/assess information. The case manager makes a recommendation as to whether absences are supported and OHD makes the ultimate decision as to whether a claim is approved. Manulife also provides access to a network of treatment providers and specialists. If Manulife recommends an additional health service to assist on a file, OHD decides whether to go ahead with it.

Ms. Balfour testified that RTA Kitimat uses a specific Employee Declaration form. The first part of the Declaration allows case managers to collect medical information that is relevant to the employee's current medical condition and situation. Without this authorization, Manulife cannot provide services. The second part of the

authorization allows Manulife to share the medical information with OHD. This is necessary for OHD to discuss Manulife's recommendation and make decisions.

In cross-examination, she confirmed that the Employee Declaration relates to Manulife AMS, as set out in Schedule "A" of the General AMS Contract. If the employee refused to sign, they could be found to be "non-participating" but OHD would make a decision as to how to proceed. She agreed the Declaration allows Manulife to share information with other service providers and the employee's doctor, noting this is a standard form for disability claims. She indicated that the Declaration provides authorization for the collection of information by and from relevant parties for the AMS of a specific claim. If the information is not relevant or necessary (as judged by the case manager and, ultimately, OHD), it is not collected. She agreed that the consent for Manulife to provide information to OHD pertains to a broader scope of information than functional limitations etc. and includes personal information. She confirmed that the authorization would allow OHD to request information from a past Manulife file, which are kept for 15 years after it is closed. Manulife also has the discretion to look back into an old file and to use any information it judges may be relevant to a new file.

In terms of processing new DIP claims for RTA Kitimat, Ms. Balfour explained the following: OHD refers the file to Manulife after an employee has been away for more than 5 days; the case manager contacts the employee and sends them the Employee Declaration to sign and return; a copy of the Declaration is sent to OHD; OHD then shares the employee's DIP Application and Physician's Report. The case manager reviews the medical information to determine whether: there is support for the absence; the employee is totally disabled from performing job tasks; and, the employee is following a treatment plan. Based on reports from case managers and file notes, Ms. Balfour is aware that case managers and OHD hold weekly case conference calls to share information, discuss updates and make verbal recommendations on active files. The case manager documents a summary of the discussion in each individual file. The case manager makes a recommendation to OHD based on the gathered information. OHD will either agree or disagree with the recommendation, or will request additional information before it makes a final decision. In the latter situation, OHD may ask the case manager to follow-up or OHD may see the employee directly. Once OHD confirms its decision, Manulife puts the decision in writing as its final recommendation to OHD (not to the

employee). A case manager will communicate a decision of support to employees. Ms. Balfour was not aware of any decisions of non-support since Manulife began providing AMS.

Ms. Balfour indicated that Manulife does not have written protocols; rather, case managers are trained to follow standard processes. Case managers may ask an employee questions about their current medical condition, limitations and restrictions, and current treatment plan. They will have periodic follow-up with the employee as needed, with frequency determined on a case-by-case basis. Generally, there is follow up after a doctor's appointment and where there has been a change in condition, treatment or prognosis for the potential return to work. There is the potential for non-medical factors to be discussed, depending on the case. A case manager may ask about any non-medical barriers that will affect their return to work (e.g., interpersonal issues with colleagues or supervisors, process barriers with job tasks, challenges with schedules, etc.). If the employee shares that information, the case manager will share it with OHD. Any non-medical barriers are addressed by RTA. OHD makes decisions about and arrangements for workplace accommodations, independent medical examinations or functional assessments.

In cross-examination, Ms. Balfour confirmed that case managers ask questions about treatment as well as medical and/or non-medical barriers to a return to work. An employee may share personal circumstances. OHD may request that case managers share medical documentation they receive. She did not agree that case managers challenge doctor's recommendations, noting they may clarify information to determine whether the employee is disabled or there are potential accommodations. If they believe a diagnosis or treatment is "not optimal", they may make recommendations to OHD (e.g., referrals to specialists or an independent medical examination, as opposed to alternate treatment, itself). If there is the potential for alternate treatment, they may recommend investigating treatment facilitation services (which is not related to benefits entitlement). While Manulife does not offer Return to Work Facilitation at RTA Kitimat, case managers do discuss recommendations for return-to-work plans (in terms of an employee's medical condition) and OHD manages the return-to-work facilitation.

In terms of privacy, Ms. Balfour indicated that all information collected by Manulife is held in a protected electronic file claims system and is only accessed on "a need-to-know" basis by those managing the files. Information in a disability file attracts the

highest level of privacy and confidentiality. All Manulife employees complete training on ethics and information protection/privacy. Manulife retains personal and medical information for 15 years after the date the file is closed (based on Ontario legislation) to address any future actions, client audits or later claims. Further to global requirements, Manulife keeps records of the destruction of electronic media. In cross-examination, she agreed that employees are not given notice of who at Manulife (including third party consultants) has access to their file.

As the RTA Kitimat Occupational Health Team Lead, Ms. Martins was involved in the implementation of Manulife AMS beginning in October 2018. She testified that OHD had been triaging cases and was having difficulty following-up within timeframes; Manulife offered more "bandwidth" for more effective case management and to address absenteeism. Manulife was to provide consultation and administrative services to assist OHD, through a dedicated group of case managers. They would gather and share information so OHD could make a decision as to whether to support (or not) a DIP claim or whether further information was needed.

She indicated that, although Manulife used their forms, employees continued to submit the DIP Application and Physician's Report to OHD to initiate a claim. If the absence was longer than five business days, OHD would open the case with Manulife. A case manager would send the employee a Manulife Employee Declaration, which included consent for Manulife to release information to OHD. OHD needed the information to assess DIP entitlement and fitness for work. Once the Declaration was signed, OHD would release the Physician's Report and case particulars to the case manager. Manulife would then collect the same type of information that OHD would normally request. If the employee did not sign the Declaration, OHD continued to manage those cases directly. She confirmed that DIP benefits were continued as long as employees participated with OHD.

Ms. Martins testified that, prior to using Manulife for AMS, OHD requested information concerning: diagnostics; tests; imaging; bloodwork; and clinical notes/reports, depending on the case and as needed. OHD would often ask employees a variety of questions, depending on the nature of their claim, including: how they were doing; the status of their condition and follow-up dates/appointments; how treatment/medication was going; what symptoms they were experiencing; what support they had at home; and, whether additional support/resources or a second opinion was required or would assist.

In cross-examination, she confirmed that employees could see what was on the Physician's Report when they authorized disclosure to OHD and any follow-up was based on what was in that Report. OHD would follow-up after a doctor appointment to get a sense of the employee's status, assess any opportunity for modified duties, and to provide support. Further follow-up/clarification was done to adjudicate an ongoing absence. To protect employee privacy, OHD would only request information that was reasonably necessary. Ms. Martins agreed that where additional information beyond general follow-up was requested (e.g., bloodwork, specialist reports, chart notes, call with the doctor, etc.), OHD obtained further consent from the employee. She also agreed that, prior to Manulife's involvement, OHD initially decided the majority of cases based on the DIP Application and Physician's Form, noting some cases required more information.

Ms. Martins testified that OHD had been unable to check-in for updates and provide reminders to employees due to a lack of resources. Two Manulife case managers were to follow up with employees in a manner that was consistent with OHD's best case management practices. Follow-up by Manulife for the continuation of benefits was based on the information in the Physician's Report (e.g., next appointment date). In terms of the breadth of information, she indicated that OHD verbally directed Manulife as to what information should be collected (which may include non-medical factors). She agreed that Manulife case managers could, on their own, collect information if they had consent to do so. OHD does not typically receive Manulife's notes and emails relating to its conversations with employees.

Ms. Martins confirmed that OHD and Manulife held weekly case management meetings, beginning in March 2019. There was no formal agenda and meeting minutes were high level. Case managers would share status updates and make recommendations as to whether to support claims. The updates included: how employees were doing; diagnostic and treatment information; any information OHD had requested; and, any flags for employee assistance or community resources. Case managers may provide medical documents to OHD. OHD may then approve the claim, ask for more information, decide that an employee should be assessed by an OHD Doctor or Nurse, or decide not to approve the claim. OHD retained the decision-making authority. If an independent medical examination was required, OHD handled the referral and arrangements. Ms. Martins confirmed Manulife provided its written recommendation on a specific case after it was discussed at the

case management meeting. Manulife could advise an employee if their DIP claim was supported. For cases that were not supported, OHD would handle the follow-up with the employee. Any challenges to denials were to be handled by OHD.

Madison Pereira, the Workers Compensation Administrator in OHD, has worked at RTA since March 2019 and carries out administrative and coordinating duties. She confirmed there was consistent communication between OHD and Manulife to ensure alignment on the case management of files. She attended case management meetings with Manulife and took minutes of high level action items, but not all verbal discussions. Manulife would bring information and make a recommendation about a claim. OHD would review it and provide direction going forward. She testified that OHD makes DIP decisions and may take a different direction than Manulife's recommendation (e.g., in situations where: an employee was found to be "not participating" in the claims process; OHD wants to proceed on a different timeline; or, where OHD wants more information before an employee returns to work).

COMMUNICATIONS AND TRANSITION TO MANULIFE FOR AMS:

One of the Union's concerns was the lack of notice to the Union about RTA's arrangements with Manulife. Mr. McIlwrath and Mr. Madsen testified that the Employer had raised concerns about absenteeism going into bargaining in 2017 and the issue came up as part of discussions around flexible temporary employees and earned leaves. However, RTA did not reveal a plan to use a third party to manage DIP claims; nor, did it discuss changing the DIP forms. Had these issues been raised, the Union would have had the opportunity to address its concerns.

Mr. McIlwrath noted the parties had arbitrated a grievance in 2017 respecting medical information and addressed the outcome of that award in a letter of understanding. However, no concerns or changes were raised by RTA about the administrative processes for the DIP during those discussions.

Mr. McIlwrath and Mr. Madsen sit on the Joint Benefits Committee ("JBC") and confirmed that the JBC has authority to consider issues related to the DIP. Yet, nothing was presented to the JBC about using Manulife for DIP claims and the JBC had no opportunity to discuss it.

The arrangements with Manulife were not raised with the Joint Medical Placement Committee. Mr. Madsen indicated the Union was concerned that the information received by the Committee was being impacted by Manulife. However, Ms. Martins confirmed that the arrangements with Manulife are unrelated the Committee. She testified that the same information has been provided to the Committee, although it is in a different format due to a change to an electronic charting system.

In cross-examination, Ms. Yuen confirmed that, in May 2017, she was aware that the parties were bargaining but noted that she did not make decisions about communications with the Union or details respecting forms etc. In her view, AMS did not result in any changes to the Collective Agreement as Manulife was hired as a consulting service to act as an extension of OHD, like other consultants OHD used in the past. She believed OHD's responsibilities and accountabilities did not change.

Mr. McIlwrath and Mr. Madsen first heard of the arrangements in communications from Scott Blackman, former Labour Relations Manager, on January 17, 2019. Mr. Blackman advised RTA would be assigning some of OHD's administrative functions to Manulife, effective February 1, 2019. He indicated the initiative would not change the DIP, noting RTA had used contracted services in OHD in the past. He set out some of the benefits to employees and confirmed the "ultimate decision-making authority remains with OHD".

Ms. Martins testified that, in February 2019, the transition of active DIP cases to Manulife took over a month. Employees were told that Manulife would be calling with questions, but they could reach out to OHD or the Union. She indicated the transition process was rocky and issues were dealt with as they arose.

Mr. McIlwrath, Mr. Madsen met with Mr. Blackman and Ms. Martins on February 7, 2019 to discuss the Union's concerns, including: the scope of the Manulife Employee Declaration; the fact that information was going directly to Manulife (not OHD); the fact a form incorrectly indicated employees had to pay for its completion; and, the concern that Manulife was making DIP decisions. Mr. Madsen testified that the Union was told Manulife was providing administrative services for claims over five days and OHD decided whether DIP claims would be accepted. Mr. McIlwrath and Mr. Madsen were advised the arrangements with Manulife were to assist with Ms. Martins' workload; however, they later came to believe the changes were part of a

"corporate driven" program. This was the first time the Union was advised that RTA keeps medical information indefinitely.

Ms. Martins testified that, in the February 7th meeting, the Union was advised that Manulife was an extension of OHD and work was ongoing to address concerns with the Employee Declaration. She confirmed that RTA pays for completion of the medical forms, noting the incorrect reference about payment for forms was addressed and, in the end, no employee had to pay to have forms completed.

The day after the meeting, an issue arose where an employee indicated they were advised that Manulife was making the decision on his DIP claim. The Union raised the issue with the Employer. Ms. Martins sent an email to RTA Montreal and Manulife to reiterate OHD remains the decision-maker and the message has to be clear for Manulife staff and in communication with employees. Ms. Bibauld followed up with Manulife and confirmed the final decision rests with OHD. The Employer advised the Union that Manulife's mandate is to provide OHD with the necessary information, not to make final DIP decisions.

Union members continued to raise complaints. Mr. Madsen and Mr. McIlwrath prepared a February 19, 2019 Bulletin setting out concerns with the Manulife arrangements and forms. They advised members not to sign the Employee Declaration.

In a March 11, 2019 meeting with the Union, RTA confirmed a number of issues, including that: a revised Manulife form would reference the fact RTA pays for physician reports; if employees refused to sign the Manulife Employee Declaration, they would be denied benefits; and, OHD made the final decisions on DIP claims.

The Grievance was filed on March 25, 2019. Union members were advised to sign the Employee Declaration "under protest".

