Unifor Local 707A v SMS Equipment Inc., 2016 ABQB 162.

This was an application for judicial review of the decision of a single labour arbitrator regarding the interpretation of a collective agreement provision for a premium payment for work in a confined space. The clause in the agreement provided:

> Employees assigned to work in a confined space, or rotate work in a confined space as a member of a team, will be paid a premium of three dollars ($3.00) per hour for the time engaged in the work. The premium will not be paid to confined space monitors or any other members of the confined space team unless they actually work in the confined space or take a turn working in the confined space.

A heavy equipment technician was assigned to repair brakes in the axle box of a truck. He applied for and was denied the confined space premium for the 7 hours that he worked in the axle box.

The employee described the axle box as a space "the size of a washer box". He accessed the axle box via a trap door 30' in diameter. He had to work stooped over in the space, which was hot, loud, greasy and dusty. He had to wear hearing protection, a respirator, and other protective equipment including coveralls, boots, gloves, safety glasses, and a hard hat, in the high heat.

A monitor was assigned to observe the employee at work. The employee described the role of the monitor: "He is your monitor and if he has to leave you have to get out. If you have a heart attack, or bang your head and knock yourself out or suffocate, he is there to help. It is extremely hot so you might pass out. You need the other person there."

The collective agreement contains no definition of confined space.

The Occupational Health and Safety Code distinguishes between "restricted spaces" and "confined spaces" and requires employers to have Codes of Practice for Confined Space Entry. The OHSC defines restricted spaces as "enclosed or partially enclosed spaces not designed or intended for continuous human occupancy which have restricted, limited or impeded means of entry or exit" Restricted spaces become confined spaces" when (a) they are hazardous because of atmospheric conditions; (b) an activity conducted within or outside may affect the health and safety of workers inside; or (c) limited entry or exit may complicate first aid or rescue.

The Union's position is that, under either the ordinary meaning of the terms in the collective agreement or the OHSC definition the employee's work in the axle box was work in a confined space.

The employer's past practice was to pay the confined space premium only to welders, who work in restricted spaces including axle boxes. Welders work with supplied air in a team of 3 or 4 persons including a monitor, a runner and a bottle-watch (who monitors oxygen levels). The employer's position is that the confined space premium was intended to address this specific safety issue. There was no evidence that the Union had acquiesced to this practice. This interpretation was advanced by the employer during collective agreement negotiations but the union did not agree.

The Arbitrator upheld the employer's interpretation. He held that, as it was undefined, the term "confined space" was ambiguous and he could therefore have resort to extrinsic evidence as an interpretive aid. He did not rely on evidence regarding contract negotiations, given the lack of agreement. He relied on the past practice that the employer had paid the premium only to welders and the employer's documentation regarding this practice. The Arbitrator did not consider the definitions in the OHSC, as there was "sufficient detail in employer's policies and procedures, that an interpretation of the Code was not required."

The Court found that the Arbitrator's decision was unreasonable as he ignored the words of agreement (the agreement referred to space; the interpretation focused on specific type of employee or work done in the space). Further, the Arbitrator considered only extrinsic evidence from the employer's documentation, not OHSC definition even though the provision dealt with safety and both parties would have been aware of OHSC definition in that regard.

Process:

The judge said that in this case she felt that common sense strongly suggested that provision regarding confined space applied; she had a "gut feeling" from the beginning. She believed she would, however, have deferred to the Arbitrator's decision otherwise, if he had taken a balanced approach, but she felt he was not even-handed in considering only extrinsic evidence from the employer, and not even considering the OHSC definition. Also, part of the reasoning regarding the wording of the provision just didn't make sense. The definition adopted effectively varied the provision of the agreement by focusing on the type of employee or type or work done, rather than the space. Basically, to defer to the Arbitrator's decision that she felt was contrary to common sense, she wanted to <u>know</u> that he got there in the right way.