July 21, 2004

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Registrar **Delivered in Person**
Labour Relations Board
600 - 1066 West Hastings Street,
Vancouver, B.C.
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Attention: Lancie Chung, Case Administrator

Dear Sirs/Mesdames,

Re: Nicholas Hughes (Complainant) -and- Brewery, Winery and Distillery Workers' Union, Local 300 (Labatt Brewing Company) [Section 12(1) - Case No. 50392/04C]

Re: Michael Nunas (Complainant) -and- Brewery, Winery and Distillery Workers' Union, Local 300 (Brewers' Distributor Ltd.) [Section 12(1) - Case No. 50783/04C]

I am authorized to make this Reply on behalf of myself and Michael Nunas to the Union's and the Interested Parties' June 7, 2004 Response to the Complaints captioned above.

A - INTRODUCTION

I will first begin by Replying to the Union's introductory remarks concerning my Complaint. This will be followed by a similar Reply to the Union's remarks regards Mr. Nunas' Complaint.

(i) The Hughes Complaint

The Union states that its decision to treat my grievances as settled turned on my settling a dispute with the Employer's (Labatt) insurance carrier, Manufacturers Life Insurance Company (Manulife). The Union then goes on to characterize the *"passing mention"* I afford that settlement in my Complaint to the Board as *"remarkable."*

What truly is 'remarkable' is that this appears to be the first instance in which the Union has showed any interest whatsoever, in my relationship with Manulife, nor its conduct.

But the same must be said of the Union's interest in the crucial role played by the Employer, particularly during the period of time that encompassed the weeks and months immediately following the insurance carrier's initial disqualification of my claim for disability benefits on January 17, 1995 and continuing on through the Employer's termination of my employment July 21, 1995.

Because the Union showed absolutely no interest when, in 1995, I disclosed information to the Union's then Business Agent, Rick Sutherland indicating I had seen evidence of gross impropriety on the part of the Employer and its insurer Manulife with respect to their respective mishandling of my claim for disability benefits.

The Employer had engaged in acts of bad faith of the highest (or should that be, lowest?) order, when in the course of its administration of my claim for disability benefits, certain and specific requests, suggestions, and advisements

meant for me were communicated solely to the Employer, and not passed on to me.

The bad faith afforded me by the Employer and Manulife as they worked hand in hand to disrupt and ultimately disqualify my rightful claim for those disability benefits has never once been addressed by the Employer **nor** the Union in any meaningful way, despite numerous requests by me and opportunities afforded the parties to do so.

And whereas I have a great deal to say to the Board, as I have in the past, with respect to the mistreatment I was subjected to at the hands of **both** the Employer and Manulife, I offer my limited concurrence with Mr. Glavin that a Complaint under *Section 12* of *the Labour Code* is not necessarily the proper vehicle to lodge a complaint that concerns a third party such as Manulife.

Nonetheless, this is by definition a complaint pointedly aimed at the Union .

And having said that, I thank Mr. Glavin for bringing Manulife's role in all of this to the fore as it serves to point to the consistent and arbitrary disregard the Union has shown me concerning the mistreatment I suffered from the Employer and its insurance carrier.

Thus, there is nothing remarkable in my reticence to disclose information pertinent to the settlement I reached with Manulife. The document in question, [Union's Appendix 1 - document No. 112) is a confidential agreement and I am bound by its terms.

I have made no secret of my settlement with Manulife. And I have maintained my treatment of that matter in a confidential manner pursuant to my agreement to keep the terms of the deal confidential.

And notwithstanding the Union's opinion, I take issue with the notion that my *"disability benefits grievance against the Employer no longer offered any remedy."*

For whereas I agree with the Union that the Release I signed does in fact name

the Employer as a principal of the Releasee *"with respect to weekly indemnity and long term disability insurance benefits under the relevant policies,"* (emphasis added) the Board should take careful note that I make no claim here for any *"insurance benefits"* from the Employer.

It is unlikely that a grievor could ever be successful in attaining insurance benefits from an employer whose business is wholly concerned with the manufacture and sale of beer.

However, I maintain that the Employer does continue to owe me a duty of good faith in providing me the disability benefits agreed to and in accordance with the collective agreement.

At the time of the Manulife settlement I specifically instructed my lawyer Paul Seale that the Release to Manulife should reflect that distinction between insurance benefits owed by the insurance carrier and disability benefits rightly owed by the Employer.

My reason for doing so is fairly obvious: ostensibly to allow me to continue to seek the outstanding disability benefits (among others) from the Employer in the labour relations forum. The Board will rightfully conclude that my intentions to hold the Employer accountable have been reasonably consistent throughout the long ordeal I've been subjected to by the parties.

It may well be that my right to claim all the benefits owed to me hinges on that critical distinction that exists between the **notion** of insurance benefits contemplated, and the **actual** disability benefits that the Employer is legally required to provide pursuant to the collective agreement.

I submit that distinction is significant and duly notable.

It too should be duly noted that in his arbitration award (*"the Second Taylor Award"*), Arbitrator Colin Taylor found as a fact that the Manulife policies did not conform to nor provide the benefits stipulated in the collective agreement, up to the first 104 weeks of disability.

I submit Mr. Taylor's finding has put the question of liability for those benefits squarely in the Employer's lap, where, I maintain it rightly belongs.

As to the question of liability for disability beyond 104 weeks, I concede (to a limited extent) to the Union's assertion found at page 40 of its Response to our Complaints that *"no discrepancy has ever been found by an arbitrator for that period of entitlement."* But that is not to say that a discrepancy in this case didn't exist.

In fact it did, and would ultimately have been shown to exist, had Arbitrator Taylor been given a reasonable opportunity to make that finding in arbitration.

Unfortunately, he wasn't as the parties -particularly after the issuance of Mr. Taylor's second preliminary award in December 1999 -did everything in their power to keep from ever returning before Mr. Taylor's panel, thus denying him the rightful opportunity to make such a finding.

In relation to this I raise three points for the Board's consideration:

Firstly, Mr Taylor stated unequivocally at page 13 of the award that:

> the issue of whether there exists a discrepancy between the collective agreement and long-term disability policy disability tests...beyond 104 weeks is properly before the (arbitration) board.

Secondly, the comparative list of disability definitions was provided to the arbitration panel (prior to the issuance of the *"Second Taylor Award"*) in a convenient chart found at page 9 of the award. A cursory review of the chart reveals the existence of numerous discrepancies in the disability definitions beyond 104 weeks.

Thirdly, the Union's position, and as noted at page 4 in Mr. Taylor's first preliminary award (*"the Original Taylor Award*) was that the arbitration board

> should decide all aspects of the Grievor's claim including (my)

> eligibility for so-called "soft LTD" and "hard LTD".

"Hard LTD" is referred to by Mr. Taylor as the period *"from the 104th week of disability."*

Furthermore, at page 14 of *"the Original Award,"* Mr. Taylor notes that:

> In asserting its position, the Union urged the Board not to put any stock in the word "plan" which appears in various forms throughout Article 9. The presence of that word, it was argued, does not necessarily mean a plan of insurance. The same argument was made with respect to the word "coverage". This might mean insurance coverage or coverage against loss provided by the Employer as part of its plan of Social Security." (emphasis added)

Therefore and given the foregoing, I take issue with the Union's introductory remarks concerning the *"significant bearing upon* (my) *outstanding grievances"* that my settlement with Manulife has had, as well as its erroneous assertion that my *"disability grievance no longer offer*(s) *any available remedy to* (me)

I have not, as the Union claims, *"released the Employer from claims to weekly indemnity or long-term disability benefits as a term of* (my) *settlement"* with Manulife. (emphasis added)

Nor do I agree with the Union's position that *"as restoration of* (my) *"employee" status is no longer necessary to support my disability benefits claim,* (my) *termination grievance* (is) *moot."*

In fact, my *"employee status"* confers upon me numerous other benefits beyond the disability benefits provided by *Article 9* and to which I claim are rightfully owed to me by the Employer, not the least of which includes the right to recall.

Additionally, in its introductory remarks to its Response, the Union raises a

"preliminary objection based on the timeliness of a core part of (my) *Complaint."*

I will deal with this unfounded aspect of the Union's Response in the course of this Reply.

Finally, with respect to the Union's perfunctory disregard of my longheld allegation of 'poor conduct' on the part of the Employer -not contained in his introduction but stated in Mr. Glavin's analysis at **page 38, B (iv)** of the Union's Response -for the record, my allegation as stated here against the Employer is a declaration, that by January 16, 1995, the Employer had embarked on an initiative to divest itself of as many junior employees as possible, and in the course of what can only be seen as overzealousness on the part of the Employer, took the giant and mistaken step in providing a letter of termination to an employee whom the Employer **knew to be disabled** within the meaning of an important provision of the Labatt collective agreement.

The employee in question was the Complainant, Michael Nunas.

The important provision was *Article 3:1:1 (c).*

The next day, January 17,1995 -following the Employer's issuance of its letter of termination to Mr. Nunas -my own disability benefits were suspended and I likewise, was subsequently terminated by the Employer on July 21, 1995, notwithstanding I had too, remained disabled and was thus, likewise covered by *Article 3:1:1 (c)*.

As the Board will come to see, *Article 3:1:1 (c)* is a provision specifically designed to protect the seniority of sick and injured employees, when such employees are otherwise faced with the prospect of *"permanent layoffs"*.
[Complainants' document No. 5.5]

I will have much, much more to say about this significant and pivotal provision of the Labatt collective agreement in the course of this Reply.

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(ii) The Nunas Complaint

By letter of January 16, 1995 the Employer's former Human Resources Manager, David Reinboth confirmed that the Complainant Nunas' employment had been terminated more than three weeks before on December 22, 1994. [Union's Appendix 2 - document - No. 3]

[For more on David Reinboth, I urge the Board to refer to my May 2003 application to Arbitrator Colin Taylor - Complainants' document No. 1.2 - paragraph 52]

The second paragraph to Mr. Reinboth's letter contained what must be seen as a bold misrepresentation by the Employer of Mr. Nunas' medical condition at the material time.

Mr. Reinboth stated erroniously that:

> *"You have maintained,..along with your medical and legal advisors, that you are totally and **permanently disabled**."* (emphasis added)

Mr. Nunas rejects that statement as false.

On the contrary, at the period in question, Mr. Nunas was struggling valiantly to make a recovery from his numerous injuries and associated pain and trauma and depression, and has no recollection of ever stating or claiming that his disability was "*permanent*", and thus denies unequivocally the Employer's misrepresentation of his true condition at the time in question.

Mr. Nunas did in fact, eventually achieve a modicum of success as conceded by the Union, recovering sufficiently by 1997 to attempt a return to work in the brewing industry -but was repeatedly denied that opportunity.

Finally in July 1999, and only after the Union had gone to *"great lengths to successfully dispatch"* him (as noted by Mr. Glavin in the Union's Response), did Nunas receive a chance to prove himself capable and was in fact, hired by the Employer's subsidiary, Brewers Distributors' Ltd. (BDL).