RTA confirmed that, between February 2019 and February 2020, there were approximately 167 DIP claims for both staff and unionized employees. 109 employees signed the Employee Declaration, two employees expressly signed "under protest", and 58 employees did not consent to release information to Manulife. OHD continued to manage the latter cases. OHD has managed DIP claims since February 2020, when the use of Manulife for unionized employees was "paused" on a without

prejudice basis. Among the files handled by Manulife, there were no cases where a unionized employee's DIP claim was not supported.

AB'S SITUATION:

The Union called evidence about AB's experience with DIP claims filed before and after Manulife's involvement to illustrate the impact on employees. The evidence was highly sensitive and will be briefly summarized.

AB worked at RTA Kitimat in a job that is not safe to perform during pregnancy. In 2014, she went off work while pregnant and qualified for DIP benefits after completing the DIP Application and Physician's Report. She was called in for one day of safe work and was not contacted for additional medical information while off on the rest of her leave.

During her second pregnancy in 2019, she was accommodated with work in the warehouse for several months, but had to stop working due to severe symptoms. She submitted her DIP Application and Physician's Report to OHD. She could see the information on the Physician's Report before she consented to it being shared for her DIP claim. She was then contacted by Manulife. When she received the Employee Declaration, she was felt the scope of consent was unnecessary given the information already provided. She did not understand all the purposes the medical information would be used for. She signed the Declaration under protest. She believed that if she did not sign it, she would not get DIP benefits.

AB was next contacted by Manulife after the period of absence identified in the Physician's Report and after every doctor's appointment. She shared what was discussed at her appointment as she felt they "could find out anyway", but was humiliated to provide intimate details. In addition, she had to have her doctor complete the Manulife Treating Physician form, which included questions she felt were detailed and an unnecessary, gross invasion of her privacy. Part of the way through her absence, she was contacted by a different case manager and continued to share information with him, including a further doctor's note (as he requested). She later received a copy of a Manulife recommendation that her absence was supported. She felt the experience with Manulife was invasive, unnecessary, overwhelming and

stressful, at a vulnerable time. No one from OHD contacted her. She confirmed that she received DIP benefits during her absence.

Ms. Martins testified that, if a pregnant employee cannot safely work in a particular area, they are accommodated in another area, where possible. If there is no available safe work, the employee remains off and is contacted if safe work arises. There is no need for check-ins or follow-up, unless possible accommodations arise or there is a change in their condition. Where an employee is off work due to symptoms that can change over time, OHD checks in periodically to ensure she is still unable to work. That follow-up involves questions about symptoms, medications, similar issues in prior pregnancies, etc. OHD is always looking for possible accommodation in meaningful work so the employee can return to full pay. Also, to remain entitled to DIP benefits, the employee must follow a treatment plan and remain unable to work.

Ms. Martins believed that, given AB's ongoing absence, follow-up after her doctor's appointments was needed. Ms. Martins instructed Manulife to follow-up with AB to obtain information related to: her diagnosis and treatment plan; how she is doing; and, whether she could be accommodated at work. Manulife would also ask for specific information that was relevant to her particular diagnosis, just as OHD would have asked. In her view, this was typical case management. She confirmed that Manulife provided an Attending Physician form (which included a request for lab results) for AB, but the form was not fully completed. She believed the form followed the same principles that are applied by OHD and sought similar information that OHD would seek (i.e., diagnosis, treatment, effect of medications, diagnostics (blood work), prognosis, past/current issues, any functional limitations) to determine what support could be offered. Manulife shared information about AB's situation with OHD and her DIP claim was approved.

DISCUSSION AND DECISION:

The parties have identified a number of issues that have arisen in the context of this case. It makes sense to address the issues in the order they have been raised by the parties in their submissions. The submissions were lengthy and detailed and have only been summarized generally below.

1. *Are RTA's arrangements with Manulife for AMS (including the requirement that employees release personal information to Manulife for the purposes of the DIP) permissible under the Collective Agreement?*

Union:

The Union submits that RTA's arrangements with Manulife for AMS for bargaining unit employees were made without notice to the Union and amount to a breach of the Collective Agreement. The parties understand OHD's trusted role and its established protocols. They have expressly addressed the release of personal information to OHD (both in terms of form and scope) to initiate a DIP claim. OHD is then responsible for consulting with physicians and requesting reasonably necessary information for administering a DIP claim. They bargained detailed provisions respecting the DIP, including recognition that OHD will handle private information as well as claims administration and determination. The parties have also negotiated a joint committee to address workplace accommodations as well as the JBC to address issues with the benefits plans (see: Articles 22, 37, 22-LU-#1, 26-LU-#4; *Rio Tinto Alcan Inc. and Unifor, Local 2301*, unreported, November 17, 2017 (Fleming) ("*RTA (Fleming)"*).

Applying established contract interpretation principles in this particular and unique context, the Union submits that the parties have explicitly contemplated how claim decisions and administration of the DIP will dealt with, including: the role of "OHD" specifically (as opposed to RTA generally or a third party); the forms used to initiate claims; the scope of the authorization for information to be released to OHD; and, that entitlement decisions are to be made by OHD, in consultation with an employee's physician. Thus, the clear mutual intent was that OHD is the ultimate decision-maker and is responsible for administering the OHD process, including gathering relevant information for that purpose. It maintains that OHD's bargained role cannot be unilaterally changed by RTA contracting out the administration of the DIP, without the Union's agreement (see: *PCL Construction Ltd. -and- CGWU, Local 111* (1982), 8 LAC (3rd) 49 (Sychuk); *Atlas Copco Canada Inc. and IUOE, Local 115*, [2009] BCCAAA No. 30 (Burke); *Surrey School District No. 36 and BCTF*, [2009] BCCAAA No. 27 (Korbin); *HEABC and HEU*, [2002] BCCAAA No. 1340 (Gordon); *Catalyst Paper Corp. and CEP, Local 686*, [2010] BCCAAA No. 49 (Germaine)).

The Union argues that there is no common law or management right that allows RTA to compel an employee to release personal information, particularly to a third party. The concept of management rights does not apply in this context. Rather, an employer can only obtain medical information or demand that it be disclosed to another organization if it is entitled to do so by way of contract or statute. Where there is a legitimate business interest in obtaining personal information, that interest must be balanced with the employee's right to privacy, especially in the context of medical records. Employers must use the least intrusive measure and only gather medical information that is reasonably necessary at the specific stage of the inquiry (see: *Telus Communications Co and TWU*, [2010] CLAD No. 11 (Lanyon); *BCPSEA and BCTF*, [2004] BCCAAA No. 177 (Taylor)).

The Union submits that nothing in the Collective Agreement authorizes or requires the release of employee information to RTA (generally) or to a third party. Further, RTA's management rights are subject to the clear, explicit and specific terms that have been bargained. It says the parties have not simply agreed that OHD must remain the final decision-maker for the DIP; they have expressly agreed that information is to be received and managed by OHD. They specifically negotiated terms for the DIP process, the applicable forms, and the role of OHD. Thus, RTA has no broad, unqualified or unilateral right (express or implied) to change the administration of the DIP or compel employees to release their private information to Manulife instead.

The Union says the law in British Columbia, the unique context of this Collective Agreement, and the particular facts here distinguish this case from the authorities relied upon by RTA. The requirement to release information to Manulife and the scope and nature of the personal information that is being compelled (on threat of withheld DIP benefits) is unlawful and contrary to the Collective Agreement.

In any event, the Union argues that, even if there was a management right to contract out OHD work to Manulife and require the release of personal information, the decision to do so was unreasonable. Any general exercise of RTA's management right to make arrangements with Manulife must be considered in the context of the Collective Agreement (including the established role of OHD and the ability to consult with the JBC) along with the importance of balancing privacy rights and the need to assess the circumstances of each case. RTA's engagement of Manulife was made in an unreasonable manner, without justification or consideration for the impact on employees. It says the use of Manulife is unlike the historical use of "contractors"

who functioned as part of OHD and who did not change the agreed upon role and procedures of OHD. RTA's arrangements with Manulife have resulted in a fundamental, unprecedented change in the employees' experience that cannot be supported by the language of the Collective Agreement or by extrinsic evidence.

RTA:

RTA submits that an employer may engage a third party to assist with the administration of sick leave benefit programs as a valid exercise of management rights, unless there is express language prohibiting such arrangements. Where an employer has engaged a third party to assist in this way, it has the right to require employees to provide information (that would otherwise have been provided to the employer) to the third party (see: *Sanofi Pasteur and CEP, Local 1710*, [2010] OLAA No. 682 (Knopf); *Revera Long-Term Care Inc and CUPE, Local 2564*, [2014] OLAA No. 357 (Goodfellow); *FortisBC and IBEW, Local 213*, [2011] BCCAAA No. 105 (Thompson)).

RTA maintains that it properly engaged Manulife to assist OHD, further to its broad management rights (see: Article 5). While Article 37 prescribes certain responsibilities of OHD to reflect the "wall of confidentiality" vis-a-vis other RTA departments, there is no agreement that the DIP can only be administered by OHD. Nor, is there an express restriction on how OHD does its work or a prohibition against OHD utilizing Manulife as its agent to assist with DIP administration. It argues that, had the parties intended such limitations, they would have done so expressly just as they have done elsewhere in the Collective Agreement (see: Article 23, 24-LU-#3). It points out that OHD has long used third party service providers, including independent contractors, to assist with the DIP (see: *RTA (Fleming), supra; ONA and AXR Operating (National) LP*, 2018 Can LII 83549 (Trachuk)). It notes the Union has never grieved these arrangements and the arrangements with Manulife are simply another iteration of this practice.

RTA notes that 22-LU-#1 addresses the Joint Medical Placement Committee, which has no role in the administration of the DIP, in gathering and reviewing employee medical information, or in determining disability. 22-LU-#1 does not deal with the administration of the DIP or the role of OHD. It also argues that, while 26-LU–#4 provides for the JBC, it does not require that RTA discuss or obtain approval

respecting engaging service providers to assist OHD. RTA's use of other contractors in OHD was not discussed or negotiated on the JBC.

RTA submits that OHD has retained decision-making power respecting DIP claims, while Manulife provides additional resources to and acts as an extension of OHD. This arrangement does not change the Collective Agreement and is wholly consistent with Article 37. Given Manulife has been properly engaged for AMS, RTA says it can also require employees to release personal information to Manulife for the purpose of administering the DIP (see: *Revera, supra*).

Decision:

This issue involves the interpretation of the Collective Agreement, with a particular focus on Article 37. The arbitral task is to find the parties' mutual intention in relation to the DIP. The well-established principles for collective agreement interpretation were aptly summarized by Arbitrator Gordon in *HEABC, supra* as follows (at paras. 13 & 14):

> The task for this Board is to determine the meaning which was mutually intended by the parties for the words they used in their collective agreement. In fulfilling this task, arbitrators adhere to certain rules of interpretation including the following.
>
> The primary resource for interpretation is the collective agreement. The search for the purpose of a particular provision may serve as a guide to interpretation. Significant benefits and obligations are likely to be clearly and unequivocally expressed in the language used by the parties. When interpreting two provisions, a harmonious interpretation will be preferred to a conflicting one. Wherever possible, all words and provisions should be given meaning. Words in the agreement should be viewed in their normal and ordinary source unless that would lead to some uncertainty or inconsistency with the rest of the collective agreement or unless the context establishes the words were used in another sense. The words used in the agreement should be read in the context of the phrase, sentence, provision, and collective agreement as a whole. When faced with the choice between two linguistically permissible interpretations, the reasonableness and administrative feasibility of each may be considered. Additionally, the parties are presumed to be aware of relevant jurisprudence.

The parties do not take issue with the private nature of employee medical information or the general requirement to obtain consent for its disclosure. These and other helpful considerations respecting the provision of medical information, employee privacy rights, management rights and negotiated sick benefits were addressed by Arbitrator Lanyon in *Telus, supra* (at paras. 75, 77, 80-81 and 89-90):

> An Employer has no right at common law to search or physically examine an employee without their consent. To do so amounts to a trespass or an assault upon the person (*Re*

Thompson and Town of Oakville, supra, *Re Monarch Fine Foods Co Ltd., supra*). Further, the right to demand a medical examination or the disclosure of medical information does not fall within the retained rights concept of management rights - the right of management to control and direct the enterprise. As a result, any such authority must be found either by way of contract or statute (*Victoria Times Colonist and Victoria Newspaper Guild, Local 233*, unreported, February 12, 1986 (Hope); *Monarch Fine Foods Co Ltd., supra*).

…

Arbitrator Sims in *Peace Country Health, supra* conducts an extensive examination of privacy rights of employees in the context of sick leave benefits. He quotes from Arbitrator Taylor in *British Columbia Teachers Federation vs. British Columbia Public School Employees Association [2004] B.C.C.A.A.A. No. 177* who affirms, citing Arbitrator Dorsey, not only the importance of the privacy of medical records being essential to a person's dignity, and its importance in terms of recovery, but also the test of what is "reasonably necessary" (of which more will be said later):

> There is a special privacy interest which attaches to medical information. The doctor-patient relationship is one of the most private and medical information should receive no broader distribution than is reasonably necessary.
>
> In United Steelworkers of America, Local 7884 and Fording Coal Ltd., *[1996] B.C.C.A.A.A. No. 94*, Arbitrator Dorsey said:
>
> > Confidentiality of medical records is a basic right to human dignity. Restoring and supporting dignity and the accompanying personal confidence is a therapeutic part of recovery, rehabilitation and adapting to life with a disability. Breaches of privacy may work against recovery.

…

Therefore, the Employer is not at liberty to simply unilaterally implement rules in respect to the disclosure of medical information and medical examinations in furtherance of its right to manage the enterprise. The test in *Re KVP Company and Lumber and Sawmill Workers Union, Local 2537 (1965) 16 L.A.C. 73 (*Robinson) did not concern the issue of privacy rights and since that decision the issue of privacy has undergone significant development both in the courts and in arbitration. The rules set out in *KVP* dealing with the reasonableness of the Employer's development, implementation and application of unilateral management policies may be a necessary part of the development of a policy concerning the disclosure of medical information and the demand for medical information but they are insufficient to address the balancing of rights in respect to the privacy of employees. Besides the obvious issue of the required consent of an employee there are arbitral principles such as the least intrusive measure that are required to be applied at each stage of the medical inquiry.

A basic starting point is that all employees under a collective agreement are obligated to attend work. If they are absent from work there is an onus on them to establish that they have a bona fide illness or injury and that the length of their absence is also legitimate. The primary means of proof is usually a medical certificate. The benefits under a health and welfare plan are contractual and there is an onus on employees to prove that they meet the criteria established for entitlement (*Brown and Beatty* 8:3320 Qualifying for Sickness and Disability Benefits). Thus the employee bears the onus at this stage.

…

> I conclude that it was not the legislatures intention to intrude upon doctor/patient confidentiality, or to negate the privacy rights of employees, in respect to their confidential medical information in granting the Union's its exclusive bargaining authority. I conclude that it would take express legislative language to do so.
>
> This does not mean of course that employers and unions are precluded from negotiating health and welfare plans that may determine the eligibility requirements for benefits, including the requirement of medical evidence. These plans are of significant benefit to employees. However, they cannot compel disclosure of medical information in the absence of the employee's consent. An employee who decides not to consent will of course likely suffer the consequences of refusing to provide the medical information required to establish their entitlement to these benefits. That is their choice. Further, they may not be permitted to return to work or to be accommodated until they provide the required medical evidence. The collective agreement would need to be examined in order to ascertain the consequential rights and obligations that would flow from such a refusal to consent to the disclosure of medical information.

The use of a third party to assist with the administration of a benefits plan was addressed in *Sanofi Pasteur, supra.* In that case, the union took issue with the requirement that employees sign a consent to release information to a third party. I note there were no concerns with the practices of the third party, which are in issue here and will be addressed below. Arbitrator Knopf held that the use of a third party and the requirement to release information to that service provider was permissible, noting nothing in the collective agreement before her limited that right. She stated the following (at paras. 24-28):

> The facts in this case are clear. The Employer is presently providing employees who are making claims for Sick Pay with a consent form and advising them that failure to sign the release of their medical information may result in them not receiving the benefits they are claiming. This may not be an entirely agreeable or preferred course for employees. However, the requirement to provide the consent to the release of medical information is a well-recognized and legitimate exercise of management's right to administer income protection benefits. Arbitral caselaw accepts that an employer may refuse entitlement to Sick Leave with pay to an employee until that employer is satisfied that the employee is suffering from a condition that renders him/her unable to perform duties because of illness or injury. See *Telus Communications Co. and Telecommunications Workers Unit*, *supra*. Therefore, requiring an employee to consent to the release of relevant medical information in the context of a claim for Sick Leave pay is entirely appropriate and justified. Nothing in this Collective Agreement limits or curtails that right.
>
> This leaves the critical question of whether this Employer has the right to ask employees to release their medical information to the third-party ASO that the Employer has retained to assist in the administration of the Sick Leave benefits plan. The evidence establishes that this Employer has elected to use Sun Life as an ASO for a number of reasons. The Employer wants to preserve the trust and effectiveness of its 'on site' Employee Health Centre by shielding those medical professionals from any responsibility with respect to employees' Sick Pay benefit claims. Further, the Employer believes that it

> is cost effective and more reliable to retain Sun Life for its expertise in this field. The Employer has also shown that it has taken steps to ensure that Sun Life treats the medical information confidentially and has significant safeguards in place to preserve employees' privacy. It also cannot be forgotten that the Union does not challenge Sun Life's practices with regard to it receiving, adjudicating upon and paying out LTD claims. All these factors lead to the conclusion that there is nothing to suggest that there is anything wrong with the way Sun Life is receiving or storing the information and that there are rational operational reasons for it being retained by an organization outside of the bargaining unit. As Arbitrator MacDowell said about a similar arrangement in the case of *Caledon (Town) (Deforest) v. Canadian Union of Public Employees, Local 966*, *supra*, at para. 122:
>
> > ... whatever else may be said about the administrative process that the Employer has put in place in this case, the fact is, that process may be more effective and cost-efficient than a piece of litigation; it is probably more respectful of personal privacy as well.
>
> In another case where the administration of a short-term and self-insured disability plan was being analyzed, Arbitrator Bruce concluded:
>
> > Pursuant to the terms of the Collective Agreement the Employer is contractually bound to pay short-term disability benefits to employees who are disabled within the meaning of the Plan. Further, the Employer administers the Plan as part of its right to manage the workplace. While the Employer may engage third parties, such as London Life, to assist in the administration of the Plan, it is ultimately responsible for all decisions under the Plan including determinations of a claimant's entitlement to benefits. See *Pacific Press and Communications, Energy & Paperworkers Union, Local 111-5*, *supra*, at p. 35.
>
> Therefore, it must be concluded that the simple fact of engaging a third party with expertise and efficiencies to assist with contract administration has been widely recognized as a valid exercise of management rights.
>
> I have not ignored the Union's assertion that the Employer needs explicit contractual or statutory language to support such an arrangement. However, the contrary is the case. The Employer has the management right and responsibility to administer the Collective Agreement, including the short-term benefits provision. Article 3.01 gives management "the exclusive function" of managing and "maintaining order and efficiency". Nothing in the contractual language limits that right. Since it has also been recognized that this Employer has the right to expect employees to establish their entitlement to Short Term Sick Leave, it follows that the Employer has the right to expect employees to sign authorization for the release of their medical information to the entity that the Employer has chosen to assist with the administration of that benefit. Since it is accepted that appropriate information is being requested for the administration of the Collective Agreement and since there is no evidence or suggestion that there is any demonstrable reason to be concerned about bargaining unit members' privacy or confidentiality, it must be concluded that the Union has failed to establish any contractual or statutory violations.

I accept there is arbitral recognition of an employer's general right to contract out the administration of a sick leave plan, albeit subject to the terms of the collective agreement (see: *Revera, supra* at paras. 10-12; *FortisBC, supra* at para. 40). It is also

recognized that employees must establish their entitlement to negotiated disability benefits and this may include the release of reasonably necessary medical information.

This brings us to the interpretation question in this particular case. With the above-noted considerations in mind, I turn first to the primary resource for determining the parties' mutual intention: their Collective Agreement. Article 5 speaks to RTA's management rights and expressly recognizes these are subject to obligations arising in other provisions of the Collective Agreement.

In Article 37, the parties have contemplated a specific process for the DIP and a specific role for OHD in that process. They have expressly provided that OHD, in consultation with the employee's physician, will determine whether an employee is "disabled" for the purposes of the DIP (see: Article 37.01(c)). In terms of the agreed upon process to apply for and received DIP benefits, employees must submit a completed DIP Application and Physician's report to OHD (see: Article 37.02). To be eligible for the continuation of benefits, an employee must, among other things, provide further medical evidence of disability upon request from OHD, be under the regular care of a physician and be actively following any prescribed program of treatment or rehabilitation (see: Article 37.03(a)(i)-(ii)). The payment of benefits will terminate for a number of reasons, including where the employee is no longer disabled in the opinion of OHD, in consultation with the employee's physician; or they have failed to follow a program of treatment or rehabilitation as prescribed by their physician, in consultation with OHD (see: Article 37.09(a) and (i)). Article 37.10 provides the decision of OHD (in consultation with the physician) regarding whether an employee is disabled is final.

The parties' agreement respecting the role of OHD was recently addressed in *RTA (Fleming), supra.* In that case, Arbitrator Fleming dealt with a grievance that focussed on the examination and collection of information by "RTA Physicians" in OHD. The unique nature, structure and role of OHD was described as follows (at paras. 339-345, 376, 428):

> There is no real dispute that it is appropriate for the OHD to receive the medical information contained in the Physician's Report which includes confidential employee medical information including diagnosis and treatment information beyond what an employer would normally be entitled to.

> There is also no real dispute that it is appropriate for the OHD to seek additional confidential medical information relating to the information contained in the Physician's Report from the employee's treating physician.
>
> I am satisfied that the OHD staff, not RTA managers, speak with the employee's treating physician if more medical information is found by the OHD to be necessary. In my view, that effectively eliminates the concern that confidential employee information may be inadvertently disclosed to RTA management through any direct communication with an employee's treating physician.
>
> In my view, that framework suggests an agreement between the parties which includes a recognized special role of the OHD, particularly in fitness to work and accommodation areas. A reasonably drawn inference would be that the parties' have understood that in the context of Article 37 of the Collective Agreement, the OHD would operate on an arms-length basis from RTA and ensure that the employee confidential medical information which is appropriately possessed by the OHD, would be protected and kept confidential.
>
> I find that employee medical information received by the OHD is carefully stored, kept private and only accessed by the OHD medical staff. I am also satisfied that, as a general matter, the OHD does not release confidential employee medical information to RTA management including in respect to an employee's diagnosis or treatment, which would in my view, be inappropriate as that is confidential medical information. I am satisfied that the medical information released by the OHD to RTA managers is limited to that which is reasonably necessary to facilitate the accommodation or the successful return to work by an ill or injured employee.
>
> I am also satisfied that OHD staff do not release confidential medical information to RTA human resources staff in the context of any disciplinary issues or proceedings, which would also in my view be inappropriate.
>
> As noted earlier, Article 37 of the Collective Agreement provides the basis for the establishment of eligibility for DIP benefits and there is no dispute that the Employer has the right to make that eligibility determination.
>
> …
>
> I note that where the Employer has a legitimate interest in obtaining additional medical information relating to an employee's ability to return to work or appropriate accommodation measures, its release will generally require the employee's consent. Where legitimate questions exist and the requirement for consent is reasonable, an employee who refuses to provide it may suffer certain consequences, but not discipline, which may include a refusal by the Employer to allow a return to work or the suspension or even termination of DIP benefits.
>
> …
>
> In summary, I find that the OHD plays an important role in ensuring employee health and safety at RTA. The importance placed on it by the parties, particularly in fitness and accommodation areas, is reflected in its role on the Joint Medical Placement Committee as is contemplated under #22-LU-#1 of the Collective Agreement.

There is no doubt that the parties have agreed to the DIP, itself, and have bargained specific processes relating to the DIP. RTA points out that OHD has historically

used consultants and contractors to carry out certain work and the Union has never taken issue with those arrangements. While that was established in the evidence, I do not find it particularly helpful here. I agree with the Union that the historical use of contractors working within OHD was done in an integrated manner that is distinguishable from RTA's arrangements with Manulife, which is operating as an entirely separate third party service provider.

On the express language of Article 37, OHD makes decisions respecting whether an employee is disabled, whether further information is needed, and whether they continue to be eligible for DIP benefits. On the evidence, I accept that OHD's role has not changed in that regard. OHD has retained the authority to make DIP decisions, while Manulife assists with case follow-up (this is also dealt with expressly in the General AMS Contract sections 2.1 and 6.2). Manulife makes recommendations, but OHD ultimately decides what the next steps or the outcome will be with respect to specific claims. This is consistent with OHD's obligations and the parties' negotiated process. When questions arose as to Manulife's role, RTA has been consistent in clarifying it both with Manulife and with the Union.

The Union also argues that, in addition to decision-making, Article 37 requires that OHD, itself, be responsible for administering the DIP. However, when Article 37 is reviewed on its face and its purpose and context is considered, I cannot conclude the parties agreed that DIP administration must be conducted only by OHD. They have been express as to their intentions for the role of the OHD in terms of decision-making on DIP claims and have identified OHD as the RTA department that will receive the specified information when an employee applies for DIP benefits. That is consistent with the unique context of OHD and its separation from other RTA operations. However, nothing in Article 37 restricts RTA from using Manulife with the administrative work that arises after the employee has applied for DIP as long as it does not usurp OHD's authority to make the ultimate decisions respecting DIP claims. In the context of the OHD structure, I do not agree that the reference that the DIP Application and the Physician's Report are to be submitted to OHD is sufficient to establish a bargained prohibition on the Employer's ability to have administrative tasks carried out by a third party in support of OHD's specified role. On the evidence, those forms are submitted to OHD and a Manulife file is triggered after OHD has received that information. I agree that the parties have been very particular about the role of OHD. Thus, had they intended that RTA would be

fettered in the manner suggested by the Union, one would expect them to provide a plain indication in the language they chose.

On the evidence, RTA considered implementing arrangements with Manulife for AMS because of concerns with high absenteeism generally. It was also established that OHD lacked the resources to perform certain case management tasks with the desired frequency and had been triaging cases given the lack of "bandwidth". Thus, I accept that the Employer had reasonable justification to make the arrangements with Manulife.

The Union raised concerns with the timing and lack of notice, particularly in relation to the 2017 round of collective bargaining and the ability to raise the issue at the JBC. The implications of the RTAs "silence" will be dealt with below in the context of the estoppel issue.

I accept the mandate of the Joint Medical Placement Committee is to address work placements and accommodation issues, as opposed to DIP eligibility or administration. There is no evidence that the arrangements with Manulife have impacted OHD's participation on this Committee or on OHD's involvement in accommodation issues or return-to-work facilitation.