But in January 1995, David Reinboth, in indicating his acknowledgement of Mr. Nunas' disabledness and in concurrence with Mr. Nunas' own physician, [Union's Appendix 2 - documents Nos. 1 and 6] commented further at paragraph 3 of his termination letter to Mr. Nunas, saying:

> *"The Company has no belief that you will return to work in the foreseeable future..."*

Tellingly, this erronious notion by the Employer, would be later further misrepresented by the Union as evidenced by Gerry Bergunder's February 11, 1999 letter to Mr. Nunas indicating that:

> *"February 24th/95, David Reinboth, Human Resource Manager for Labatts* (sic) *denied the grievance stating that the company had no* ***reasonable*** *belief that you would* ***ever*** *be able to return to work."*
>
> (emphasis added) [Complainant's document No. 6.13]

Mr. Nunas concedes his prognosis for recovery at that point in time was unclear, perhaps even poor -but not nearly as hopeless as the Employer and the Union were making things out to be, as evidenced by the Union's own document, above.

From Mr. Nunas' perspective, the Employer was literally writing him off prematurely, not providing him with sufficient time to recover before terminating his employment -as was the Union, in effect condoning the Employer's action in

its withdrawal **without prejudice** of Nunas' grievance for unjust termination.

The Board will come to see that the evidence supports a notion -and in concurrence with the Union's current Business Agent Gerry Bergunder -that as a result of what Mr. Bergunder would later refer to as *"the Labatt situation,"* Mr. Nunas appeared to have been effectively blacklisted throughout the years 1997-98, by "*the industry"*. [Complainants' document - No. 6.13]

At this point I pause to direct the Board's attention to the fact that the Union has failed to provide the document referred to above, in which Mr. Reinboth denies Mr. Nunas' termination grievance, and apparently dated February 24, 1995.

Further to that failure and omission by the Union, we ask that the Board direct the Union to produce forthwith, and provide to the Complainants with a copy of the document in question, and as well to the Board in order to assist it in its adjudication of these consolidated Complaints.

Let me now turn to address the Union's attempts to paint the many similarities in our respective stories as merely "*superficial"* and state that such a notion is absolutely ludicrous and patently unreasonable, as is the notion that Michael Nunas and I *"were treated <u>consistently</u> in so far as* (our) *distinct circumstances were considered and the Union made every effort to arrive at a thoughtful judgement in both cases"*. (emphasis added)

I will examine in greater depth the inconsistencies that exist with respect to our treatment by the Union, as well as the treatment afforded to other employees at Labatt, and to other members of the bargaining unit, elsewhere in the course of this Reply.

The Union asserts that *"all the issues that Mr. Nunas has raised are grossly out of time **without any explanation from Mr. Nunas** of the reason for his delay in bringing his Complaint to the Board."* (emphasis added)

With respect, that is not so.

Mr. Nunas' explanation is clearly stated at page 6, paragraph 7 of his Complaint under the heading *"Deceit and Denial"* and set out, below:

> Following the Union's abandonment of me, Rick Sutherland, who was adamant the Union could not act for me, told me that all I could do was to wait for the resolution of Mr. Hughes' grievances.
>
> In the event Hughes was successful there might be an avenue for the Union to proceed on my behalf.
>
> Given that Mr. Hughes' grievances were never allowed to proceed beyond the preliminary stage, I'm left with the realization that Mr. Sutherland never had any real intentions of ever revisiting my case and was merely using stonewall tactics.
>
> This was undoubtedly to place me in a position whereby I might be denied a Section 12 complaint by the Board on the basis of insufficient timeliness.

Mr. Nunas' Complaint then continues:

> Furthermore it has become abundantly clear, that my solicitor and I had surely been duped by Rick Sutherland into believing there was nothing could be done for me, when all the while Mr. Sutherland knew otherwise and yet chose arbitrarily not to act on my behalf.

Mr. Nunas simply took Mr. Sutherland at his word, unaware as he was that there were time limitations for the filing of a *Section 12* Complaint such as the one currently before the Board.

In fact, Mr. Nunas had absolutely no knowledge of or understanding of (and thus no contemplation in filing) a *Section 12* application to the Board, nor did he have any reason to disbelieve what Mr. Sutherland and the Union was telling him and his lawyer, namely that there was no avenue for which the Union could proceed on Nunas' behalf.

Clearly, Mr. Nunas had a reasonable belief and a reasonable expectation at that time, that Mr. Sutherland would not act in any way but in Nunas' best interest.

However, that proved to be not the case.

As demonstrated by the excerpts from his Complaint above, Mr. Nunas has

now long concluded that Mr. Sutherland's appeasing of him at that time was little more than a sophisticated ploy designed to place Mr. Nunas beyond the Board's existing time limitations for the filing of a *Section 12* Complaint, the existence of which Mr. Nunas was not even aware!

Mr. Sutherland simply relied on Michael Nunas' trust in him and Nunas' lack of knowledge of *the Labour Code* to impose his (Sutherland's) desire to see the Employer's termination of Michael Nunas remain uncontested.

Unfortunately, when he had become cognizant of the fact that he and his lawyer had been duped by Mr. Sutherland, (as has, we maintain, some segments of the Union's Executive and Grievance Review Boards) Mr. Nunas was already well past the time for filing a Complaint against the Union regards his termination by Labatt.

However, it was only following his second termination (in less than a decade) while once again disabled in 2003 by Brewers Distributor Ltd. (BDL -a subsidiary of Labatt) that Mr. Nunas decided to put the issue of this **repeated** and **longstanding**, **persistent abuse** of disabled workers by these Employers before the Board, notwithstanding the obvious difficulties regards the timeliness of his complaint with Labatt, and that the matter of his second termination was proceeding to arbitration.

Mr. Nunas' Complaint refers primarily to his recent (2003) termination by BDL but leaves it to the Board to determine if that termination has any relevance to his earlier termination by Labatt, which it surely must..

As noted at page 8, paragraph 3 of Mr. Nunas' Complaint to the Board:

> **My complaint may appear on the surface to be premature**. But when one takes into consideration the lengthy history of mine and Mr. Hughes' mistreatment by this particular employer (i.e. Labatt) coupled with the Union's longstanding and absolute failure to protect us from **previous injustices** imposed on us, **the Board may well come to a different conclusion**.
> And rightly so. (emphasis added)

The Union also states that Mr. Nunas was not terminated under *Article 3:3* as was the case with me and a third Labatt employee, Jim Dunn.

That Mr. Nunas was terminated under some other provision of the collective agreement or otherwise comes as a suprise to both Nunas and me.

Furthermore, this is in absolute contradiction to what Rick Sutherland told me personally in his office in May 1999. At that time, he advised me that there were, in fact three employees so affected by *Article 3:3*: They were Nunas, Dunn and me.

As for the denial of Mr. Nunas' disability benefits, Mr. Glavin states that: *"..this was triggered...at the transition to benefits for the post-104 week period of entitlement..., when a more stringent standard of eligibility applied and the Collective Agreement considerations differed from those at issue in the case of Mr. Hughes. The Union obtained* ***careful legal advice*** *in respect of both these issues for Mr. Nunas, and acted reasonably upon that advice."*

A closer scrutiny of this *"careful legal advise"* obtained by the Union in February 1996 and referred to above, reveals a couple of obvious and egregious flaws in its content. [Union's Appendix 2 - document No. 15]

Firstly, under the heading DOCUMENTS, item 12 at page 7, the Union notes that:

> *"Mr Nunas was likely cut off benefits because he did not meet the test for total disability imposed at the 104 week mark."* (emphasis added)

This is revealing in that some 21 months after Mr. Nunas' disability benefits had been discontinued by Confederation Life (Manulife's predecessor) the Union had still not yet come to an actual determination or conclusion as to even why he

had been disqualified.

This perfunctory disregard in ascertaining the actual facts concerning Mr. Nunas' disqualification by the Employer's insurance carrier is further evidence of the Union's arbitrary and uncaring conduct regards Mr. Nunas' mistreatment by Labatt.

In actual fact, and referred to in Mr. Nunas' Complaint, his benefits were actually cut off in or about the 102nd continuous week of disability.

Furthermore, we know for a fact (based on a finding in Arbitrator Taylor's *"Second Award"*) that the task of determining Mr. Nunas' eligibility for those benefits was wrongly delegated to the insurer by the Employer, who should have rightly made that decision.

Secondly, and conspicuous by its complete absence in the Union's *"careful legal advice"* is the Union's failure to make any mention whatsoever, of *Article 3:1:1 (c)* of the Labatt collective agreement which as already stated herein, specifically protects an injured employee in the case of permanent layoff.

Supported by and based on its faulty and inconsistent legal advice, the Union had little trouble then in 1996 in persuading Mr. Nunas' matrimonial lawyer Wayne F. Guinn that Nunas' *"claim was properly brought against the insurance carrier and not the Employer* (Labatt)*."*

[Later, in discussing the discriminatory aspects of the Nunas /Hughes Complaints -i.e. as to the notion of consistency -I will review more closely this *"careful legal advice"* concerning Mr. Nunas and provided to the Union by its legal representatives, in comparison with the advice obtained on my behalf from the same law firm during the same time frame.

As well, we shall see the important significance of the collective agreement language found in *Article 3:1:1 (c)* as it relates not only to my 1995 termination and to Mr. Nunas' 1994 termination by Labatt, but of equal importance, as how it relates to Nunas' more recent 2003 termination by BDL, and equally importantly as to how that specific language has been, in our view inconsistently applied to other members of the Union at Labatt and elsewhere in the bargaining unit]

Finally, regards the recent successful arbitration of Mr. Nunas' 2003 unjust

termination by BDL, it should be duly noted that Arbitrator Robert Pekeles' May 6, 2004 arbitration award specifically ordered Mr. Nunas (and another employee of BDL), to be made whole.

But it is a fact that 11 weeks have elapsed since the issuance of the arbitration award by Mr. Pekeles, and Mr. Nunas has still yet to receive the outstanding monies he would have earned had he not been terminated while disabled, thus it follows, he has not been made whole.

B - BACKGROUND FACTS PERTAINING TO HUGHES' COMPLAINT

(i)

I now turn to the *"Background Facts Pertaining to the Hughes Complaint"* provided by the Union. As there are 105 entries included in this section of the Union's Response, for the sake of brevity I will only comment on the matters with which I take issue, and do so in corresponding numerical order.

Having said that, the Board should know that the Union's Response's contains an overwhelming amount of factual errors, falsehoods, and presupposition that essentially concerns the integrity of and reasoning behind my earlier attempts at communicating with the Board, and the Complainants' have sought to address as much of this erronious material as possible, notwithstanding the severe time limitations imposed upon us by the Board for filing this Reply.

I apologize, in advance for any errors encountered herein as a result of my trying to meet the Board's July 22, 2004 filing deadline.

2. Whereas it is true I was initially diagnosed in 1994 as having Myofscial Pain Syndrome (in my case a reference to a chronic and unrelenting muscle spasm in the muscles of my torso), that diagnosis was upgraded March 21, 1996 to include a more serious condition known as Thoracic Outlet Syndrome (TOS), which in my case was an indication of the existence of a vascular and nerve impingement.

The original diagnosis was made by re-hab specialist Dr. Gabriel Hirsch, at the G.F Strong Rehab Center in Vancouver, and was later confirmed by a thoracic surgeon, Dr. Bill Nelems (since retired).

The impingement was determined to be anomalous and congenital.

Dr. Nelems performed an operation on me January 21, 1997 in which he removed my first, left rib in order to attempt a decompression of the affected nerves and blood vessels. That procedure resulted in a limited success: i.e.despite a modicum of relief experienced by me, I continued to experience the same chronic pain and muscular dysfunction as before.

As noted by the Union, I remain unable to work as a result of my condition.

A final note regards my thoracic outlet syndrome, as time has elapsed and yet I continue to experience right-sided pain and dysfunction on a daily basis, I remain unconvinced that a similar procedure to alleviate a similar congenital condition on the right side of my body might not be warranted. However, I do not wish to even contemplate another surgery while the matters currently before the Board remain outstanding. I say so because the extraordinary hardship I endured -imposed on me as a result of the denial of my disability benefits -was and would be detrimental to my recovery from a second surgery. I simply cannot suffer that level of hardship again and thus I first seek a resolution of the matter of the Employer's outstanding disability benefits I claim are owed to me.

3. Regards the Union's statement concerning Manulife's cutting off my W.I. benefits January 17, 1995: *"After some failed attempts to resolve the matter, the Union grieved the denial of disability benefits on July 11, 1995."*

With respect, the only attempts <u>ever</u> made to resolve the matter of the denial of my disability benefits by Manulife were made solely by me, despite my request for the Union's involvement as early as the final week of February in 1995.

The Labatt plant's Grievance Committee in 1995 was comprised of then-union

president Tom Smith, Martin MacCormick and Tony Flegel (Flegel incidentally, in his capacity as plant chairman, was the Union official who, with Charlie Puchmayr would later sign in January 2003 the *Minutes of Settlement* that effectively concluded the matters of my two grievances).

It was as a result of the failure of these three Union officials to assist me in 1995, that I turned to the Business Agent, Rick Sutherland for his assistance and intervention.

In my letter to Mr. Sutherland dated May 19, 1995, I elucidated for him the troubles I had experienced in the 3 months previous and at that time expressed my confusion over these matters and complained that Flegel's and particularly Smith's assistance to me was absolutely negligible. [Complainants' document No. 3.3]

Mr. Sutherland's response to my letter indicated he had little interest in the numerous allegations of impropriety on the part of both the Employer and Manulife that I had brought to his attention.

Indeed, his focus on a matter that I had touched upon concerning his allowance of me getting short-changed on my severance by a former employer in 1990 appeared to hold far more weight than the matters at hand. Mr. Sutherland, true to form, appeared to be willing to overlook and turn an arbitrary blind eye to the serious matters I was bringing forth for his consideration.

Most of the Union's officials are familiar with Mr. Sutherland's 'R n F' policy in dealing with matters he considers insignificant. I believe the term stands for "received and filed".

4. In fact I was terminated July **21**, 1995, not the 19th as stated here by the Union.

6. The minutes of the Union's Grievance Review Board meeting for November 1, 1995 [Complainants' document No. 3.3] reveal that the grievances referred to included

not only my two grievances but as well, Michael Nunas' January 26, 1995 grievance for unjust termination (although Nunas' actual termination date was December 22, 1994 and Labatt issued its written notification of termination to him on January 16, 1995). [Union's Appendix 2 - document No. 4]

Thus, the Union had sat on Nunas' grievance for nearly 9 months before finally getting around to obtaining a legal opinion as to the arbitrability of that grievance. This of course, raises two questions:

1. Why did the Union delay so long in deciding to obtain a legal opinion regards Nunas' termination? And

2. Why hadn't the Union filed a grievance for the payment of Nunas' LTD benefits, as was done in my case?

7. Here the Union refers to my efforts to appease Manulife whose position *"remained unchanged."* What needs to be stated is that notwithstanding Manulife's position, to which the Employer had failed to alert me despite numerous recommendations to do so made solely to Labatt by Manulife -which was essentially that it required direct medical evidence from my specialist Dr. Hirsch -at no time did Manulife take the time to write to Dr. Hirsch to ascertain his opinion, despite my authorization to do so. The reason for that omission by the Employer's insurance carrier has never been addressed and remains an outstanding mystery to me.

8. Unfortunately, on January 20, 1996 when the Union finally got around to advising me of my rights vis a vis Manulife, as stated here by the Union, more than one year had passed since Manulife had stopped paying me any disability benefits.

The Insurance Act of B.C. states that:

Limitation of actions

22 (1) Every action on a contract must be commenced within one year after the furnishing of reasonably sufficient proof of a loss or claim under the contract and not after.

and that furthermore:

Limitation of action

65 (1) Subject to subsection (2), proceedings against an insurer for the recovery of insurance money must not be commenced more than one year after the furnishing of the evidence required by section 62 or more than 6 years after the happening of the event on which the insurance money becomes payable, whichever period first expires.

Thus, the Union's January 20, 1996 letter advising me to seek outside counsel arrived some 3 days after the one year grace period for filing an action against Manulife had expired. Fortunately, I had had the good sense to contact my old and dear friend Mr. Paul Seale, a personal injury lawyer, who had set me straight on these matters, no credit to the Union.

9. Of note here is that upon concluding its *"indepth review"* Manulife wrote to me on February 13, 1996 to inform me it had declined to alter its decision, as correctly stated by the Union.

At that time Manulife stated: *"Until we receive objective medical evidence from Dr. Hirsch to support that you have been totally disabled, retroactive to January 17, 1995, to the extent that you have been prevented from performing any and every duty of our normal occupation, your Weekly Indemnity claim will remain closed,"* [Complainants' Supplemental document]

Notwithstanding that Manulife's stated position represented a disability

definition that exceeded and was more stringent than that which the collective agreement called for (as later determined by Arbitrator Colin Taylor), I reiterate that at no time did Manulife ever take the time to actually write to Dr. Hirsch to ascertain his opinion, despite my written authorization to do so. I cite this as an egregious example of the bad faith that the Employer's insurance carrier exhibited in its dealings with me, and by extension exemplifies and reflects on the Union's own arbitrary disregard for that mistreatment.

10. In fact, the Union's legal advisors' opinion referred to here by the Union, deemed the chances of winning the termination grievance on my behalf as *"excellent"* citing *Article 3:1:1 (c)* of the Labatt collective agreement which deals with an employee's seniority service records and the breaking of his seniority, and states in part:

> *Article 3:1:1* Seniority service records for the purpose of permanent layoffs shall not be considered broken by reason of
>
> .....
>
> (c) Sickness or injury or transfer from one department to another.

In contrast, the Union opined that the *Article 9 Social Security* grievance dealing with the outstanding W.I and LTD benefits merely held a *"good"* chance of being won by the Union. Notwithstanding the termination grievance stood a better chance being won by the Union, the Union however, chose instead, to focus its attention on the *Article 9 Social Security* grievance.

11. With respect, the Union's assertion here that *"the merits of* (my) *termination and disability benefits grievances differed in important respects from those of Mr. Nunas."* The Union's perceived differences of those *"merits"* are far

outweighed by the critical similarities to our denial of benefits and our subsequent terminations by the Employer.

What can't be denied further is the eventual and identical outcome of our disputes with the Employer, namely: we were both denied benefits stipulated in the Labatt collective agreement and we were both terminated in absolute flagrant contravention of *Article 3:1:1 (c)*, above.

And in Mr. Nunas' case, no grievance for his disability benefits was ever filed on his behalf by the Union as noted in item 6 above, of this Reply.

12. With respect, a matter consistently overlooked and misstated here by the Union is the fact that Mr. Nunas never actually reached the 104th week of disability. This is easily substantiated by a simple review of the relevant dates.

Mr. Nunas was initially injured on his way home from the store on the afternoon of May 26, 1992 prior to his scheduled 'graveyard' shift. Pursuant to the collective agreement, his claim for disability benefits would begin after 3 missed days of work (May 26th, 27th and 28th) on May 29th 1992.

However, his claim was finally discontinued by Confederation Life on May 13, 1994, falling short of the 104 week mark. And as already noted herein -in my Reply to the Union's introductory remarks concerning Mr. Nunas' Complaint - even after some 21 months after Mr. Nunas' disability benefits had been discontinued in 1994 by Confederation Life (Manulife's predecessor), the Union had still not yet come to an actual determination or conclusion as to even why he had been disqualified.

And yet the Union states: *"For Mr. Nunas, however,* ***his disability grievance*** *turned on the definition of disability after 104 weeks, which did not differ significantly between the Collective Agreement and the policy provided by the Employer."* (emphasis added)

With respect, the Union never did file a grievance on behalf of Mr. Nunas for

the non-payment of his LTD benefits, as was done for me. That important distinction ought to be duly noted by the Board.

As for the legal advice received by the Union concerning the insignificant differences between the relevant disability differences, it is instructive to review the Union's own submissions (to Arbitrator Taylor in my case) regarding the existence and relevance of those discrepancies.

In his submission to Mr.Taylor dated July 7, 1999 (and not provided to the Board by Mr. Glavin but included as document No. 2.7 in the Complainants' *List of Attachments*), the Union's legal representative, David Blair wrote at paragraph 4.3:

> "We submit there is no more critical aspect of weekly indemnity and long-term disability insurance coverage than the disability definitions, and these are both quite different." (emphasis added)

Then at paragraph 4.6, in respect of *"...the issue of whether there exists a discrepancy between the collective agreement and LTD policy tests beyond 104 weeks.."* (emphasis added) Mr. Blair stated that:

> "..there is a discrepancy...We submit the breadth of the discrepancy is irrelevant. If it is possible that the Grievor would be denied in litigation against the insurer coverage to which he is entitled under the collective agreement, the Employer has breached the collective agreement..." (emphasis added)

And finally, Mr. Blair concludes at paragraph 4.7:

> "There is a discrepancy between a (sic) the two LTD tests (over 104) weeks.."

13. and **14**. Irrespective of the Employer's stated reasons here for terminating Michael Nunas and me, as noted in item 10 above, *Article 3:1:1 (c)* of the Labatt collective agreement deals specifically with and prohibits the breaking of an injured employee's seniority. Furthermore, the legal opinion provided to the Union in my case contained this passage at paragraph 4.3:

> "..in the absence of some provision in the Collective Agreement to the contrary, persons who are absent from work due to injury or illness will be considered to be employees whose seniority may continue to accrue even if they are not in receipt of sick pay." [Complainants' document No. 2.1]

This notion was recently upheld by Arbitrator Robert Pekeles in his May 6, 2004 award concerning Mr. Nunas' 2003 termination by his current employer, BDL. [Union's Appendix 2 - document No.62]

In that case, the Union invoked a provision of the BDL collective agreement that was near identical to *Article 3:1:1 (c)* of the Labatt collective agreement, but that it hadn't referenced in the case of Mr. Nunas' termination by Labatt in 1994.

I submit that important distinction requires careful consideration by the Board.

15. Irrespective of any *"policy language"* that may or may not have applied to Mr. Nunas regards his *"need to maintain his "employee" status to pursue his benefits claim,"* as stated here by the Union, the Labatt collective agreement states unequivocally under the heading of *Article 9:3:8 Cancellation of Benefits*:

> 1. An employee whose service with the Company has been terminated shall not be entitled to any benefits after the date of such termination.

The use of the word <u>*shall*</u> in *Article 9:3:8* and as well as in *Article 3:1:1 (c)* is not lost on Mr. Nunas and me. That term is an imperative and a directive to the parties, and as such is not open to interpretation nor is it negotiable.

In addition, the Union is bound by its own constitution and by-laws, *Article 5:4* which states that:

> Every member shall adhere strictly to the terms of any collective agreement entered into with an employer.