I also note that Letter of Understanding 26-LU-#4 addresses the JBC and provides it with the authority to discuss, negotiate, and recommend changes to the Collective Agreement that relates to the benefits program. As part of its mandate, the JBC shall review the master policies of benefits plans, financial reports etc. However, given the conclusions above, the use of Manulife for administrative assistance with the DIP did not amount to a change in the Collective Agreement or the benefits plan, itself. While I agree that it would likely have been more productive and conducive to healthy labour relations for RTA to engage the JBC on the arrangements with Manulife, there has been no breach of Letter of Understanding 26-LU-#4 in this particular context.

Accordingly, I conclude RTA's ability to arrange for Manulife to provide administrative services respecting DIP claims in support of OHD is not restricted under the Collective Agreement. However, the arrangements themselves and the manner in which Manulife has carried out the administrative tasks remain in issue and will be addressed below.

2. *Did RTA violate the Personal Information Protection Act, SBC 2003, c. 63 ("PIPA") by requiring employees to release personal information directly to Manulife?*

Union:

The Union submits that an employer may share lawfully collected personal information with another person acting on its behalf, but only where information is shared solely for the purpose for which it was collected and to assist the work being performed on behalf of the employer. It also argues that employees cannot be compelled to release their information directly to a third party, where the employer does not retain control over the information and the employee has no way to enforce their rights vis-a-vis the third party. Such an approach amounts to a statutory violation and is inconsistent with employee rights under the Collective Agreement (see: *REHN Enterprises Ltd. and United Steelworkers, Local 1- 1937*, [2018] BCCAAA No. 89 (Coleman)). It says privacy protections are distinguishable from principles relating to public access to information and maintains that a more purposive and narrow interpretation of "control" over information should be applied.

The Union argues that, through its arrangements with Manulife, OHD has lost control of employee personal information and *PIPA* protections have been undermined. It says this loss of control is evidenced in a number of ways, including: Manulife requires the release of personal information for broader purposes (not simply to administer DIP claim eligibility); Manulife gathers information independently of RTA; Manulife maintains and retains its own files further to its own policies and procedures (which may governed by laws in other jurisdictions); Manulife files do not form part of OHD's file and double authorization is required for it to share information with OHD (i.e., RTA cannot obtain information without additional employee consent); Manulife has the discretion to use and share information with subcontractors (i.e., RTA does not control who can access Manulife files); and, Manulife is not an agent of RTA. Thus, it argues that Manulife has care and custody of its files containing RTA employee information, yet employees have no contractual relationship with or recourse against Manulife.

Further, it maintains that, while an individual could voluntarily agree to release their information, compelling authorization under threat of withholding benefits does not

amount to freely given consent. It says obtaining consent in this manner is not lawful or valid, particularly given the breadth of Manulife authorization.

RTA

RTA submits that it is common, lawful and permissible for employers to use third parties to assist in benefits administration and to require employees to release personal information to the third party for that purpose. It says no personal information was disclosed to or collected and used by Manulife without consent. Employees were not required to consent under threat of discipline; rather, they could choose to consent to providing Manulife with the required information. Withholding consent could have impacted entitlement to DIP benefits, but that did not occur during the period Manulife was used.

RTA notes that an organization can collect employee personal information without consent where the collection, use or disclosure is reasonable for the purposes of establishing, managing or terminating an employment relationship (see: sections 13, 16 and 19 of *PIPA*). Further, an organization may collect, use and disclose personal information on behalf of another organization without consent, in specific circumstances (see: sections 12(2), 15(2) and 18(2) of *PIPA*). Where an employee provides an employer with medical information for the purposes of accessing a benefit, the employer may disclose it to a third party benefits administrator without the employee's consent. Thus, RTA properly and reasonably required employees to consent to provide information directly to Manulife.

The Employer argues that *REHN, supra* was wrongly decided. It says that where Manulife stands in the shoes of RTA, the Employer remains accountable for Manulife's actions under the Collective Agreement (see: *Revera, supra*). Further, it argues that RTA is in control of employee medical information and is bound by its obligations under *PIPA*. Noting "control" is distinct from "custody", it submits an organization need not have custody for personal information to be under its control (see: sections 4(2) and 34 of *PIPA*; *School District No. 63,* OIPC Order 04-19; *Bull, Housser & Tupper,* OIPC Order 05-02). Here, Manulife collects information for OHD to assist with DIP administration and discloses the information back to OHD, further to the dual consent in the Employee Declaration. This is done pursuant to the General AMS Contract that specifically contemplates RTA has legal control of the

employee's personal information (see: Article 9.1 Confidentiality). Manulife has its own policies and training to ensure security, privacy and appropriate file retention.

Decision

As noted in *RTA (Fleming), supra,* OHD requires the provision of medical information to assess eligibility for DIP benefits. An employee may choose to consent to the provision of medical information or not. If they do not consent, their decision may impact their ability to receive DIP benefits under the Collective Agreement (see: *Telus, supra*). However, the Union says the arrangements here are inconsistent with the requirements established in *PIPA* relating to the collection, use, disclosure, and protection of personal information. Thus, an examination of the legislation is required.

Where the provision of medical information is in issue, the need to balance an individual's right to privacy and the employer's need to manage the workplace is triggered. This is generally reflected in the purposes of *PIPA* (see: section 2):

> The purpose of this Act is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of individuals to protect their personal information and the need of organizations to collect, use and or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances

Sections 4(1) and 4(2) of *PIPA* speak to compliance obligations:

> (1) In meeting its responsibilities under this Act, an organization must consider what a reasonable person would consider appropriate in the circumstances.
>
> (2) An organization is responsible for personal information under its control, including personal information that is not in the custody of the organization. …

Section 12(2) of *PIPA* addresses the collection of personal information by a third party service provider and provides that:

> An organization may collect personal information from or on behalf of another organization without consent of the individual to whom the information relates, if
>
> (a) the individual previously consented to the collection of the personal information by the other organization, and
>
> (b) the personal information is disclosed to or collected by the organization solely
>
> (i) for the purposes for which the information was previously collected, and
>
> (ii) to assist that organization to carry out work on behalf of the other organization.

Sections 15(2) and 18(2) of *PIPA* are equivalent provisions relating to the use and disclosure of personal information by another organization, without consent.

Section 34 of *PIPA* addresses the protection of personal information:

> An organization must protect personal information in its custody or under its control by making reasonable security arrangements to prevent unauthorized access, collection, use, disclosure, copying, modification or disposal or similar risks.

First, I note that section 2 of *PIPA* expressly recognizes both the need to balance employee privacy rights and an organization's need to collect, use and disclose personal information for reasonable purposes. It also allows for the collection, use and disclosure of personal information by a third party in specific circumstances. Thus, further to *PIPA,* it appears Manulife can collect, use and disclose personal information if the individual previously consented to its collection, use or disclosure by RTA, and the information was collected, used or disclosed solely for the identified purposes and to assist in carrying out work on behalf of the Employer (see: section 12(2), 15(2) and 18(2) *PIPA*).

However, the Union alleges that RTA has lost control over the employee personal information, given the arrangements with Manulife. It says this is inconsistent with RTA's obligations under *PIPA* and removes the ability of the Union and employees to address privacy concerns. There is also a dispute as to whether Manulife collects, uses and discloses information solely for the purposes of the DIP. I will address that second issue in the context of the scope of the Employee Declaration below.

The issue of control over personal information vis-a-vis *PIPA* requirements was considered in *REHN, supra*. In that case, Arbitrator Coleman addressed a situation where an employee was required to sign a release and disclose medical information to a third party retained by the employer to handle sick leave administration. He accepted that the union could grieve the actions of the third party, given its actions were subject to the collective agreement as though they were taken by the employer, itself. However, he held that the employer's lack of custody and control of the information when it was furnished directly to the third party was problematic in terms of *PIPA* obligations and the ability of employees and the Union to hold the employer accountable for the security of information. His commented as follows (at paras. 33-34, 38):

> The wording of these sections of PIPA indicates that the Employer's responsibility and accountability for the protection of its employees' medical information collected by GTC,

> depends on whether they, Rehn, can be considered to be in "control" of the information regardless of whether they have "custody" of the information. I read sections 4(2) and 34 in combination to mean that if Rehn, as the employer, still had "control" of individuals' personal information despite the fact that Global Total Care had custody, Rehn would be responsible for the protection of that information with "reasonable security arrangements"; and given the collective agreement in place, could be held accountable by employees through the Union. Section 4(2) would create an obligation on Rehn, as the organization with "control" of the information, to ensure that GTC has proper protections and security, including minimizing access and dispersal.
>
> It is an extraordinary circumstance to require a person to share personal medical information with a party with whom they have no direct relationship; and I must presume that it is no accident that the legislature made specific provision for the original organization in control of the information--and with whom the person does have a direct relationship--to share that information (sec. 12(2) for defined purposes, but at the same time requiring the original organization to retain responsibility for security (secs. 4 and 34). Under that regimen, if Rehn was the initial recipient of the information, it could be held accountable for that security, through the collective agreement. But Rehn seeks to have the employee communicate directly with GTC, cutting Rehn out of the loop entirely. The latter would never have custody of the individual's personal medical information, and thereby, in my view, would not, in any reasonable interpretation of the Act, be considered to be in "control" of the information. Mr. Hart argues that a finding that Rehn is jointly and severally liable for GTC's actions is sufficient. I respectfully disagree. The combined wording of PIPA secs. 12(2), 4 and 34 take Rehn out of the picture as far as PIPA is concerned. If GTC, which has both control and custody of the information, is not accountable to Rehn for the security of the information, it necessarily follows that Rehn cannot be held accountable by the Union.
>
> ...
>
> I find that, while GTC is Rehn's agent to the extent that Rehn can be held accountable for actions taken by GTC in a labour relations sense and under the collective agreement as far as that goes, the provisions of PIPA indicate that Rehn would have no right to control or supervise the security of the information (as per PIPA secs. 4 and 34) if it was collected directly by GTC, thereby effectively removing dispute mechanisms available thought *[sic]* the collective agreement. There is a distinction between GTC's actions towards an employee where Rehn retains vicarious responsibility, and GTC's treatment of the personal medical information of an employee, where Rehn was never in the loop. The wording of PIPA makes that distinction clear. In the result, I find that Rehn employees cannot be obligated to hand over their medical information directly to GTC.

RTA points to *Bull, Housser & Tupper, supra* and *School District No. 63, supra* to analyze the issue of "control". In response, the Union says the issue should be more narrowly construed to be consistent with the protective nature of *PIPA*.

The issue of control over the personal information (even if it does not have custody) must be considered in the context of the legislative purpose (i.e., balancing the privacy interests of the individual and needs of the organization) and on the specific facts of the case (see: *Bull Housser & Tupper, supra*). I agree that the arrangements with

Manulife must be considered in terms of RTA's obligations to protect personal information under *PIPA*. As a general proposition, it would undermine *PIPA*s legislative purpose if an organization that has an obligation to protect personal information can avoid that obligation simply by using a third party operating on its behalf.

However, the contractual arrangements and the practices of RTA, OHD and Manulife appear to differ substantially from those described in *REHN, supra*. In this case, the General AMS Contract addresses confidentiality and the ownership of employee information. First, "Employee Confidential Information" is defined and includes "all information or data whether in printed, electronic, magnetic, optical or other material or tangible form, respecting an Employee that is provided to or becomes known to Manulife under or in connection with this Agreement, or that is provided to Manulife by an Employee under or in connection with this Agreement", subject to certain exceptions that are not relevant here. Under Article 4.3(b), Manulife covenants to "protect the privacy and confidentiality of the Employer's Confidential Information, and Employees' health, medical, employment and personal information as required by law and as set out in this Agreement". Under Article 5.1, Manulife may use subcontractors, but must use reasonable care in their selection and require they agree to be bound by the same terms and conditions as Manulife with respect to the use and handling of confidential information. Article 6.1 indicates that Manulife and RTA are not agents or employees of the other and each cannot incur obligations on behalf of the other, except as provided under the General AMS Contract or as agreed.

Article 9 addresses obligations respecting confidentiality, ownership, use, and disclosure. It provides, in part:

> 9.1 **Confidentiality**
>
> (a) The parties agree that, under this Agreement Manulife is acting as a service provider, and not an insurer, carrying out a role in regard to certain aspects of the Plan, that the Employer could carry out itself directly if it wished to do so. Where the Employer determines that it may require access to any Employee Confidential Information, for the purpose of achieving an Outcome under this Agreement, then it shall be the Employer's obligation to ensure that Employees have expressly consented to allow any of their personal information held by Manulife in regard to their Claim, Case or the Plan, to be shared by Manulife with the Employer.
>
> (b) Manulife acknowledges that all Employee Confidential Information which it may receive from any source as a result of it performing the Services under this Agreement, it does so as a service provider for the Employer and, subject to Article 9.1(a) and the applicable privacy

legislation, the Employer shall be allowed undisputed complete access to any and all such Employee Confidential Information upon request.

(c) Manulife acknowledges the confidential and sensitive nature of the Confidential Information of the Employer and agrees that it will take any and all appropriate steps within its organization to ensure that its confidentiality is known and strictly maintained by its Representatives, employees and agents, and to ensure that it is safeguarded in accordance with mutually agreed upon security standards and this Agreement. Manulife further acknowledges that, subject to Article 9.1(a), Employee Confidential Information shall form part of the Confidential Information of the Employer, except where prohibited by law.

…

(e) Notwithstanding anything to the contrary in this Agreement, the parties shall at all times comply with their respective obligations under the applicable federal privacy law ("PIPEDA") or provincial privacy law. The parties represent, agree and acknowledge that their compliance with the terms of this Agreement including Schedule "A" shall always be subject to PIPEDA or the applicable provincial privacy law, whichever the case may be.

9.2 **Ownership** Manulife agrees that the Confidential Information of the Employer is and shall remain the exclusive property of the Employer. …

9.3 **Restricted Use** Manulife shall utilize the Confidential Information of the Employer only for the purpose of the Services being provided pursuant to this Agreement and except as contemplated by this Agreement shall not employ the Confidential Information of the Employer in any other manner, without the express written consent of the Employer, or as may be required by law. …

9.4 **Restricted Disclosure**

(a) Manulife shall use the same efforts as Manulife normally employs in protecting its own information of similar business importance and cause all of its officers, employees, Representatives and agents to treat and protect the Confidential Information of the Employer in the same manner. The Confidential Information of the Employer may only be disclosed to such officers, employees, and agents of Manulife whose knowledge of the Confidential Information of the Employer is required for Manulife to perform the services contemplated by this Agreement. In the event of any breach of Manulife's obligations concerning the use and handling of Confidential Information of the Employer, Manulife shall notify the Employer of such breach and work with the Employer to remedy such breach and prevent any further unauthorized use or disclosure of Confidential Information of the Employer. …

[my emphasis]

Thus, the General AMS Contract provides that Employee Confidential Information forms part of the Confidential Information of the Employer, which is the exclusive property of RTA. Further, RTA has "undisputed and complete" access to that Employee Confidential Information (subject to obtaining employee consent). The

Agreement goes on to provide that the parties will respect all applicable provincial privacy laws. Manulife is required to take all steps to maintain and protect the confidentiality of the Confidential Information of the Employer, including only utilizing it to provide the services and only disclosing it to Manulife officers, agents and employees as required to perform those services.

The practices of information collection, use and disclosure between OHD and Manulife are also instructive. On the evidence, OHD obtains the DIP Application and the Physician's Report. That information is provided to Manulife after the Employee Declaration is signed. The direct collection of personal information from employees by Manulife occurs during the regular case management follow-up and on the request of OHD. The information received is discussed in weekly case management meetings. OHD can ask for disclosure of information received by Manulife. The Employee Declaration dual consent ensures the employee information can be shared by Manulife with OHD.

The *REHN, supra* case was decided on an agreed statement of facts. The arrangements between the service provider and the employer were not analyzed. However, it appears that Arbitrator Coleman's main concern was the employer was "out of the loop" with respect to custody and, by implication, control of employee medical information. In my view, the facts are distinguishable here.

While information may be collected directly by Manulife and kept in its files further to its internal policies, OHD requests follow-up or specific information as necessary. RTA owns the information, is legal entitled to access it in its entirety and OHD is provided with the information it needs to make DIP decisions. On the evidence, the requirement that an employee provide consent for Manulife to release information to OHD is a function of their roles vis-à-vis each other and relates specifically to the decision-making authority and involvement of OHD. As Ms. Yuen testified, this unique relationship resulted in the Employee Declaration being amended for RTA Kitimat. Further, Manulife is contractually required to protect the information and comply with the applicable privacy legislation. In the event of a breach, it is obligated to work with RTA to remedy and prevent further concerns. Thus, when these specific arrangements are considered, the same concerns expressed in *REHN, supra* respecting a loss of "control" over information do not arise here.

The terms of the General AMS Contract and the case management practices support the conclusion that RTA has sufficient control of the personal information for the purposes of *PIPA,* including sections 4 and 34.

Yet, RTA and Manulife must be held to the appropriate standards for the protection of personal information. As noted in *Revera, supra* (at paras 12-14):

> By definition, the contracting out of sick leave or disability management plans places into the hands of a third party employees' confidential medical information. And, experience suggests, claims processors and adjudicators at most such institutions would not typically possess the kinds of medical qualifications argued for by the Union here. They would rely on others for that expertise. In our view, that is not by itself unreasonable.
>
> What is important is that employees of the third party be held to the highest standards of care and confidence in the handling of employees' medical information and that it be neither reviewed nor disseminated more broadly than is absolutely necessary to fulfill the purpose for which it was obtained. The third party, no less than the Employer, must have strict confidentiality policies and practices in place to ensure that those obligations are met.
>
> This requirement, it should be understood, is no less important to the Employer than it is to the employees because, as the case law also establishes, the third party stands in the shoes of the Employer for all such purposes: *Hamilton Health Sciences Corp. v. O.N.A.*, *supra.* Any breach of confidentiality by the third party is a breach for which the Employer may be held accountable under the terms of the collective agreement. This means that the Employer has a real interest in ensuring that confidentiality is maintained by the third party and that employees are aware of it.

Having considered the evidence here, it has not been established that those protections fall short, with one exception. I note that the General AMS Contract does not address the retention period for files that contain RTA employee's personal information. Article 8.7 of the General AMS Contract provides for the return of information to RTA, but also provides that Manulife "may retain copies of those portions of the Confidential Information of the Employer such as Claim files and other documents it requires for its records at its own cost." The evidence is that Manulife retains file information for 15 years after the file is closed. As will be discussed further below, the retention of personal information is a matter that is addressed in section 35 of *PIPA.* The Employer concedes it is an issue that requires further review. It is also an issue that must be considered in relation to information retained by Manulife, when they stand in the shoes of RTA and collect employee personal information for AMS.

3. Is RTA estopped from requiring employees to release information to Manulife?

Union

Even if RTA has the right to make arrangements with Manulife, the Union argues it is estopped from doing so. It says it reasonably relied on a set of circumstances that amounted to an unequivocal representation that RTA would not impose a third party service provider in relation to the DIP. These circumstances include: the unique words negotiated by the parties in the Collective Agreement providing for the DIP process and role of OHD; RTA's silence (i.e., at the JBC and in bargaining); and, RTA's conduct (i.e., in recent arbitration and OHD's historical practices). The Union submits it reasonably relied on RTA's representation to its detriment as the arrangements were imposed, without notice and without the Union having an opportunity to bargain changes to the Collective Agreement. In this situation, it would be inequitable to allow RTA to proceed with the unilaterally-made arrangements with Manulife (see: *ICBC and OPEIU, Local 378*, [2002] BCCAAA No. 107 (Hall); *Nor-Man Regional Health Authority Inc.*, [2011] 3 SCR 616).

RTA

The Employer submits that the elements of estoppel have not been established (see: *West Fraser Mills Ltd.*, [2006] BCLRBD No. 199; *Victoria Times Colonist and CWA Canada*, [2010] BCCAAA No. 200 (Sullivan)). It notes that bargaining concluded in July 2017, while the recommendation to utilize Manulife at RTA Kitimat was made in March 2018. In any event, there was no discussion in bargaining or at the JBC respecting third party service providers for DIP administration. Nor, is there evidence that RTA represented it would not utilize a third party, particularly given its long-standing practice of using independent contractors in OHD (without negotiation with or consent from the Union). The Union did not raise the topic and RTA's silence cannot be reasonably relied upon as an unequivocal representation that OHD would continue to administer the DIP without assistance.

Decision

In *ICBC, supra*, Arbitrator Hall succinctly set out the applicable principles and elements of the modern doctrine of estoppel (at para. 40):

> The purpose of the modern doctrine is to avoid inequitable detriment. An estoppel may arise where: (a) intentionally or not, one party has unequivocally represented that it will not

> rely on its legal rights; (b) the second party has relied on the representation; and (c) the second party would suffer real harm or detriment if the first party were allowed to change its position. The requirement of unequivocal representation or conduct is a question of fact, and may arise from silence where the circumstances create an obligation to speak out. The notion of reliance must be assessed from the perspective of the party raising the estoppel. In the labour relations context, the element of detriment may be satisfied by a lost opportunity to negotiate: Versatile Pacific Shipyards, supra, at pages 270-71. See more generally Re Abitibi Consolidated Inc. and I.W.A. Canada, Local 1-424 (2000), 91 L.A.C. (4th) 21 (Blasina), at page 35.

Thus, the issue of whether RTA made an unequivocal representation to the Union that it would not use a third party service provider in relation to the DIP is a question of fact. As noted above, I do not find the extrinsic evidence respecting the practice of using contractors as integrated service providers within OHD assists here given the different external arrangements fashioned with Manulife.

However, I do not find the evidence supports the conclusion that RTA made an unequivocal representation as suggested by the Union or that the Union reasonably relied on the circumstances to its detriment. While there were planning discussions in 2017, the recommendation by Ms. Lapointe to enter arrangements with Manulife was not made until March 2018. It was established that the parties discussed absenteeism and coverage issues generally in 2017 bargaining; however, there was no evidence that they discussed topics related to the DIP, its administration, or the role of OHD. There was also no discussion of those issues at the JBC or the Joint Medical Placement Committee. I note the hearing that led to *RTA (Fleming), supra* occurred in the spring and summer of 2017 and that Award did not deal with type of arrangements that were later established with Manulife. Thus, in my view, this was not a situation where the issue was raised and it was reasonable to expect the Employer to respond, rather than remain silent (see: *West Fraser Mills, supra*).

The Union points to the long-standing role of OHD in relation to the DIP to say it has been unfairly misled by the Employer. However, the existence of a practice, on its own, is insufficient to establish an estoppel. That is because the practice may be an exercise of discretion, as opposed to an unequivocal representation that legal rights are being waived. It is not reasonable for a party to rely on a practice that is equivocal (see: *West Fraser Mills, supra; Victoria Times Colonist, supra*).

As noted above, it would likely have been more productive to labour relations if the Union had been provided with earlier notice so that some of the issues now in dispute

could have been proactively addressed. However, on the facts, it cannot be concluded there was an unequivocal representation (by words, conduct or silence) by RTA that it would not use a third party service provider to assist OHD with the DIP or that the Union reasonably relied on the circumstances to its detriment. Accordingly, the elements of estoppel have not been met.

4. *Is the authorization for the release of information to and the information sought by Manulife overly broad?*

Union

Even if it is permissible for RTA to require employees to disclose information directly to Manulife, the Union submits that the Employee Declaration is unlawful. It says the scope of the authorization is not limited to what is reasonably necessary for the decision being made and exceeds the information RTA would be permitted to collect. It maintains that the manner in which Manulife gathers information is not minimally invasive (see: *BCPSEA and BCTF*, [2002] BCCAAA No. 168 (Korbin) ("*BCPSEA (Korbin)*"); *BCPSEA and BCTF*, [2004] BCCAAA No, 177 (Taylor) ("*BCPSEA (Taylor)*"); *ICBC and COPE, Local 378*, [2010] BCCAAA No. 22 (Burke) ("*ICBC (Burke), supra"); HEABC and BCNU* [2006] BCCAAA No. 162 (Hickling) ("*HEABC (Hickling)*") *Complex Services Inc. and OPSEU, Local 278*, [2012] OLAA No. 409 (Surdykowski)).

The Union notes that the Employee Declaration is additional to the requirements in Article 37. It was developed by Manulife, further to its policies, and was not adopted from the DIP Application or negotiated with the Union. RTA does not dictate its terms (although it may attempt to negotiate changes with Manulife). As such, the Declaration is not under the parties' control and they cannot resolve any concerns between them.

On a general level, the Union submits that the Employee Declaration is overbroad and unreasonably intrusive for the routine administration of a DIP claim. It compels an open-ended authorization that is not limited to information that is reasonably necessary to justify an absence and determine eligibility. The information that will be reasonably necessary will depend on the circumstances of each claim; yet, the authorization allows Manulife full access to any personal information from any person for any "purposes" associated with providing AMS. It says RTA would not be

permitted to use this broad an authorization. Thus, the authorization is unlawful and indirectly permits Manulife to do what RTA cannot lawfully do directly.

Turning to the specifics of the Employee Declaration, Attending Physician's Statement and letters to treating physicians, the Union maintains that their scope and certain questions are inappropriate at the initial (and later) stages of a DIP claim. Areas of concern include access to and requests for: a primary and secondary medical diagnosis; details of treatment and adherence; history of illness/injury beyond the current absence; requests for testing results; details of complications and personal information (some which may be unrelated to the current absence); and, details about specialist referrals. These lead to the disclosure of irrelevant and unnecessary information that RTA is not entitled to. Further, it is improper to require authorization for an employer or third party to contact the employee's physician directly. The Union submits that the Manulife forms are unreasonable and their use amounts to a serious violation of employee privacy, particularly since consent was compelled by RTA under threat of withholding negotiated disability benefits.

The Union also submits that Manulife staff gathered additional and unnecessary personal information. Follow-up calls correlated with physician appointments; they explored details of medical visits and probed for personal and social information. The information was not limited to what was reasonably necessary for assessing DIP benefits entitlement. Information was noted in Manulife's files which are not accessible by the employee, RTA or the Union. It says AB's experience was not anomalous or unusual, but illustrative of Manulife's practices.

By comparison, the Union says the DIP Application includes an appropriately narrow authorization that is consistent with providing reasonably necessary information for initiating a DIP claim. The release on the Physician's Report is limited to the specific information on the form. If additional information is required, OHD obtains specific consent in a manner that is transparent and minimally intrusive, which allows employees or the Union to raise concerns. However, it notes that the Physician's Report requests information relating to a diagnosis and says the JBC should discuss any necessary changes to protect employee privacy.

RTA

The Employer argues that in *RTA (Fleming), supra* it was determined that the information sought in the Physician's Report, which was negotiated and relied upon, is reasonably necessary for the DIP. As such, the Union cannot now assert that form is overbroad. The parties have agreed that OHD is entitled to diagnostic and treatment information from the outset and this has been their long-standing practice. Thus, when Manulife steps into the shoes and acts on behalf of OHD, it is entitled to the same information.