16. With respect, the notion put forward by the Union here that mine and Mr. Nunas' grievances were only *"superficially similar"* to each other is to deny the obvious: that we were both injured and disabled and yet were both allowed by the Union to be terminated by our Employer, Labatt. The Union may try as hard as it likes in order to convince the Board that there exists substantial differences in our respective treatment by the Employer, but its really like painting chairs; one can paint them in a variety of colours, but at the end of the day, they're still chairs - just given a different coat.

17. Notwithstanding on March 26, 1996 *"the Union advised the Employer that it was proceeding to arbitration on both* (my) *grievances (the disability grievance and the termination grievance) together, as they were related,"* as stated here by the Union, it is my recollection that Mr. Sutherland advised me of something quite different -i.e. it was the <u>Employer</u> who sought to have both grievances arbitrated *"together"* and was seeking a tribunal as opposed to a single arbitrator.

I distinctly recall Mr. Sutherland advising me in 1996 that (and I'm paraphrasing here) "at least that way (i.e.with a tribunal) you have someone (by which he meant the Union's arbitration panel pick) behind the scenes to voice and support the Union's position. I recall telling him I'd have to defer to his judgement in those matters.

But regards the Union's assertion here that "(I) *was not then seeking reinstatement to active employment, but, rather, a return to notional "employee" status to support* (my) *claim to eligibility for ongoing disability benefits,"* -this is sheer fabrication on the part of the Union.

The only thing I was concerned with at that time was the new diagnosis of my disorder that I had been recently given by Dr. Hirsch just 5 days before, and with the prospect for a surgical solution to my painful condition.

As to how the Union was proceeding with my grievances -well, I hadn't a clue. I knew little if anything about arbitrations and had absolutely no experience in labour relations etc. I still don't, beyond this Complaint! But at that time I was sick with the pain I was having to endure, and in any event, the matter of my two grievances was in Rick Sutherland's hands, and he certainly wasn't asking for my input regards how best to proceed -quite the opposite.

18. I had requested to be present at those hearings referred to here by the Union (accompanied of course, by my friend and lawyer from my action against Manulife, Paul Seale) and any and all subsequent hearings.

However, the Union did not provide us with a time and place for the February 10th hearing, and with the exception of the February 14th hearing which we attended, I was not invited to any subsequent hearings.

19. Interestingly, the Employer's position here appears to be nearly identical to that of the Union's in Michael Nunas' case, as evidenced by Mr. Nunas' lawyer Wayne Guinn's letter to Nunas following Mr. Guinn's meeting with the Union's legal representative, Marni MacLeod April 22, 1996. After the Union had provided to Mr. Guinn its legal opinion he wrote:

> *"There is no question that, after a certain number of weeks where an employee is off work for whatever reason, the* (Employer) *is at*

> *liberty to terminate that person's employment pursuant to the Collective Agreement."* (emphasis added)

Mr. Guinn continues with:

> *"The* (Employer) *is obligated to hold an insurance policy in full force and effect for you in accordance with the terms of the Collective Agreement. There is no question that was done and your claim is against the insurance company for failure to provide you with coverage"* (emphasis added)

So it appears the Union was successful in convincing Mr. Nunas' lawyer that there was no avenue for which the Union could proceed on Mr. Nunas' behalf, and that the matter should be resolved in a civil action. This was undoubtedly something that Mr. Guinn perhaps wanted to believe, as it would afford him the opportunity to sue Manulife on Mr. Nunas' behalf; this is what lawyers do, after all.

It is unfortunate, but Mr. Guinn was labouring under the false impression that the Union was acting in Mr. Nunas' best interest, when it clearly wasn't.

20. With respect, Arbitrator Taylor's *"Original Award"* makes no mention of any *"notional "employee" status"* as referred to here by the Union. And as for me, I think it's only in the context of the Union's Response to my Complaint that I have ever encountered that term. I don't recall ever hearing Mr. Sutherland or David Blair ever utter the phrase *"notional employee status."*

Equally, nor have I yet to find any reference, whatsoever to this term in the Labatt collective agreement. I'm really not sure even what it truly means. There appears to be no basis for such a notion as *"notional"* employee status -one is either an employee or one is not.

Thus it follows, this *"notional employee status",* as referred to here by the Union appears to be have originated with Mr. Glavin for the purpose of the Union's Response.

21. I too, concede that *"*(I) *would have been permanently laid off in October, 1995 had* (I) *remained able to work."* And like the other non-disabled members of the Union I would have then had the opportunity to go and work at some other job within the bargaining unit, establishing seniority in another plant, such as BDL, for instance. But that proved not to be the case.

The reality was that I was disabled, and I maintain and submit that given the specifity of *Article 3:1:1 (c)* of the Labatt collective agreement -in particular its reference to *"permanent layoffs",* and the protection afforded an injured employee's seniority by that provision -the fact that I was (and still am) disabled ought not be so readily discounted by the Union as a trivial matter, which I further maintain it has.

I have no problem with being 'down-sized' (although the term itself I believe to be repugnant and euphemistic and ought not be utilised by a trade union) -like hundreds of my union Brothers and Sisters I've experienced wholesale layoffs, before. It's no big deal, providing it's done pursuant to the provisions of the collective agreement. Clearly in my case and in the case of Mr. Nunas that hasn't proved to be so, and thus it follows that the Union bears its share of the blame for our mistreatment by the Employer.

22 and **23**. Here the Union attempts to absolve itself from any blame for its own failure to provide Arbitrator Taylor at the time of the arbitration hearing on February 14, 1997, with the proof it had in its possession that would have undoubtedly discounted the need for a *Section 99* appeal of Mr. Taylor's first preliminary award.

I am referring of course, to the *"detailed list of discrepancies"* between the Labatt collective agreement and the Manulife insurance policies that the Union possessed, as evidenced by its inclusion as *Appendix B* to a letter from Victory Square Law Office to Rick Sutherland and the Brewery Workers' Union, dated March 21, 1996. This letter was in fact, the legal opinion provided to the Union with respect to my two grievances. [Complainants' document No. 2.1]

Thus, the Union is technically correct here in its assertion that *"the relevant policies and the Collective Agreement had been in evidence before* (Mr. Taylor)*"*.

However, notwithstanding the foregoing, that technicality in no way negates the fact that it was the Union's legal representative, David Blair who had failed to provide Mr. Taylor with the relative convenience of the comparative, detailed list of the disability tests' discrepancies that he and the Union possessed.

Instead, he simply provided the arbitration board with the two Manulife insurance policies and with the collective agreement, leaving Mr. Taylor et al to ferret out for themselves the relevant passages and to make comparisons of same.

Now really, is this truly the way a labour lawyer of Mr. Blair's caliber and experience draws an arbitrator's attention to critical details of his case that provides absolute proof of that which he is purporting to establish as fact? Is that not what the Union is attempting to persuade the Board?

The Union here makes no apology for nor concession to its omission to Mr. Taylor -indeed, as Mr. Blair would later state in his letter to my social worker with the Ministry of Human Resources, dated October 12, 1999:

> *"That was* (the arbitration board's) *mistake."*
> [Complainants' document No. 2.8]

Not mentioned here by the Union is the additional fact that the adjudication of the Union's *Section 99* appeal of the *"Original Taylor award"* would take two

years to complete, thereby creating a delay in the proceedings that Mr. Blair himself would term *"grossly excessive"*. [Complainants' document No. 2.4]

24, **25**, **26** and **27**. These items refer to an aspect of my Complaint that involves what I believe to be a misrepresentation to Mr. Taylor's arbitration panel by Mr. Blair.

With respect, the Union's assertion here in item 24 of its Response, that *"the Complainant accuses the Union's lawyer, David Blair, of misleading the arbitration panel by denying that the Union had possession of the Manulife or Confederation Life policies "prior to the hearing,"* is a further misrepresentation by the Union.

The allegation made by me and referred to here by the Union concerns a paragraph contained in Mr. Blair's July 7, 1999 submissions to Mr. Taylor's board. As noted earlier herein, that particular document has not been furnished by Mr. Glavin, but is provided as document No. 2.7 in the Complainants' *List of Attachments*.

The paragraph in question is found at page 8 and is numbered 3.7. It is reproduced here for the benefit of the Board in its entirety:

> 3.7 In the recent decision in *MacMillan Bloedel Limited Powell River Division,* June 13, 1997, R. Germaine, unreported, **the Arbitrator had the good fortune to have presented to him**, not the claim of a disabled grievor denied coverage by an insurer, but **a detailed list of discrepancies between a collective agreement and the insurance coverage provided by the insurer** (an approach not possible here due to non-disclosure of the policies). The arbitrator referred (at pp. 13-14 to the *Coca-Cola Bottling* decision and continued...(emphasis added)

A simple review of that portion of my Complaint that refers to the allegation made by me reveals that what I actually said with respect to Mr. Blair's submission above, was:

> I take that to mean Mr. Blair did not have that *"detailed list of discrepancies"* in his possession prior to and in time for the preliminary hearing for these proceedings February 14th, 1997.

Let's be clear as to what we're discussing here:

In his submission to Arbitrator Taylor, Mr. Blair is clearly making a **comparison** between the *"good fortune,"* (i.e. the opportunity) to review *"a detailed list of discrepancies"* between a collective agreement and an insurance policy that was afforded to Arbitrator Germaine in the *MacMillan Bloedel* case and the Union's inability to provide the same for Arbitrator Taylor, in my case.

And notwithstanding the aspersions cast my way by Mr. Glavin with respect to my allegations, it was not me, but David Blair who cited the *"non-disclosure of the policies"* by the Employer as the **compelling reason** for his inability in my case to provide Mr. Taylor with a *"detailed list of discrepancies"*.

Yet, I fail to see how that could possibly be true.

For Mr. Blair had that *"detailed list of discrepancies"* in his possession as early as March 21, 1996 as evidenced by *Appendix B* to his law firm's letter to Rick Sutherland concerning the merits of my two grievances, and noted above.

[Complainants' document No. 2.1]

And yet Mr. Blair advises Mr. Taylor that it was literally impossible for the Union to furnish such a *"detailed list of discrepancies"* to him because the Employer had not disclosed (i.e. provided) the policies to the Union.

There can be no doubt that David Blair **mislead** Mr.Taylor in this matter to cover up his original failure in providing the critical and definitive proof that Mr.

Taylor required to make a finding regards same.

I submit that Mr. Taylor might have enjoyed the same *"good fortune"* as Arbitrator Germaine had, had Mr. Blair simply included the *"detailed list of discrepancies"* he possessed, as part of the evidence put forth by the Union for Mr. Taylor's consideration. He didn't, and as a result Mr. Taylor's first award was inconclusive and required a lengthy and time-consuming *Section 99* appeal by the Union.

As noted elsewhere herein, that appeal and its adjudication created a delay in the proceedings that lasted a full two years, thus it follows the Union and David Blair bear a great deal of responsibility for that delay for their failure in providing to Mr. Taylor's board, the *"detailed list of discrepancies"* that the Union possessed.

28. The Union makes much of a July 1,1997 submission I made to the Labour Relations Board in which I expressed my approval of Mr. Blair's submissions on appeal, particularly concerning what Mr. Blair had termed the arbitration board's *"egregious error"* in overlooking *"the evidence before it."* [Complainants' document No. 3.12]

In all fairness, my remarks to the Board were made unaware that David Blair had failed to provide Arbitrator Taylor with the conclusive evidence that Mr. Blair possessed (i.e. his *"detailed list of discrepancies"*). At that time, I really couldn't understand how Mr. Taylor could have made such an error.

But given Mr. Blair's gross negligence in **not** providing the arbitration board with the evidence that he possessed, Mr. Taylor's inability to make his finding now makes perfect sense to me.

My mistake then was in thinking David Blair was acting in my interests, which he clearly wasn't.

29. As already noted, and notwithstanding the Union had promptly appealed the first Taylor decision, the appeal of the first Taylor award took 2 years for the Board to complete which, admittedly, and deservedly lead to some frustration on my part.

I too, did not fully understand why my grievance for unjust dismissal was apparently taking a back-seat in the proceedings. At the time of the issuance of the first Taylor decision it appeared to me as if the termination grievance had indeed, somehow *"fallen off the table"* and I called Rick Sutherland to discuss this with him.

Mr. Sutherland said to me, "I told you I was going to withdraw the termination grievance," to which I replied, "no you didn't," because in truth he hadn't.

Mr. Sutherland then conceded to me that he "might not have used those words, exactly."

I honestly never fully understood the Union's reasoning for its decision not to support fully my grievance for unjust dismissal, and this idea of *"notional employee status"* was never once mentioned to me by Mr. Sutherland nor Mr. Blair. Indeed, all Mr. Blair had to tell me regarding his intended approach to the upcoming arbitration was that he had decided to limit the Union's representation to something he referred to as "black letter law," a term I was not familiar with.

It was much later that I came to fully understand that this would mean that my disputes with the Employer would have to stand or fall strictly on the basis of (some but apparently not all of) the relevant provisions of the collective agreement, with no consideration or even mention of what I knew to be egregious conduct on the part of the Employer concerning its surreptitious manipulation of my claim for disability benefits.

As noted elsewhere herein, the Union showed complete and absolute <u>arbitrary</u> disregard for my complaints alleging gross impropriety on the part of the Employer's Human Resources staff.

But it wasn't until April 1997, and following the issuance of Mr. Taylor's first

award that I was first advised by Mr. Sutherland that he in fact intended to withdraw my termination grievance negating the protection of my recall rights in accordance with *Article 3:1:1 (c)*.

My first reaction to that news was to contact Charlie Puchmayr to whom I had first consulted regards these matters in 1995, when I chanced to meet him one day at the New Westminster Quay. Mr. Puchmayr I knew to be experienced in Union matters and I endeavoured to keep him apprised of events related to the Union's dispensation of my grievances and likewise sought his advice.

When I contacted him in April/97 Charlie opined that Mr. Sutherland had no right to withdraw my termination grievance (later however (in 1998), following his election to the Union's Executive Board, Mr. Puchmayr would change his tune dramatically regarding that matter).

It was during this conversation in April/97 with Mr. Puchmayr that I first heard of the complaint process he termed "a Section 12." Mr. Puchmayr told me of a *Section 12* Complaint he had recently brought against the Union's then-Business Agent, Rick Sutherland on behalf of another member of the Union, Roy Vance. The matter apparently concerned Mr. Sutherland's nepotism in regards to his son Steve Sutherland's position on BDL's seniority list.

This is verified by the Union's Business Agents Report dated February 22, 1996. On page 2, under the heading "Section 12" and in reference to Roy Vance, Mr. Sutherland wrote:

> After reading Brother Puchmayrs (sic) submission, I am considering a libel suit against him. [Union's Appendix 1, document No. 20]

Ironically, in 1998 following my distribution of an information pamphlet questioning Rick Sutherland's conduct, then-president Gerry Bergunder contacted not me, but Michael Nunas and advised him that likewise, Mr. Sutherland was considering a libel suit against Mr. Nunas. [Complainants' document 5.2]

30. Here the Union makes a reference to something it terms, *"super seniority"*. The Board should know that that particular expression was never used by Mr. Sutherland nor Mr. Blair in their explanations to me of the Union's 'reasoning' in these matters.

In fact, my first encounter with the term *"super seniority"* was when I recently read it in the arbitration award issued by Arbitrator Pekeles on May 6, 2004 in regard to Michael Nunas' 2003 termination by BDL. If I am not mistaken, this notion of *"super seniority"* originated with and was put forth by the Employer (BDL) in its failed attempt to have Mr. Nunas' termination upheld.

The Union's reasoning that my *"position"* on the Labatt plant seniority list *"had been eliminated"* and thus my *"right to reinstatement...would be to give* (me) *a form of super seniority over all those who lost their employment due to downsizing,"* is to negate a couple of crucial points apparently not given any consideration by the Union, although certainly brought to the Union's attention by me in my February 5, 1997 meeting with Rick Sutherland in Mr. Blair's office.

Firstly, it seemed to me that pending a decision by a competent and impartial arbitrator in the matter of my termination, my position on the plant seniority list remained where it had always been since my first day worked.

Because notwithstanding the Employer's desire to see me terminated while I was injured and disabled, and the Union's inexplicable but apparent acquiescence to that desire, I maintained (and still do) that *Article 3:1:1 (c)* insulated me from that termination.

Thus this was not a matter of *"reinstatement,"* as the Union claims here, but rather, a matter requiring the simple enforcement of a provision of the collective agreement designed specifically to protect the rights of a disabled employee - a provision that both the Employer and the Union were choosing to discount completely, as they also were in the case of Michael Nunas.

My thoughts at the time (and even still) regards my termination was that until the termination had been upheld by an arbitrator, my seniority and thus my position on the plant seniority list remained intact.

Secondly and most importantly, in coming to its *"reasoned"* conclusion that I would enjoy some *"form of super seniority over all those who lost their employment and thus their seniority due to downsizing,"* the Union was choosing to overlook another important provision of the Labatt collective agreement, namely *Article 15:5* which states in whole:

> If an employee applies for and accepts a separation payment hereunder, his employment is terminated and **his seniority and other rights under the Collective Bargaining Agreement are cancelled**. (emphasis added)

Thus, it would appear the Union was in effect advocating the denial of my collective bargaining rights in a misguided attempt to somehow offset and otherwise protect the rights of other members of the Union, who had willingly agreed to a cancellation of their rights in accepting a severance payment from the Employer.

In effect the Union made an arbitrary decision to protect a number of former employees whose rights had been maintained up to and including the point where they no longer had any rights, in apparent favour of protecting me, an employee who still maintained his rights and had not agreed to a cancellation of those rights.

It is noteworthy here to mention that in the case of Mr. Nunas -likewise terminated by Labatt some two years earlier while injured and disabled and providing proof of same -no severance cheque was ever issued to him, unlike the dozens of other downsized Labatt employees both senior and junior, and thus likewise, he maintains his collective bargaining rights under the Labatt collective

agreement remain intact.

I must add here, in light of Arbitrator Pekeles' recent findings in the matter of Michael Nunas' 2003 termination by BDL, the position I took in 1997 in respect to the termination of an injured Labatt employee appears to have been upheld completely, by Mr. Pekeles.

31 and **32**. Here the Union makes reference to the discussions I had with Rick Sutherland and David Blair in Mr. Blair's office February 5, 1997, five days before the arbitration's onset. At that time I was 15 days post-surgery and I brought some photographs that showed me in my hospital bed, and provided some close-up views of my recent surgical scars.

As well I had brought for Mr. Blair a copy of the list of documents from my lawsuit against Manulife which my friend and lawyer Paul Seale had provided for the Union's benefit. The list contained numerous medical reports as well as personal correspondence I had had, not only with Manulife but with Mr. Sutherland and the Employer's then-Human Resources Manager, David Reinboth.

My reason for providing the Union with this list of documents was to assist the Union in its upcoming arbitration. I told Mr. Blair if he wished to, he could access any of the documents listed by contacting Mr. Seale.

Mr. Blair had no apparent use for any of this material as the list was returned in a letter dated February 7, 1997, and provided to the Board here as document No. 2.3 in the Complainants' *List of Attachments*.

As stated by the Union, a discussion ensued in which Mr. Sutherland expressed his opinion concerning my possible return to work at Labatt in the event my recovery from my recent and radical surgery was sufficient enough to allow me to do so.

But Mr. Sutherland's and Mr. Blair's assessment of my situation seemed to me then, and still to this day, simply implausible for the reasons cited herein (see item 30 above). In short, the Union's position in my view, defied logic.

As noted by the Union, and reflected in my later correspondence to it (cited by the Union and provided here as documents Nos. 3.10 and 3.14 in the Complainants' *List of Attachments),* Mr. Sutherland explained to me, using highly metaphorical language to characterize my potential return to my job at Labatt, that to do so would likely be tantamount to *"parachuting into someone else's job-slot,"* a notion I strongly disagreed with then and do still, absolutely. Parachuting? From where? Out of the blue, perhaps!

Mr. Sutherland's colourful depiction had no basis in reality nor was it, in my view an appropriate analogy to my true situation.

In my letter to Mr. Sutherland dated May 12, 1997 (and cited here by the Union) I challenged Mr. Sutherland to provide me with the name of the employee whose job-slot, in his opinion I would be usurping. Mr. Sutherland didn't respond to that request; he couldn't because it wasn't true.

In any event and expressed in my October 15, 1998 submission to the Union's Regional Executive Board, it was my naivety in these matters that led me to conclude from my meeting with him in Mr. Blair's office *"that Mr. Sutherland was simply offering me his opinion, but that the matter* (of my termination) *would ultimately be decided by a fair and impartial arbitrator."*

My submission continues with this statement: *"I assumed (wrongly, it appears) the Union would be duty-bound to fully represent and advance my interests at the arbitration table."*

33. The Union is correct in stating that I disagreed with its flawed reasoning regards the matter of my termination and its assessment of that situation vis a vis a possible return to work by me. In my view, the Union's argument was specious at best, and appeared to give more consideration to the Employer's interests and desires than to mine.

The Union makes note of a letter from me to the Board dated April 18, 1997 in which I make an application for a *Section 99* appeal of the first Taylor award.

[Complainants' document No.3.9]

What should be apparent and obvious from my letter to it is my complete lack of knowledge of the machinations of the Labour Relations Board, as evidenced by the statements I made in closing.

The Board will recall that I wrote: *"Please note: until receiving a copy of Mr. Blair's letter to you yesterday I was not even aware of the existence of Section 99 nor its time limitations, etc. I hope the board* (sic) *will grant me some latitude concerning this matter, taking into account my layman status."* Also found in my letter's closing is a reference to a possible *"Section 12 failure to represent charge against Mr. Sutherland and Local 300."*

The reality then was that I had no understanding of these matters. I don't believe I even knew that these *"Sections"* I was making reference to were sections of *The Labour Code*!

The naivety I exhibited in 1997 (and continuing up to and including the latter portion of 2001) will prove to be of some importance to my Complaint, particularly in relation to Mr. Glavin's misguided and erronious appraisal of me when he refers to my *"feigned ignorance"* of matters. This is pure presupposition on Mr. Glavin's part.

The fact is, when you're clueless, as I was, you don't have to feign your ignorance because its right there for everyone to see. Such was the case with me.

What is absolutely clear from this particular piece of correspondence was my mistrust of the Union, and the very real fear I held that the Union would abandon me, as it had Michael Nunas in 1996 and as it eventually would in my case in January 2003 with its surreptitious settling of my grievances.