RTA notes that employees continue to submit the DIP Application and the Physician's Report to OHD directly. Where absences exceed five working days, Manulife asks them to fill out the Employee Declaration. After that is signed, OHD discloses the Physician's Report to Manulife. Manulife may follow-up and request further medical information after consulting with and obtaining approval from OHD. It uses customizable templates for letters to treating physicians on a case-by-case basis. That additional medical information, generally, is not more than what was previously collected by OHD. RTA says the Manulife Attending Physician Statement is not and will not be utilized for bargaining unit employees, given duplication with the Physician's Report.

It also indicated the Employee Declaration has been updated and the current version will not be used. In any event, it submits the Declaration requires similar information to that in the DIP Application and the Physician's Report, plus certain new authorizations. It says Sections 1, 2 and 4 do not relate to sensitive information and are not overly intrusive. In Section 3, other than frequency of visits and type of practitioner, the information requested duplicates the Physician's Report and, thus, can be removed.

With respect to Section 5, RTA submits that certain acknowledgments and certifications are proper and have no detrimental impact on employee privacy (i.e., references to RTA referring the case to Manulife; Manulife is not responsible for benefits; certification of the truth of information; valid copies of the form; and, the availability of Manulife's privacy policy online). A second category of authorizations allow Manulife to collect, use and disclose personal information for the purposes of providing AMS, to assist with DIP administration, and to disclosure information back to OHD. It submits that these are reasonable and necessary for Manulife's

consultative role and for OHD to make informed decisions, noting the authorizations are limited to the information needed for the "Purposes" (i.e., DIP administration, audit, and the assessment/ investigation/management of the DIP claim). It says the authorizations should be interpreted in the context of the arbitral jurisprudence that limits RTA (and Manulife, as its agent) to information that is reasonably necessary in the circumstances of the case and the particular stage of the process.

With respect to AB's case, RTA notes the Employee Declaration was signed under protest. OHD directed Manulife to get updates on her diagnostic and treatment plan, whether she was able to return to modify duties and her ability to be accommodated at work. Manulife clarified information and followed up on her case in a timely manner, based on her appointment schedule. Manulife regularly discussed AB's claim with OHD and her claim was approved. At no point, were her benefits discontinued. It says this process was reasonably necessary for OHD to determine continued entitlement to DIP benefits and whether AB was medically able to return to work in an accommodated capacity.

Decision

Article 37 expressly references the DIP Application and a completed Physician's Report as requirements to apply for and receive DIP benefits. On the evidence, these documents continue to be submitted by employees to initiate a DIP claim. Where OHD triggers Manulife's involvement, employees are asked to complete the Employee Declaration. Thereafter, additional Manulife forms may be used (depending on the circumstances of the case). While the use of Manulife has been paused while this matter is adjudicated and it does not appear that any DIP claims have been denied for concerns relating to authorizations or forms, it was established that a refusal to complete Manulife forms could potentially impact an employee's DIP claim on the basis on "non-participation". At the time of hearing, a revised Employee Declaration was not yet been finalized.

In my view, the Union's general and specific concerns raised in relation to the Manulife forms and practices are legitimate. The requirement to balance employee privacy and RTA's operational needs is clearly established in the arbitral jurisprudence and the applicable privacy legislation. Generally, an employer is only entitled to collect the private medical information that is reasonably necessary for the specific stage of the inquiry. It must also approach the collection of personal information in

the least intrusive manner (see: *Telus, supra*; *BCPSEA (Korbin), supra*; *BCPSEA (Taylor), supra; ICBC (Burke), supra; HEABC (Hickling), supra).* For the purposes of this case, the Employer's own evidence is that Manulife is standing in the shoes and acting on behalf of OHD. In these circumstances, Manulife must be held to the same standard as RTA and must only collect reasonably necessary information in the least intrusive manner. Put another way, Manulife cannot request and gather more information than RTA would be entitled to lawfully access in the context of assessing DIP claims.

In *ICBC (Burke), supra* the propriety of a standard medical forms was addressed. Arbitrator Burke set out the following principles in terms of the scope and nature of information sought (at paras. 73-76):

> As expressed by the Employer and recognized by both arbitral and B.C. Labour Relations Board authority employers have a legitimate interest in reducing the impact of excessive absenteeism (see *Re Health Employers Association of B.C., supra*). Policies unilaterally introduced in respect of that however must take into account statutory obligations, be reasonably necessary and consistent with the collective agreement.
>
> It is also important to note as the Union says in interpreting the scope of medical information the Employer is entitled to under the collective agreement, the type of sick leave requested is an important consideration (*Health Employers' Association of British Columbia and British Columbia Nurses' Union*, *[2006] BCCAAA No. 162* (Hickling) at par. 42. Matters involving short term absences attract limited disclosure:
>
> > The matter before me relates to the appropriate form of doctor's certificate to be provided to the [employer] on the third day of illness. The [employer] submitted and I agree, that there is a continuum along which an employee's obligation to provide detailed medical information increases with the length of absence and/or complexity of accommodation required upon return to work. The matter before me is at the lowest end of disclosure along that continuum.
> >
> > *Brant Community Healthcare System and ONA, [2008] OLAA No. 116* (Harris) at para. 24
>
> While I agree with the Employer that this collective agreement recognizes the Employer's right to a variety of medical information in its administration of the sick leave plan, the issue in this case involves a standard form that will be used on a routine basis for all employees for short term illness or injury. Routine requests for medical information are limited to information which reasonably necessary for the administration sick leave benefits (*B.C. Public School Employers' Association (Korbin Award), supra* at par. 70; *British Columbia Public School Employers' Association v. British Columbia Teachers' Federation, [2004] BCCAAA No. 177* (Taylor Award) at para. 24). The focus is on information necessary to assist management in determining whether the illness or disability is *bona fide* and what impact it will have on the presence and attendance of the employee (*Victoria, supra*, cited in *B.C. Public School Employers' Association (Korbin Award), supra*, at para. 49).
>
> I have no hesitation in concluding more information is useful to the Employer in administering its sick leave policy and encouraging early return to work and accommodation initiatives. Indeed, it is evident the Employer has initiated wellness initiatives to prevent

> illness and assist employees who seek to maintain good health. The enhancement of these initiatives and the desire for an earlier return to work does not however override the recognition in the jurisprudence of the privacy of employee's medical information such that it must be considered "reasonably necessary" to justify the provision of that information under the *KVP* decision or indeed any analysis on this point. The arbitrator in *Brandt* and other cases have similarly commented to this effect; comments with which I agree. (See also *Health Employers' Association of B.C. and BCNU [2006] BCCAAA No. 162 9 (Hickling Award) at para. 43).*

Arbitrator Hickling commented on the notion of a continuum of disclosure in *HEABC (Hickling), supra* (at paras 42, 65):

> Even if there is no reason to suspect abuse, the nature and amount of detailed information about the medical condition of the claimant that the employer might reasonably require may depend on a variety of factors; e.g. the terms of the collective agreement; is it an initial determination of entitlement or an application for an extension? Is the projected absence short of long term? Does the application raise issues of accommodation or return to work on modified duties? A simple short form may be sufficient if there is no basis for doubting the legitimacy of a short-term illness. In the case of an extended leave, it may be reasonable to raise questions that might not be appropriate or necessary on the initial application. When the issues of fitness to return to work or of accommodation are appropriately raised, the acceptability of a medical certificate and of the doctor's assessment of functional limitations may depend on his level of knowledge of the job requirements. Follow-up questions may be necessary.
>
> …
>
> The stage of the inquiry was also recognized in West Coast Energy Inc. as a relevant factor, amongst others. Arbitrator Hall states, at p. 12:
>
> > The case law demonstrates that the extent to which an employer may be entitled to personal medical information depends on the circumstances. Relevant particulars include the stage of the inquiry (e.g. is the employee making an initial claim for sick leave or seeking extended coverage); who will have access to the information, and whether there is any term in the collective agreement which provides for the disclosure of medical information.
> >
> > The present grievances challenge the Employer's inquiry at the point where employees are making an initial [claim] for short-term disability benefits. Arbitrators have generally limited the type of medical information which employees must provide in these circumstances, and have almost universally held an employer is not entitled to know an employee's medical diagnosis. The authorities do not preclude a more intrusive investigation at a latter stage, going beyond the routine information, provided it to be justified on a case by case basis.

It must be remembered that the DIP is a short-term disability plan, offering wage loss benefits for a specified duration. The first assessment of a DIP claim relates to whether the employee is "disabled" for initial entitlement. If the absence is ongoing, assessment of continued eligibility may arise on a case-by-case basis. The amount of

information collected is informed by the stage of the inquiry. While information may be reasonably necessary in the context of an ongoing or lengthy absence, that does not mean that every absence and DIP claim would require the same scope and type of disclosure. In my view, the initial application for DIP benefits falls on the low end of this continuum of disclosure. The need for further information may arise, depending on the nature and length of absence and whether accommodation issues are in play.

On the DIP Application, the employee must specify: their name and address; the nature of disability (not a diagnosis); whether the absence is occupational or non-occupational; if injured, where and how it happened; and, the date of initial examination for the current absence. The employee must certify at the information they provide is true. The Physician's Report includes a small box with the following headings "Diagnosis, Subjective, Objective, and Plan (treatment)". The following information is also sought: whether the person is totally disabled from all work duties and, if so, as of what date; the date the worker can return to normal work; the date they can perform alternate work; if modified work is offered, the estimated duration of restrictions; and the date of the next appointment. Only if alternate work can be performed, is further information requested. The employee authorization states "I hereby authorize my physician to release to Rio Tinto Occupational Health Department the above information."

As both the Union and RTA pointed out, the parties negotiated Article 37 with specific reference to the DIP Application and Physician's Report and have lived with those documents for many years. It appears that the scope of those forms as historically used internally by OHD has not been seriously disputed. While the parties may choose to review and amend those forms at some point, this case is focussed on the arrangements with Manulife. As such, my analysis will focus on the current Manulife documentation.

To start, RTA's general assertion that Manulife seeks the same type of information as was previously sought by OHD is not determinative. Depending on the facts of a specific case, the information sought by OHD and/or Manulife may or may not be appropriate. Further, I reject the argument that Manulife's forms should be "interpreted" in a manner consistent with privacy law. The forms must be assessed on their face in terms of the scope and nature of the information that Manulife could access, if used. The Union and the employees are entitled to certainty about whether

the forms used on behalf of RTA are, in fact, lawful and appropriate. In my view, for both general and specific reasons, they are not.

Starting with the Employee Declaration, the Union has not taken issue with sections 1, 2 and 4. These include the employee's name, address, birthdate, etc.; whether the absence relates to an accident; description of job duties; and, the expected date of return to the job. However, Sections 3 and 5 are problematic. I will deal with them in reverse order.

Section 5 requires the employee to sign off on certification, agreement and authorization as follows:

> **I acknowledge** that my Employer has referred my case to Manulife for the purpose of providing Absence Management Consultation Services, and that Manulife is not responsible for providing benefits in relation to my current employment absence.
>
> **I certify** that the information provided by me in the course of Manulife's involvement in my case, and any further verbal or written statement provided by me in the future, is true and complete to the best of my knowledge.
>
> **I authorize** any person or organization who has personal information about me, including any employer, group plan administrator, health care professional, health care institution, pharmacy and any other medically-related facility, rehabilitation provider, insurer, administrators of government benefits or other benefit program, the Medical Information Bureau and investigative agency, to release my personal information to Manulife and/or its service providers for the purposes of plan administration, audit, and the assessment, investigation and management of my case, including, but not limited to independent medical assessments (all of the purposes being referred to herein, collectively, as the "Purposes") **I authorize** Manulife, its reinsurers and its service providers to collect, use, maintain and disclose to the persons or organizations listed above and/or to each other, any information needed for the Purposes.
>
> **I authorize** Manulife to share and discuss with my Employer information regarding my functional limitations, restrictions and obstacles to return to work for the purpose of confirming the anticipated duration of my functional limitations and/or my workplace absence, and assisting in my return to productive work.
>
> **I agree** that a photocopy or electronic version of this authorization shall be as valid as the original.
>
> **I understand** that Manulife's Privacy Policy and Privacy Information Package are available at www.manulife.ca/planmember, or from my Employer.
>
> **I understand** that any personal information provided to or collected by Manulife in accordance with this authorization, may be kept in a group life and/or disability benefits file. Access to my personal information will be limited to:
> • Manulife employees, representatives, reinsurers, and service providers in the performance of their jobs;
> • persons to whom I have granted access; and

> • persons authorized by law.
> I have the right to request access to the personal information in my file, and, where appropriate, to have any inaccurate information corrected.
>
> [Employee's signature] [Date signed (dd/mmm/yyyy)]
>
> **I authorize** Manulife to release to *Rio Tinto's medical centre:* any personal information gathered through the claim adjudication and rehabilitation process including, but not limited to, my diagnosis, all medical information, consultation reports, independent medical reports, and hospital records for the purposes of *supporting me through my absence and my return to work*.
>
> [Employee's signature] [Date signed (dd/mmm/yyyy)]
>
> [emphasis in original]

On a general level, I conclude Section 5 is unduly intrusive and does not appropriately balance an employee's right to privacy over their personal information. On a more micro level, certain paragraphs are not problematic, while others are particularly concerning. The acknowledgement that Manulife is providing AMS and is not responsible for providing benefits; the certification that the information provided is true; agreement that certain versions of the form are valid; and, confirmation that Manulife's privacy policy is available from Manulife (or RTA) are reasonable and appropriate. However, the scope of the third and fourth paragraphs of Section 5 extend beyond what could be characterized as authorization for reasonably necessary information to assess or assist in the administration of a DIP claim, particularly for initial applications pertaining to short term absence.