The evidence of that fear is borne out by this statement to the Board: *"In the meantime I hope this letter will suffice to initiate a Section 99 review by the Board should Mr. Blair and Mr. Sutherland miss today's 4:30 deadline for application of said review."* (emphasis added)

My lack of understanding of these matters is further evidenced and supported by, as the Union notes here, the fact that I had *"expressed the concern that the Union's submission did not refer to* (my) *termination grievance,* notwithstanding *"...the decision under appeal did not decide upon the termination."*

35 and **36**. The Union here refers to my letter to the Labour Relations Board dated July 1, 1997 [Complainants' document No. 3.2] and makes note of my concern that the Union had *"withdraw*(n)*..my grievance for wrongful dismissal,"* when, in fact the grievance had not been withdrawn.

This again points to my confusion and lack of understanding of the Union's position in respect to the termination grievance and how that matter was to be handled, as well as expressing my mistrust of the Union.

Put simply, nothing that the Union was advising me of in that matter made any sense to me, whatsoever. On the one hand, the Employer had conceded that to terminate my employment was impermissable if I was disabled -and I was and had proof of same -and yet it seemed to me, the Union was far more interested in seeking an avenue in which it could oblige and accomodate the Employer's wish to be unburdened of its obligations to me; all at the expense of my rights and best interests.

That I was, in fact disabled appeared to be totally discounted by the parties, because one way or another -disabled or not -I was losing my job. Case closed, as Mr. Sutherland liked to say.

I failed to see how this could be right and expressed that view repeatedly but in vain.

37. Here the Union is in error, for I had begun to make comparisons to the <u>treatment</u> afforded other injured and disabled Labatt employees long before the summer of 1997. My initial mistrust of Rick Sutherland had begun when I had

first made contact with Michael Nunas on Easter Sunday in April 1995. Then towards the end of that year, I learned of Jim Dunn's situation when I chanced to meet him at a physiotherapy clinic we both attended.

Mr. Dunn was being treated for injuries he had sustained at work as a result of being hit by a forklift, and was in receipt of WCB benefits. I wish to state it was only natural that I made such comparisons, given we were all injured and disabled and were having to rely on the Union for protection from an Employer that was demonstrating little regard for the rights of its disabled employees.

I had further noted that contained in the parties' *Draft Agreement of Facts* [enclosure to Complainants' document No. 3.10] in the matter of my arbitration, were statements (though deleted by the parties prior to and not entered into the proceedings) concerning the parties' dispensation of Mr. Dunn. It appeared Mr. Dunn had been terminated by the Employer but had been reinstated based on a decision by Manulife to continue to pay Mr. Dunn disability benefits.

It occurred to me that the Union had possibly entered into an agreement on behalf of Mr. Dunn that was in variance to the collective agreement.

One further matter that remains a mystery to me (and I believe to Mr. Dunn) was exactly how had he gone from a WCB claim for the injuries sustained in the workplace to a claim for a non-work related disability with Manulife.

In any event, Mr. Dunn had confided to me that while awaiting a decision by Manulife regards its discontinuance of his disabilty benefits, he had attempted to return to work at Labatt but instead, had been told by Byron Hansen of Labatt's Human Resources Dept. that that was impossible due to "the Nick Hughes thing".

It struck me at the time that Mr. Hansen was taking liberties in invoking my name so gratuitously, particularly as "the Nick Hughes thing" was currently before Arbitrator Taylor, and the Union's *Section 99* appeal of his first decision had not been completed by the Labour Relations Board.

I wrote to Mr. Hansen on May 12, 1997 to request he *"cease and desist"* his misrepresentation of me to Mr. Dunn, but received no reply to my letter.

[Complainants' Supplemental document]

One other disabled Labatt employee whom I did make several comparisons to was Brian Lambert, whose name is conveniently omitted in its Response by the Union.

Mr. Lambert's seniority in 1994-95 was even lower than Mr. Dunn's, I believe some **37** positions below mine and **50** positions below Michael Nunas'.

The Board should take note that Mr. Lambert continues to enjoy full benefit status as an employee of Labatt, whereas Mr. Nunas and I obviously don't.

38. Here the Union again makes a comparison between Michael Nunas' situation and mine and negates the similarities regards same. On this point the Union is correct in its assessment that I am indeed, as is Mr. Nunas, unaware of any substantial differences in our respective terminations, differences which Mr. Nunas and I consider to be negligible, given the exact, same outcome for us in these matters.

39. Irrespective of the flawed legal advice provided to the Union concerning Mr. Nunas and his claim for disability benefits, the Union chooses arbitrarily to ignore a few pertinent facts regards the insurance contracted by the Employer.

Firstly, the Employer's insurance carrier Confederation Life had gone out of business approximately 5 weeks after discontinuing Mr. Nunas' disability benefits May 13, 1994.

Secondly, the Employer had contracted a replacement policy with Manulife Financial that appeared to provide no coverage for claims (such as Mr. Nunas') incurred prior to Manulife's takeover on August 30, 1994. [Complainants' document No. 6.2]

This of course, seriously undermines and effectively renders implausible the Employer's long-held position in my case, that it need only provide an insurance policy that provides the stipulated benefits and otherwise conforms with the

collective agreement, and moreover its claim to have done so.

Thirdly, and this is important, the Union had not filed a grievance for Mr. Nunas' LTD benefits as it had done for me, and thus was likely barred from doing so due to its delay in filing such a grievance in a timely manner.

The Union paid little if any consideration to the denial of Mr. Nunas' disability benefits in May 1994, and indeed, didn't bother to obtain legal advice regards that matter until February 1996!

The legal opinion provided to the Union at that time indicates the Union was unaware of the serious complications regards the issue of Manulife's non-liability that the newly-acquired Manulife policy raised for Mr. Nunas.

But even after Mr. Nunas' lawyer had brought this matter to the Union's attention it was still met with apparent disregard.

All of this indicates that Rick Sutherland had made his decision to abandon Mr. Nunas back in 1994, and that his legal representatives in 1996 were simply providing him with a legal opinion that lent substance and credence to Mr. Sutherland's earlier decision.

Finally, with respect to the Union's assertion that it *"had declined to proceed with arbitration of* (Nunas') *termination in September 1996,"* in reality that recommendation had been made to the Union's Grievance Review Board on March 18, 1996 [Union's Appendix 2, - document No. 18].

The legal opinion provided to the Union at that time concerning its chances of winning Mr. Nunas' grievance was accompanied by a proviso. [Union's Appendix 2, - document No. 15]

Interestingly and reflected in the minutes of that meeting of the GRB, that proviso appears to have been given no mention, whatsoever and thus was likely given no consideration by the Union in its decision to abandon Mr. Nunas.

I submit the omission of this important proviso was both deliberate on Mr. Sutherland's part, and designed to exert influence on the Union's GRB to

countenance a decision to abandon Mr. Nunas. This is just one example of Rick Sutherland's underhanded misrepresenting of matters to the Union's elected boards, ostensibly in order to get them to do his bidding, no questions asked.

40. In fact, Mr. Dunn had been terminated (as was I) under *Article 3:3* of the collective agreement, notwithstanding he was injured and disabled. His claim was later accepted by Manulife -a determination as to eligibility we now know to have been wrongly delegated to the insurer by the Employer (pursuant to the *"Second Taylor Award"*) and he was reinstated. Mr. Dunn's claim unlike mine, suffered no interference (that I'm aware of) from the Employer. Furthermore, the Union filed no grievances on his behalf that I am aware of.

42. The Union states here that in the case of Mr. Dunn, it *"agreed with the Employer that* (he) *would maintain notional "employee" status so long as he remained disabled and entitled to disability benefits."* (emphasis added)

The Board should take note that there exists no such reference in *Article 3* - which deals exclusively with an employee's seniority -to any entitlement to disability benefits as a stipulation to maintaining one's seniority. In that respect the Union's misguided *"agree*(ment)*"* above, is clearly at variance to the collective agreement.

As in the case with my grievances (which dealt with *Articles 3* and *9,* two disparate sections of the collective agreement independent of one another,), the Union appears to be mixing apples and oranges when it attempts to impose disability tests concerning insurance eligibility with the far simpler test that is found in *Article 3:1:1 (c)*.

43. As noted in item 33 above, I had no real understanding of *Section 12* and as referred to here by the Union, I sought to meet with the Board's Information

Officer, Clive Lytle to discuss the matter. Unfortunately, Mr. Lytle declined to meet with me, and so I continued on in relative ignorance.

However, in subsequent telephone conversations I had with Mr. Lytle in which we discussed the feasibility of a *Section 12* Complaint, I was advised by him that the Board's policy regards complaints of this nature dictated that as long as the termination grievance was deemed to be "alive," as was the case with my termination grievance, such a complaint would undoubtedly be considered premature and likely dismissed on that basis.

It appeared from these discussions with Mr. Lytle that I had little alternative but to wait for the eventual outcome of matters before a complaint of this type could be given any serious consideration by the Board. This appears to be borne out by numerous decisions the Board has rendered and that I subsequently became aware of.

44. I submit that given the *Article 3:3* termination grievance was for all intents and purposes "alive" up to and including the moment when the Union settled the matter in January 2003, it follows that the Union's submission here that *"the timeliness of* (my) *complaint as it relates to this aspect of the Union's treatment of* (my) *termination grievance must be assessed from this time frame"* is completely unfounded and ought to be disregarded by the Board on that basis.

45. The Union states that in the matter of the Union's *Section 99* appeal of *"the Original Taylor Award,"* the parties *"waited an inordinate amount of time for the Board to render its decision."*

With respect, that is a gross understatement.

The Union filed its *Section 99* application on April 30, 1997, the adjudication of which was not completed until April 23, 1999 [BCLRB 149/99 - Complainant's document No.

1.9].

On December 3, 1998 in a letter to the Union [Complainant's document No. 2.4] David Blair characterized the delay as *"grossly excessive"* and noted the Board had *"not responded to our letters in June and September* (1998) *pressing for an answer."*

The truth of the matter is this represents only one of numerous delays in and abeyances of the proceedings that I was subjected to. Consider that it took 19 months from the date of my filing the *Article 9* grievance for disability benefits to even get to a preliminary hearing of the matter!

By comparison the successful and recent arbitration of Michael Nunas' 2003 termination by BDL, from the date of filing the grievance to the issuance of Mr. Pekeles' award making him whole, took less than 10 months to complete!

I urge the Board to make careful note of that significant distinction.

46. With respect, here the Union makes an incorrect and absolutely false assumption.

In fact, the Union's advice to retain my own counsel had arrived too late for me to commence an action (see item 8, above). However, I was fortunate enough to have a long-time friend in Paul Seale, who happened to be a personal injury lawyer and whom I had consulted in April 1995 as a result of the Union's failure to properly advise me in these matters.

The Union's hubris here, to take some credit for advising me to seek counsel, when in reality it had **not** done so in a timely fashion at all, is offensive to me. The supporting documentation [Complainant's documents Nos. 3.3 and 3.4] clearly indicates that my inquiries at that time to the Union regards the matter of my legal rights resulted in my receiving either disinformation or none at all!

I urge the Board to review these two, compelling documents.

47. The Board should take note that my decision to bring these matters to the

attention of Gerry Bergunder, the new (at that time) president of the Union was as a result of Mr. Puchmayr's advising me that I should and that I must utilise the Union's internal dispute mechanisms, the first step which was to appear before the Union's General Executive Board.

48. Interestingly here, Mr. Bergunder, prior to Mr. Nunas' and my appearance at the Union's REB meeting, had assured me that he would be discreet and not alert Mr. Sutherland and the REB to our planned attendance at the meeting until we had arrived. That a motion was made by the GEB the month before to have us attend the next REB meeting comes now as a complete suprise to me, given Mr. Bergunder's prior assurance to me of discretion. But the revelation that Mr. Bergunder could not be trusted anymore than could Rick Sutherland, at least as far as matters pertinent to Michael Nunas and me are concerned -that's no longer news to me.

49. Regards my attendance at *"the Union's REB Meeting on October 15, 1998",* the Union incorrectly states here that I have *"included three letters to the* (Regional Executive) *Board,"* when in fact I have provided four letters.

Furthermore, a review of the minutes of the Union's REB meeting held on October 15, 1998 [Union's Appendix 1, - document No. 56] reveals a number of inaccuracies I believe need to be addressed:

Firstly, the minutes make note of an apology by me for allegedly disrupting a union meeting at the Firefighter's Hall on October 4, 1998.

Although I have no recollection of making such an apology, I do recall however, interrupting Rick Sutherland's Business Agent's Report to query why my name was neither included nor mentioned in his report to the membership, whereas he elucidated on the status of numerous other outstanding grievances the Union was involved in at the time.

The omission of any mention of my grievances was thus glaring and conspicuous by its absence and I interrupted his report to ask him why that should be so. I did not receive an answer to that question and was advised by then-president Bergunder to sit down, as this was "not the time nor the place" for discussing this matter. I took this to mean that he preferred to have this discussion out of hearing range of the membership at the upcoming REB meeting I was to attend, October 15, 1998.

Interestingly, the minutes of the meeting I am alleged to have disrupted makes absolutely no mention of my alleged disruption of the meeting. [Union's Appendix 2 document No. 36]

Strangely, and as noted above, this document is found only in the Union's Appendix 2 to its Response, which is concerned solely with Michael Nunas' Complaint (who was not in attendance at the meeting in question), and is not included in Appendix 1, which deals exclusively with my Complaint.

Secondly, the minutes of the October 15th meeting indicates that I *"proceeded to present the appeal on behalf of* (my)*self and Brother Nunas."*

With respect, that is incorrect. Mr. Nunas went first, speaking on his own behalf. Although prior to entering the meeting I had asked him to let me speak first, Mike, possibly a little nervous jumped the gun and got right to it. When he had finished what he had to say, I began to read from my prepared, written submissions (I had brought 5 documents, 4 of which are included in the Complaints' documents at 3.14).

Thirdly, the minutes indicate that I felt *"the time spent* (by Mr. Nunas and I) *on WI/LTD should count as days worked and therefore* (we) *should not have been terminated."*

With respect, that is a misrepresentation and gross oversimplification of my written submissions to the Union, as evidenced by the submissions' content. I submit that a simple review of those submissions by the Board will verify my true position regards the matter of my termination and the arguments I put forth at the

REB meeting in question.

Fourthly, concerning the alleged *"heated debate"* that followed and resulted in Mr. Sutherland's departure from the meeting, again with respect, that is not what occurred.

In fact, at the time at which Mr. Sutherland rose from his chair to exit the meeting saying, "I don't have to take this shit from this fucking asshole," -in reference to me, of course -however, there was no debate going on.

On the contrary, I was calmly reading from the second of my five prepared submissions, the one with a circled number 4 at the top of the page and captioned:

> **Re: Rick Sutherland's refusal to address the issues related and pertaining to Labatt's treatment of injured and/or disabled Local 300 members. Request for assistance and/or information from the Union**.

I was not prepared for such a blatantly **hostile** response from Mr. Sutherland as evidenced by his abusive and profane remarks to me at that time, but it was quite apparent he didn't wish to address the very issue being raised by my submission at the time of his hasty exit which ironically, was his unreasonable refusal to provide me with a reasonable explanation to the matters raised in my letter to him of May 12, 1997. Instead he employed a tactic I would later term, "duck and run".

In retrospect, I wish that I had declined to continue my submissions to the Union at that time, instead demanding that Mr. Sutherland be brought back into the meeting and made to give answers to my accusations that he had been "stonewalling" me.

Instead, what I did say as Mr. Sutherland stalked out the room in what I considered to be an overdramatic fashion, was: "That's right, Rick, run away, run away," whereby Mr. Sutherland curtailed his exit momentarily to approach me at the table where I had remained seated.

I don't recall all Mr. Sutherland had to say to me at that moment (or more rightly screamed into my face), however I do recall him being most adamant about not wanting me to circulate my complaints with him -"all over Local 300" was how he put it.

Mr. Sutherland then retired upstairs to his office, where he ostensibly reviewed mine and Mr. Nunas' files before sheepishly returning to the meeting, an estimated one to one and a half hours later.

50. Regards my *"lengthy argument concerning the Union's position regarding* (my) *termination grievance,"* in which the Union claims I summarized the matter as *"...if you hadn't been disabled, you would have been terminated, anyway"*, in actual fact that quote is attributed by me to Rick Sutherland. Those were his words verbatim, first spoken in David Blair's office February 7, 1997 and reiterated by Mr. Sutherland in response to my questions to him at the October 4, 1998 Union meeting at the Firefighter's Hall.

My *"lengthy argument"* in respect to this arbitrary and capricious summary of matters by Mr. Sutherland can be best summed up by simply posing the question in the alternative (i.e. if I had been disabled, what then of my termination?).

The Union's consistent answer to this remains the same: either way, I'm terminated. The Union's position on this point therefore defies logic.

51. As noted herein, the termination grievance was *"alive"* at all times, notionally or not, and I was advised by the Board's information officer, Mr. Lytle that a *Section 12* Complaint would be undoubtedly deemed premature by the Board and dismissed on that basis. I was therefore obliged to wait for the Union to conclude matters before requesting this type of review of the Union's conduct in its over-all representation of me in these matters.

As stated too elsewhere herein, I had assumed (wrongly, it appears) that the

matter of my termination would, in any event be decided by the arbitration Board, notwihstanding the Employer's and the Union's desire to see the termination upheld.

The Union too, explained to me numerous times that the labour relations process took some time to complete and I would have to wait for a resolution of my disputes. I was not delaying in any way, but simply waiting for the Union to complete its discharge of my two grievances as was its right to do so.

As already noted herein, and as well in Mr. Nunas' Complaint, Mr. Nunas was too waiting, as he had been told by Rick Sutherland that the only hope Nunas had was if the Union was successful in the arbitration of my grievances (I refer the Board here to my introductory remarks under the heading, The Nunas Complaint, above).

52 an **53**. It is noteworthy that the Union's then-president Gerry Bergunder's initial response to Mr. Nunas' submission amounted to nothing more than a photocopy of the letter he sent to me, demonstrating that Mr. Bergunder considered Mr. Nunas' complaints to the Union did not require nor warrant a direct response to Mr. Nunas. Mr. Nunas responded to this slight in a letter dated November 11, 1998. [Complainants' document No. 6.12]. Mr. Bergunder's response to Mr. Nunas' letter came 3 months later on February 11, 1999, in which he *"aplologiz*(ed) *for not writing sooner and for adding you in with Nick Hughes' letter, rather than give you one to address your issue."* [Complainants' document No. 6.13

Prior to my receipt of the October 28,1998 letter [Complainants' document No. 3.16] from Mr. Bergunder and referred to in the Union's Response, I took the liberty of providing Mr. Bergunder with a follow-up letter to address some things that came to light in the meeting that had not been contained in my submissions to the Union.

Dated October 19, 1998, [Complainants' document No. 3.15] I proposed at that time my willingness to attend a meeting with Mr. Bergunder and (at Mr. Bergunder's

discretion) Mr. Sutherland, in order *"to calmly discuss* (Rick Sutherland's) *past representation of me,"* and to *"afford* (Mr. Bergunder) *the opportunity to judge for* (himself) *whether my complaints with* (Rick Sutherland had) *any merit."*

It is unfortunate and moreover, noteworthy that my conciliatory offer to Mr. Bergunder was apparently neither considered nor accepted by him, exemplifying Mr. Bergunder's turning a blind eye to some serious matters that threatened to undermine my collective bargaining rights.

Then, following receipt of Mr. Bergunder's letter October 28th, I responded to same with a letter dated November 9, 1998 [Complainants' document No. 3.17] in which I sought to refute a number of issues raised by Mr. Bergunder. One of these was his pointing to what I referred to as *"*(the Employer's) *successful decimat*(ion of) *its New Westminster workforce from 270 people...to "less than 130 positions"."*

These numbers provided by Mr. Bergunder failed to mention *"that Labatt's plant seniority list was attacked from <u>both</u> the top <u>and</u> the bottom,"* and that Mr. Bergunder's *"omission...might be misconstrued as misreprepresentative, to say the least."*

And in response to Mr. Bergunder's assertion that my *"seniority ranking no longer exists,"* I suggested to him that *"the obvious and only reason that* (was) *so* (was) *due to the fact the Union had done little on my behalf to contest Article 3:3's validity,"* adding *"Article 3:3 is entitled after all, "Loss of Seniority"."*

The Board will undoubtedly come to the rightful conclusion that this type of nonsensical and convoluted logic on the part of the Union has been the hallmark of its representation of me (and Michael Nunas, too).

I noted too, that the number of employees referred to by Mr. Bergunder and in fact, included in his tally were *"those* (employees) *<u>on Weekly Indemnity or Long Term Disability.</u>"* (emphasis added)

Thus it would appear that in order for a disabled employee to remain a benefitted employee, he/she would be required to <u>first</u> satisfy and comply with a

third party (Manulife) that rightly should have had no bearing on matters related to his/her employee status. That might require the disabled employee to pursue an action against the third party in the courts, solely in order to maintain his employee status.

I submit that if such an arrangement had been agreed to by the Union, it would appear then that the Union had agreed to a provision that was in variance to the spirit if not the meaning of the collective agreement, with little consideration given to the serious and obvious ramifications that such an arrangement held for the disabled employee.

No response to my letter of November 9th nor to the serious issues raised by me was ever received from Mr. Bergunder.

54. Irrespective of any motions passed by the Union's GEB to permit Mr. Nunas and me to appear at the next meeting of the GEB in January 1999 as noted here by the Union, no written notification was ever provided to us in regards to this matter. In fact, we were both dissuaded from attending at that time by Mr. Bergunder, possibly for the reason that he was still engaged in formulating his response to Mr. Nunas' letter noted above (item 52), and would not complete that task until February 11, 1999 [Complainants' document No. 6.12].

55. Here the Union refers to its response to David Blair's letter of December 3, 1998 [Complainants' document No. 2.4] in which Mr. Blair stated that the Labour Relations Board had *"failed to deal with* (the Union's) *section 99 application that was filed April 30, 1997"* and had *"not responded to our letters in June and September* (1998) *pressing for an answer."* Mr. Blair added that the Board's delay was considered to be *"grossly excessive."*

Notwithstanding the Board's *"grossly excessive"* delay, it took the Union a further full 3 months to act on Mr. Blair's advice in writing to the Board -*"as a*

clear hint of the need to get on with this matter" -of the Union's decision and intention to seek an order of *"mandamus"* from the Supreme Court, and a further month of delay on Mr. Blair's part before he got around to actually writing to the Board March 30, 1999. [Complainants' document No. 2.6]

It is my sincere hope that the Board pays some consideration to the mention of these noted delays by the Board and by the Union, in its consideration of any perceived delays on my part or that of Michael Nunas, as noted by the Union in its Response to our respective Complaints.