The third paragraph provides authorization for "any persons or organizations" who have personal information about the employee to release it to Manulife (or its service providers) to collect, use, maintain and disclose to "the persons or organizations" listed, with virtually no limitation. While the information is to be released for the defined "Purposes", those purposes are vague, broadly described and potentially extend far beyond the services that relate to the DIP.

This also creates a potential issue under *PIPA* given an organization may collect, use and disclose personal information from or on behalf of another organization if previous consent has been given and it is used "solely for the purposes for which the information was previously collected" (see: sections 12(2) and the equivalent sections in 15(2) and 18(2) of *PIPA*). This paragraph extends well beyond the consent contained in and scope of information captured by the DIP Application and the Physician's Report.

Under the fourth paragraph, Manulife can then share the information with RTA for the purposes of confirming the estimated duration of functional limitation and/or absence or assisting in the return to productive work. On the evidence, return to work facilitation is not being offered by Manulife at RTA Kitimat and other additional services may be provided on an ad hoc basis, depending on the nature of the case. Thus, while Manulife may offer additional services to RTA Kitimat under the General AMS Contract, that possibility is not a reasonable basis to support the invasive scope of this broad authorization for all claims.

The last paragraph of Section 5 allows for the disclosure of information back to OHD. That, in itself, is not problematic and may, in fact, be necessary to meet the requirements of the Collective Agreement and OHD's decision-making role. However, given the broad scope of information Manulife is authorized to collect, use and disclose in the third and fourth paragraphs, the disclosure back to OHD of "any information gathered through the claim adjudication and rehabilitation process… …for the purposes of supporting me through my absence and my return to work" is overly broad and may reach beyond what would be appropriate at the low end of the continuum of disclosure for the purposes of initiating a DIP claim for a short term absence. Again, this becomes particularly clear when the information sought in the DIP Application and Physician's Report is compared to the scope of disclosure contemplated in the Employee Declaration.

On the evidence, the arrangements with Manulife were made to assist with managing absenteeism and to offer additional "bandwidth" for OHD. Yet, "follow-up" could range from a general update on the employee's status (e.g., any change from what was described in the Physician Report, any change in estimated dates for return, the date of the next doctor appointment) to further specific or clarifying medical information to assess ongoing eligibility or fitness to return to work. The nature and scope of reasonably necessary information may change and must be assessed within the context and evolution of the particular case. The ability to collect further information may require additional consent from the employee. Accordingly, in the context of an initial DIP application, Section 5 amounts to a serious intrusion into employee privacy.

Section 3 seeks information about the doctors consulted for the present condition, including: the date the employee first sought medical attention for this condition; the frequency of visits; the date of next visit; the type of practitioner; diagnosis; and

specific treatment plan (medications, treatments, etc.). As RTA has indicated this section may no longer be necessary, it will suffice to briefly note certain issues with the current form of the Declaration. I note that similar issues may arise in relation to the nature and scope of information sought in the Manulife Attending Physician Statement (although it may not be in use for bargaining unit employees) and letters to treating physicians.

On the general arbitral jurisprudence relating to medical forms for short term absence, it is recognized that requesting the date an employee first sought medical attention for a condition (as opposed the absence in question), identifying the type of practitioner/specialist, and providing specific diagnostic and treatment details are not appropriate on a standard form, at least at the initial stages of a short-term absence. Again, the request for information must be reasonably necessary and minimally intrusive. Questions that lead to the disclosure of information relating to historical or ongoing health conditions may be irrelevant or overbroad (see: *ICBC (Burke), supra; HEABC (Hickling), supra*). In my view, these principles should be considered in relation to the forms used by Manulife on behalf on the Employer.

It has been concluded that RTA has the ability to engage Manulife to act on behalf of OHD and assist with the administration of DIP claims. However, it cannot do so in a manner that does not properly balance employee privacy rights. In these circumstances, Manulife is not entitled to gather more information than the Employer is permitted to collect for the particular stage of inquiry. Accordingly, a requirement of RTA (and/or Manulife, when acting on behalf of OHD) that employees sign the Employee Declaration, in its current form, is improper and amounts to a breach of privacy.

5. Retention of personal information

Union

The Union argues that the indefinite retention of medical information in DIP files is improper. Section 35(2) of *PIPA* requires that personal information be destroyed as soon as it is reasonable to assume that the purpose for which it was collected is no longer being served and when retention is no longer necessary for legal or business purposes (see: *KE Gostlin Enterprises Ltd.*, [2005] BCIPCD No. 18 ("*Gostlin*")).

It submits that RTA has not justified ongoing retention, has no file retention review process, and retains medical information indefinitely in breach of the law. The sensitivity of the information weighs in favour of its prompt destruction, particularly given the purpose for collection is no longer being served after a DIP claim is closed. Later occupational disease claims are not typical and information about occupational disease is unrelated to DIP claims. The possibility of later accommodation or recurring disability (addressed in Article 37.07) is an insufficient basis for retention.

The Union says files should be destroyed one year after closing the DIP claim, noting that period is beyond the timeframe for filing grievances. Alternatively, files should be reviewed after one year and only information that is demonstrably necessary for an ongoing business or legal purpose should be retained.

RTA

The Employer agrees the indefinite retention of DIP documentation is not permissible or appropriate. It notes that section 35 of *PIPA* provides a one year minimum period for retention, but there is no statutory maximum. It says there is no "one size fits all" and retention periods must balance the risks associated with prolonged retention against the risks of premature destruction (see: *Gostlin, supra*; Barbara von Tigerstrom, *Information and Privacy Law in Canada* (Toronto: Irwin Law, 2020) at 372: *Acosta Canada Corporation*, 2017 CanLII 29250 (AB OIPC)).

RTA submits that, while sensitive personal information is retained by OHD, it is kept secure and retained for the purposes of DIP administration, fitness for work, accommodation assessment, and further to legal limitation periods and the professional obligations of OHD representatives. It notes the information may be relevant to future claims (e.g., WorkSafeBC claims and continuing disabilities) (see: *Rio Tinto Alcan Inc. and Unifor, Local 2301*, [2020] BCCAAA No. 20 (Sullivan)). It says it is committed to preparing a retention schedule that complies with its obligations under *PIPA*, but maintains a one-year retention period is not appropriate when all factors and risks are considered and balanced.

Decision

Section 35 of *PIPA* addresses the retention of personal information as follows:

> 35(1) Despite subsection (2), if an organization uses an individual's personal information to make a decision that directly affects the individual, the organization must retain that

> information for at least one year after using it so that the individual has a reasonable opportunity to obtain access to it.
>
> (2) An organization must destroy its documents containing personal information, or remove the means by which the personal information can be associated with particular individuals, as soon as it is reasonable to assume that
>
> (a) the purpose for which that personal information was collected is no longer being served by retention of the personal information, and
>
> (b) retention is no longer necessary for legal or business purposes.

This provision was addressed in *Gostlin, supra* (at paras 99-101):

> …The only question is whether the organization is required to destroy personal information when it is "reasonable to assume" that the purpose for which the information was collected is no longer being served by its retention and further that retention of the information is no longer necessary "for legal or business purposes".
>
> In considering this issue, it is appropriate to take into account the nature and extent of the personal information involved, any applicable legal requirements (such as statutory limitation periods for civil lawsuits) and the business purposes relating to retention of the personal information.
>
> The personal information involved here is not, as I have already noted, generally of a sensitive nature. Its permanent retention is not, however, justified on that basis alone. While I acknowledge the personal information is useful to detect possible patterns of fraudulent activity, I am not persuaded it is reasonable to assume that this purpose will always continue to be served, such that permanent retention is permitted under s. 35(2)(a).

On the face of the provision, the one year period for retention is a minimum, not a maximum, that provides an individual with an opportunity to access personal information that was used to make a decision. Yet, there is also a statutory obligation to destroy personal information where the purpose of collection is not being served and retention is no longer necessary for legal or business purposes. The Employer has conceded it needs to review this issue. I agree and conclude OHD's indefinite retention of files is improper.

The files contain highly sensitive personal information, which weighs in favour of limited retention. The information is collected for the purpose of managing absences and claims for DIP benefits, but could also relate to issues such as recurring disability, accommodation, etc. RTA has pointed out that statutory and professional retention requirements may apply. Indeed, there may be a number of relevant factors to balance in a decision to retain or destroy, depending on the nature of the information in the file(s). As such, it would not be appropriate to impose a specific retention period, based on the information before me at this time.

It is, however, necessary for the Employer to establish a file review procedure and address the retention issue. This should be done after genuine consultation with the Union that includes a full opportunity for the Union to provide input respecting employee privacy rights and any specific concerns. The goal is to balance privacy interests and RTA's business and legal purposes. The sensitivity of the information is a significant factor. Retention should not continue if it is "reasonable to assume" that the purpose for collection is no longer being served and retention is no longer necessary for legal or business purposes.

The establishment of the file review procedure should be completed within six months of the date of this Award, subject to the parties' agreement otherwise. To provide some guidance, it would be appropriate for the procedure to address: steps and schedules for ongoing file review; factors to be considered for retention or destruction; retention timeframes; and, manner of destruction. This is not an exhaustive list. Steps to protect confidential information and maintain the separation between OHD and other RTA operations should be taken throughout the establishment of the file review procedure and during its implementation.

Once the procedure is established, a review of all files currently retained by OHD should be undertaken. That review should be completed within twelve months, subject to any agreement between the parties to a longer period. The Union should be advised when the review process of retained files has started and when it is complete.

I retain jurisdiction to address disputes respecting the establishment or terms of the file review procedure, but not its application to particular files.

I have noted above that file retention has not been specifically addressed in the context of the arrangements with Manulife. If Manulife is to step into the shoes of OHD and collect personal information, consistent arrangements respecting file retention by Manulife will also be necessary.

6. Remedy

Union

Given the circumstances of this case and the intrinsic value of the rights involved, the Union seeks a variety of damages for the Union and employees for non-monetary loss (see: *Polymer Corp. and OCTW*, [1959] OLAA No. 1 (Laskin); *Unifor Vancouver Container*

Truckers Assn and Aheer Transportation, [2017] BCCAAA No. 38 (Dorsey); *West Park Healthcare Center and SEIU, Local 1.ON*, [2005] OLAA No. 780 (Charney); *Green Grove Foods Corp. and UFCW, Local 175*, [2012] OLAA No. 156 (Craven); *Toronto Police Services Board and Toronto Police Assn*, [2008] OLAA No. 479 (Tacon); *Lindsay Hutchinson, et al and Government of Yukon*, [2018] YTLRD 366-YG-31 (Love); *BCPSEA (Taylor), supra*).

It submits the rights of the Union and its members have been breached in a manner that is seriousness, pre-meditated, persistent and ongoing. RTA's unilateral changes to the administration of the DIP were made without consultation with the Union or consideration of the Collective Agreement. This has affected the Union's ability to represent its members and the employees' representational rights have been denied. The Union's concerns were ignored until February 2020. Accordingly, it seeks the following damage awards: $25,000 to the Union for injury to its reputation and breach of Collective Agreement rights; $10,000 to AB for breach of privacy; $5,000 to all other individual employees who were forced to authorize the release of information to Manulife; $500 to each employee who has had their file improperly retained by OHD; $250 for all other employees to redress the breach of their Collective Agreement rights and the interference with the Union's representation.

RTA

The Employer submits that declaratory relief is sufficient to allow the parties to move forward with a better understanding of their rights and obligations. It notes damages are meant to be compensatory. Where there is no monetary loss, they should only be awarded in exceptional circumstances where it is necessary to achieve a sound labour relations purpose such as future compliance (see: *Lilydale and UFCW Local 1518*, 2013 CanLII 77054 (Kinzie); *Revera, supra*: *Columbia Forest Products and USW, Local 1-2010*, 2017 CanLII 66076 (Gedalof)).

RTA says it exercised what it understood were its management rights and temporarily paused the use of Manulife on a without prejudice basis until the Grievance was determined. There has been no monetary loss suffered; DIP benefits were not denied; and, no personal information was collected, used or disclosed without express written consent. This is not a case of repeated or deliberate breaches, misrepresentation, or egregious conduct. The Union was aware DIP records were retained and RTA is committed to establishing a retention practice.

Further, it says there is no basis to award damages broadly to any and all employees who submitted DIP claims, noting only two employees signed the Employee Declaration under protest. It points out there is only evidence relating to AB's DIP claim, noting she suffered no monetary loss and provided no medical evidence to support an award of general damages.

Decision

It is well-established that arbitrators have broad remedial authority and may award damages, in the appropriate circumstances, for a non-monetary loss. In *Aheer Transportation, supra*, Arbitrator Dorsey commented on these damages as follows (at paras. 259-260):

> The circumstances when damages are awarded for non-monetary loss are varied. The award can be payment to affected employees whose workload was impacted by a contravention of a collective agreement. It can be an award to the union. Illegal strikes have often resulted in awards of damages for monetary loss, including legal fees, and punitive damages payable to employers. In some situations, there is an award of damages to both affected employees and the union.
>
> In 2008, Arbitrator Tacon in Ontario summarized the evolution in arbitral remedial authority for non-monetary damages as follows:
>
> > The redress must be commensurate with the wrong and the purpose of relief is remedial not punitive. Monetary damages may be warranted for non-monetary losses if such is appropriate to ensure the breach of the collective agreement is adequately addressed and other remedies are insufficient. In some instances, where there have been persistent breaches of a particular provision of the collective agreement, damages may be suitable as a deterrent against future violations. Damages may be awarded to the union for violation of its rights under the collective agreement, independent of any contravention of the rights accruing to individual employees. A collective agreement is fundamentally different from an ordinary commercial contract or contract of employment and that gives rise to different approaches and policy considerations in addressing remedy.

Given the conclusions reached above, the Grievance succeeds in part. A breach of Article 37 was not established. Nor, is there support for the conclusion that the Union's ability to represent its members or the employees' representational rights have been undermined. However, it has been determined that the use of the Employee Declaration is overly intrusive and amounts to a breach of privacy. Additionally, RTA (and Manulife, where it stands in the shoes of the Employer) must address the retention issue.

This is an issue of first instance between these parties. While I accept that RTA exercised it management rights in the manner it believed was permissible, the Union,

once notified, immediately raised concerns. It was approximately one year before the arrangements were "paused" on a without prejudice basis. In that year, RTA (through Manulife) continued to require that employees sign the Employee Declaration, despite the Union repeatedly raising issues. While only two individuals signed expressly "under protest", I accept that others signed in the context that the Grievance was filed and they had been told a refusal to do so may impact their DIP benefits.

Non-monetary damages have been awarded where it was determined, on the facts of a particular case, that a declaration is insufficient. Deterrence may not be necessary here, given RTA's indication that a revised Declaration is in development. However, in my view, the failure to properly consider and balance employee privacy rights is a significant misstep that impacted bargaining unit members. The use of the Employee Declaration for approximately a year over the ongoing protests of the Union and employees warrants more than a declaration.

I am cognizant that this is a policy grievance. The Union indicated that AB's evidence was intended to be illustrative and provide the "human context" of the dispute. I have taken her general experience into account and accept that she felt she had to disclose unnecessary personal information rather than face potential consequences to DIP benefits at a vulnerable time. I am also prepared to accept that it is likely others were similarly impacted, although the experience will vary among individuals.

Damages are remedial, not punitive. They should be commensurate with the wrong. Considering all the circumstances, the privacy violation merits a damage award of $350.00 for each individual who was required to sign off on the Employee Declaration and, as a result, provided personal information to Manulife.

I am not prepared to award damages in relation to OHD's retention of files. There is no evidence that information was improperly disclosed, there may be reasons for ongoing retention in certain circumstances (which remain to be explored) and RTA has committed to taking steps to remedy the situation.

COSTS ISSUE:

The Union is seeking certain costs related to the adjournment that was granted in February 2020. Some background information is necessary to shed light on this issue.

The parties have a substantial number of outstanding grievances. They schedule a certain number of blocks of arbitration hearing dates on an annual basis, further to the Collective Agreement. Grievances are arbitrated in order of the "oldest first", unless they are discharge cases or cases that require further investigation (see: Article 7 and 07-LU-#1). The specific grievance(s) to be heard on a block of arbitration dates may not be identified until the next set of arbitration dates is approaching. The parties can agree to address a particular grievance differently or may agree to prioritize a grievance, in which case it "jumps the queue". It is undisputed that a number of blocks of arbitration dates have been cancelled. There is no evidence that one party has sought costs relating to an adjournment or cancellation from the other in the past.

This Grievance was not the oldest in the queue and would not have been heard in March 2020, unless the parties agreed to do so. Ultimately, there is a dispute about whether there was an agreement to arbitrate the Grievance in March 2020. Mr. McIlwrath and Christl McCracken, Human Resources Manager, testified to the events that occurred before the adjournment. The parties disagree on what occurred and the conclusions that should be drawn from the chronology. The following is a brief summary of the relevant evidence.

Ms. McCracken started work at RTA Kitimat in late 2019. Mr. Blackman, the previous Labour Relations Manager, left RTA in mid-January 2020 and she took over his duties. She was scheduled to go on vacation in early February 2020.

On February 3, 2020, she emailed the Union to ask what case it would be putting forward for the March arbitration dates. Mr. McIlwrath responded that the parties should have a "pre-arb" meeting to discuss the cases.

On February 4th, Ms. McCracken emailed Mr. McIlwrath about issues encompassed with the Grievance and noted "this is the one I'd like to talk about moving to the forefront (considering the implications)." Ms. McCracken testified that the Grievance was causing a lot of issues for OHD and she wanted it heard "in 2020, not 2023". In cross-examination, she maintained that she did not propose using the March arbitration dates, noting that if she wished to do so, she would have specified that.

In the afternoon of February 4th, Mr. McIlwrath and Ms. McCracken had two phone calls. He maintained that on one of those calls, she requested that the Grievance be moved to the forefront in March and he agreed. Ms. McCracken testified that they did not discuss what matters would be addressed at the March arbitration. She

indicated that she proposed moving the Grievance forward, but not that it be heard in March. She explained that there was only a month until the March arbitration dates; Mr. Blackman had just left RTA; she had only been with RTA for eight weeks and was about to go on vacation; the Human Resources Advisor was on maternity leave and about to return to work; the Senior Human Resources Advisor was on leave; and, the matter was complex and required significant follow-up with many individuals.

There was a Labour Management meeting on February 5th. Ms. McCracken testified that, after the meeting concluded, Mr. McIlwrath advised that the Union was putting the Grievance forward for the March arbitration. She responded that she would have to check with her team. Mr. McIlwrath testified that there was no discussion after the meeting. Ms. McCracken left for vacation, was out of the country until February 13th and travelled back to Kitimat on February 18th.

On February 14th, after talking to her team and individuals in Montreal, Ms. McCracken determined that RTA could not gather the necessary information and prepare in time for the March dates. She texted Mr. McIlwrath, indicating she would like to discuss moving the Grievance to arbitration dates in May. She viewed this as a collaborative attempt to move the Grievance forward in the queue. Mr. McIlwrath viewed this as a request to adjourn the Grievance from March to May.

They next discussed the matter by phone on February 18th. At that time, Ms. McCracken indicated that she was working on getting information from Montreal and there was no way to do the arbitration in March. She proposed they attempt to resolve some issues and hear anything remaining in May. Mr. McIlwrath indicated that he did not want to lose the dates and had no grievance to replace it at that point, so he did not want to move the Grievance to May. Mr. McIlwrath maintains that he pointed out to Ms. McCracken that she was the one who asked to move the Grievance to March and she did not deny or qualify his statement.

On February 21, 2020, RTA's counsel applied to adjourn the Grievance, taking the position that the Union was attempting to have it heard out on sequence contrary to the Collective Agreement. The Union opposed the application. That evening, on a phone call with Ms. McCracken, Mr. McIlwrath took exception to RTA's position that the Union was taking a grievance out of sequence. He maintained she did not deny it was RTA's request to hear the Grievance in March, but agreed she probably indicated the March dates were unworkable. Ms. McCracken agreed it was her idea to

hear the Grievance, but maintained that she advised him she did not propose the March arbitration dates. She again proposed hearing the Grievance in May.

On February 24th, they had another discussion and Ms. McCracken took the position she had not requested that the Grievance be heard in March.

On February 25th, the Employer agreed, on a without prejudice basis, to "pause" the arrangements with Manulife. It declined the Union's request that RTA cover the Union's cancellation and legal costs, given that was not the parties' practice.

The arbitration of the Grievance was adjourned to September 2020. The Union's lawyer was not available on the September dates and other counsel was retained to prepare for the case.

Union:

The Union acknowledges that the costs of arbitration are normally borne equally by the parties, but submits that such costs may be awarded in exceptional circumstances of bad faith or egregious conduct that results in an abuse of process (see: *BCAA and COPE, Local 378*, [2015] BCCAAA No. 69 (Fleming); *BC Hydro and Power Authority and IBEW Local 258*, [2016] BCCAAA No. 113 (Fleming); *Vibrant Health Products Inc and Boilermakers Local Lodge D400,* [2004] BCCAAA No. 127 (Moore); *Air Canada and CAEA* and *Patchogue Plymouth-Hawkesbury Mills and IWA, Local 91*, as cited in *North Bay Nugget and North Bay Newspaper Guild*, [2002] OLAA No. 965 (Baum)).

The Union submits that, on the balance of probabilities, RTA proposed that the Grievance be heard in March 2020 (see: *Faryna v. Chorny*, [1951] BCJ No. 152). On that basis, the Union invested resources to prepare the case. By the time the adjournment was raised, it was too late to advance another case to arbitration. It says this situation amounts to an abuse of process as RTA sought to have this matter heard and then applied for an adjournment, on a misrepresentation of the facts. Due to the re-scheduling of the hearing, it was necessary to reassign the file to other counsel. It maintains that this is an exceptional circumstance where RTA should bear the cost of the adjournment application, the adjournment, as well as the Union's legal fees paid to original counsel, up to and including the adjournment application.

RTA:

RTA submits that no costs should be awarded, arguing the costs of an arbitration proceeding are born equally by the parties, absent express Collective Agreement provisions to the contrary or exceptional circumstances (see: section 90 of the *Code*; *BC Hydro, supra*; *BCAA, supra*; *Vibrant Health Products, supra*).

The Employer notes that costs are not addressed in the Collective Agreement and there is no evidence that either party has sought costs in the past. It argues that, on the balance of probabilities, Ms. McCracken did not propose to arbitrate the Grievance in March; rather, she wanted to move the matter forward in the regular sequence of grievances. While there was a genuine miscommunication, this situation does not amount to the exceptional circumstances that justify awarding costs. In any event, it says an adjournment was required. Given the witnesses, the issues and the extensive evidence, there was insufficient time for either the Employer and the Union to properly prepare the case.

Decision:

Section 90(1) of the *Code* addresses the issue of fees and costs as follows:

> **90**(1) Unless the provision required under section 84 or 85 provides otherwise, each party to an arbitration under section 84, 85, 104 or 105 must bear
>
> (a) its own fees, expenses and costs,
>
> (b) the fees and expenses of a member of an arbitration board that is appointed by or on behalf of that party, and
>
> (c) equally the fees and expenses of the chair of the arbitration board or a single arbitrator, unless the arbitration board allows another person to participate in the hearing in which case the arbitration board may direct that a portion of the fees and expenses of the chair be borne by that person. …

Thus, the *Code* provides that a party is to bear their own costs and share equally in the fees and expenses of an arbitration board. While it has been recognized that costs may be awarded in exceptional circumstances, arbitrators are generally reluctant to do so given the potential impact on labour relations and the variety of circumstances that can arise and potentially affect arbitration hearings (see: *BC Hydro, supra*; *BCAA, supra*). As Arbitrator Moore explained in *Vibrant Health Products, supra* (at para. 35):

> The statutory standard with respect to fees and costs is set out in Section 90 of the *Code* and requires that they be borne equally by both parties absent a collective agreement provision to the contrary. The collective agreement between these parties is silent on the issue.

> Nonetheless, the authorities relied upon by the Union, and of particular significance those decisions of the BCLRB, appear to recognize a jurisdiction to award costs against a party. They do not, however, provide much assistance as to the principles upon which the exercise of this discretion should be based. Given that the arbitration system, unlike the civil court system, is by statute costs neutral, I am of the opinion that any departure from that neutrality by the exercise of a discretion should only occur in extraordinary circumstances. I am not persuaded that the circumstances of this case attract the exercise of that discretion. While earlier efforts to exchange documents and discussions between counsel would have identified the problem and may well have avoided the adjournment I cannot say that difficulties of this nature are uncommon in the informal process leading up to arbitration. Certainly counsel can be reasonably expected to act with reasonable diligence to try avoid such problems. However, the exigencies of arbitral practice are such that short of introducing a more formal procedural structure, which may have the undesirable effects of increasing the complexity and expense of the process, problems of this nature will arise. I decline to award costs against the Employer.

The Grievance is not the "oldest" in the queue. Ultimately, it appears that both parties recognized it would be useful to move the matter forward, given the nature of the dispute and its potential impact. Ms. McCracken wanted to bring the Grievance to the "forefront"; Mr. McIlwrath understood she was proposing to arbitrate in March. They have differing recollections of their various conversations. However, after assessing the evidence on the balance of probabilities, I am satisfied Ms. McIlwrath and Ms. McCracken simply misunderstood the intention of the other. They were each communicating from a different starting place. Ms. McCracken proposed moving the Grievance forward generally; Mr. McIlwrath heard that proposal in the context of the pending March arbitration dates and her recent inquiry about what case would be proceeding. Ms. McCracken was new to the position and had not fully investigated what was needed to prepare the case. She was about to go on vacation and did not have her Human Resources team available to her. While she took steps to assess whether it would be possible to use the March dates, she ultimately advised the Union it was not possible and proposed arbitrating in May. The Union did not agree. This misunderstanding was unfortunate. However, when viewed objectively, there is no evidence of bad faith, misrepresentation or an abuse of process.

In any event, even if there had been an agreement to arbitrate in March, RTA's application would have been a first request to adjourn when the full nature of a complex case became clear. Such adjournment applications are not uncommon, arise for a variety of reasons, and are routinely dealt with. Further, even with the adjournment, five hearing dates and written submissions were necessary to complete

the proceeding. Thus, the Grievance would not have been fully heard in March 2020 and continuation dates would have been necessary.

Given the circumstances, I do not find this to be an exceptional case that would attract an award of costs. Nor, would such an award serve to further good labour relations between the parties.

SUMMARY:

The Grievance succeeds, in part. The Manulife Employee Declaration is overbroad and the requirement that employees sign it amounts to a breach of privacy. This violation merits a damage award of $350.00 for each bargaining unit employee who was required to sign the Declaration and, as a result, provided personal information to Manulife.

Additionally, the Employer is directed to address its file retention practices as outlined above. The retention issue should also be addressed with Manulife, should it provide services in relation to the administration of the DIP.

It is so Ordered.

DATED in Vancouver, BC this 24th day of June, 2021.

JULIE NICHOLS, ARBITRATOR