With respect to the decision rendered by the Board on April 23, 1999, the Union incorrectly refers to this decision as BCLRB **B159**/99, when in fact it should be **B149**/99.

57. With respect to this money loaned to me by the Union, in a recent letter to Roy Graham in his capacity as Mr. Bergunder's successor to the Union's presidency, I acknowledged the outstanding debt to the Union but noted that, *"my agreement regards repayment to the union was conditional upon receiving monies from Labatt. This is clearly indicated on the document I signed and provided herein. There is no mention of Manulife, whatsoever.*

Secondly, the loan was made with the clear understanding that my severance cheque from Labatt (which had been returned to Labatt uncashed pursuant to Article 15:5 of the Labatt collective agreement) would serve as collateral for the loan.

Unfortunately, it may be that my outstanding severance money from Labatt has been included and bargained away in the union's alleged settlement with Labatt on my behalf and is no longer available to me."

The Board will take note that no response regards the foregoing matters has been forthcoming from Mr. Graham.

58. Here the Union refers mistakenly to my letter to Arbitrator Taylor dated July 5,1999 [Complainants' document No. 3.18] and in which I sought to elaborate not only on my misunderstanding of matters regards the *Article 3:3* termination grievance and the negligible amount of consideration given to it in Mr. Taylor's "Original Award" -but not my *"confusion"* as stated here by the Union -but also the relevant details concerning the Employer's misconduct in its underhanded approach to its administering of my claim for disability benefits with its insurance carrier.

Quite simply put, the Union was not bringing these important matters to the fore and, aware that Mr. Taylor was once again receiving submissions, I took the opportunity to apprise him of the relevant and disturbing events that led up to and resulted in the disqualification of my claim for disability benefits and my subsequent termination by the Employer. As well, I paid particular attention to what I considered to be the unwarranted abuse of me by Mr. Sutherland.

My plea to Mr. Taylor at that time went unanswered.

59. Now here in my letter to David Blair dated July 8, 1999, [Complainants' document No. 3.19] I in fact, do *"confess my confusion as to the status of my two grievances, their arbitrations, and the Union's plan to resolve my disputes with Labatt, etc."* - and with good reason!

Because little if any of that which I was being advised by the Union - particularly in regards to its proposed dispensation of my grievance for unjust dismissal -was making any sense to me, whatsoever; it still doesn't to this day. For it appeared to me the Union was going to allow my unjust termination, disabled or not, much the same as it had allowed the termination of Michael Nunas in 1994.

Again I remind the Board that the crux of the Union's reasoning as related to me by Rick Sutherland during this time was that *"if you hadn't been disabled, you would have been terminated, anyway."*

The callusness and insensitivity demonstrated by that type of arbitrary remark was really all I had to go on. It seemed to me then, as it continues to, that Mr. Sutherland hadn't really given much consideration to my interests or as to what constituted fair treatment to me in these matters. He appeared in fact, to be more interested in providing the Employer with the necessary means to make my unjust termination a fait accompli, with no questions asked.

And given my termination has been allowed to stand unchallenged by the Union, it follows that my assessment of Mr. Sutherland and the position adopted by the Union was ultimately correct.

60, **61** and **62**. I continued in my opposition to the Union's misguided thinking in these matters, but as is clear from my unsuccessful earlier attempt (the previous October at the Union's REB meeting) to convince the Union of the error of its ways, there was little else I could do to influence the Union regards its unprincipled decision in basically allowing my termination by the Employer to go unchallenged.

The proverb, "there are none so blind, as they that will not see" comes to mind when I reflect on my earlier efforts (in vain) to persuade the Union and its elected officials of the wrongness of its decisions pertaining to mine and Mr. Nunas' unjust terminations. Indeed, the Union appeared to be hell-bent on pursuing a course of action that could only lead to a justification of our respective and unlawful terminations by Labatt.

We still remain unclear to me and to Mr.Nunas is to how such a position by the Union could ever be considered to be in the interests of the Union's membership.

63. Here the Union fails to even mention my attendance at the Union's GEB meeting of November 18, 1999 [Union's Appendix 1 - document No. 77] to which I was finally allowed to attend.

Notable in the Table of Contents of Appendix at item No.77, is the Union's assertion that the Union at that meeting *"deal*(t)*"* with my complaints to it. With respect, nothing could be further from the truth as I was thwarted by Rick Sutherland and Gerry Bergunder with numerous interruptions as I attempted to elucidate my concerns. This is borne out by Mr. Bergunder's subsequent letter to me dated January 17, 2000 in which he affirms as much at paragraph 2. [Complainants' document No. 3.22]

The first matter I had brought to the Union's attention was its constitutional duty to assist members pursuant to ***Article 15, Section 8, Duty to Assess Working Members*** of the Union's *Constitution and By-laws*. That section is set out below:

> In the event of financial emergencies, levy special asessments against members who are working in order to assist members who are involved in labour disputes.

Such as was clearly the case with me.

But Mr. Sutherland shot that idea down, explaining that the provision was only in reference to disputes involving work stoppages and as such had no application to my situation. This denied request by me is noted in the minutes from the meeting in the form of request for clarification of the provision. [Union's Appendix 1 - document No. 77].

Then, as I attempted to bring my concerns in respect to Mr. Sutherland's conduct to the Union's GEB, I was subjected to numerous interruptions by both Mr. Sutherland and Gerry Bergunder and by at least one other member of the committee -both Sutherland and Bergunder repeatedly tried to frame my reason for being there as a simple matter of my wishing to voice my displeasure at the extraordinary length of time that the arbitration of my grievances was taking to complete, despite my repeated protestations that that wasn't so, that I had other matters to discuss.

"Nick," I can still recall Mr. Sutherland saying, "you're here to complain of how long the arbitration process is taking to complete," to which I repeated numerous times, "No, I'm not." These interruptions, in my view, were solely designed to add chaos and confusion to the proceedings, and to prevent me from discussing before the GEB the many concerns I had with Mr. Sutherland's conduct as Business Agent.

Amongst these was the matter of Mr. Sutherland's surreptitious and unconstitutional issuance in May 1996 of a withdrawal card in my name - something I had neither applied for nor required as a member of the Union unable to work due to disability.

The matter of the withdrawal card's issuance had been first brought to my attention in March/99 when, while discussing another matter over the telephone with a secretary at the Union's office, I happened to mention that the Union card I held currently at that time had expired, and that I wished the Union to replace it with a card that reflected my membership in good standing.

With that, the call was transfered to Mr. Bergunder who then informed me that Mr. Sutherland had indeed issued the withdrawal card, unbeknownst to me, some three years previous, despite neither a request from me nor a need to do so.

The Union's *Constitution and By-laws, **Article 6, Section 4 (a),*** as set out below defines a withdrawal card as:

> "A withdrawal card is a suspension from membership which entitles the member to be readmitted to membership on presenting a valid card." (emphasis added)

In addition, there are further provisions that detail the circumstances and procedures for issuing such a card -none of which had been properly adhered to by Mr. Sutherland in his underhanded suspension of my union membership. Notable among these was ***Article 6, Section (k)*** which states:

> "Members holding withdrawal cards shall not attend meeting of the Union or participate in elections, referenda, or any other business functions of the Union." (emphasis added)

Thus it appeared to me that in issuing me a withdrawal card, Mr. Sutherland was both able to prevent me from being notified of and possibly attending union meetings, as well as removing my name from the Union's balloting list of members eligible to vote (or possibly even run) in Union elections. This has in fact, resulted in the denial by the Union of my right to suffrage, a further contravention of my constitutional rights.

Unfortunately, the Union apparently didn't wish to hear the sordid details of Rick Sutherland's behind-the-scenes shenanigans regards this matter that essentially concerned the denial by him of the rights conferred upon me by the Union's constitution.

As a matter of fact, I said as much before being curtailed by a motion to have me return to the GEB after the arbitration was finished. Interestingly and despite the GEB's own motion to have me back at that time, I have yet to receive an invitation by the Union to do so. [Union's Appendix 1 - document No. 77]

It was my utter exasperation to the Union's not allowing me the right to bring these matters to the GEB's attention at the meeting that prompted me to file with the Union the letter outlining the charges against Mr. Sutherland that I had prepared and produced from my briefcase.

And notwithstanding Mr. Glavin's description of this letter as my *"complain(ing) generally of alleged poor representation by Mr. Sutherland..."* (emphasis added) the charges I levelled at Mr. Sutherland were quite specific and stated that: *"...though my complaints with Mr. Sutherland are numerous...my primary complaint with the Union is its indifference to the shabby, unfair treatment by Labatt of injured and disabled Local 300 members during early 1995,"* and

included some 14 violations of the Union's *Constitution and By-laws*. including as correctly stated by Mr. Glavin here, *"...trickery, betrayal and neglect of duties..."*.

64. Notwithstanding Mr. Glavin's assertion here that *"these charges were considered by the Union in accordance with its Constitution..."*, in fact the Union simply stayed the matter of the charges until finally, at a union meeting some 10 months later, in response to a question posed by me as to why a trial jury had not yet been convened in the matter, another member made a motion to hold the trial and the motion was carried with overwhelming support from the membership.

The resulting trial was an absolute fiasco, in which the trial jury refused to even hear from my witnesses, nor even allow me to raise matters that did not pertain to the arbitration of my grievances, notwithstanding the charges clearly enunciated and sought to address other matters not pertinent to that arbitration process.

In sheer frustration and as a result of the procedural roadblocks I experienced at the hands of this panel (handpicked for the job by Gerry Bergunder), I withdrew from the proceedings under protest, having come to the conclusion that the process was both flawed and that its outcome was predetermined.

65. What ought to be mentioned here is that the Union had informed me the night before at the GEB meeting that it could provide to me as much as $1500.00 to which I requested but a fraction of that amount.

Upon my acceptance of a cheque for $1,000.00 from the Union, Mr. Sutherland advised me that should I require additional funding from the Union, a further $500.00 was always available to me. However, as the Board shall see, this would prove not to be the case.

Because, in January 2000 when I telephoned Mr. Sutherland to request the additional funding from the Union, Mr. Sutherland's response to me was that he

would have to first "canvass" the Union's Table Officers.

This prompted me to ask of him if he had been "just blowin' smoke up my ass" with his prior assurance and promise to me to provide additional funding.

Indeed, Mr. Sutherland appeared to have no recollection of his prior assurances to me. In retrospect, I would come to conclude that at the time he made those assurances to me in November 1999, Mr. Sutherland had been drinking alcohol, and that it was his insobriety that had contributed to his loss of memory in January 2000 of events from two months before.

Following my conversation with him, Mr. Sutherland informed president Bergunder that I had been "abusive" of him on the telephone, prompting Mr. Bergunder to issue his libelous and threatening letter to me. [Complainants' document No. 3.22]

It is noteworthy here that the Union makes no mention of this episode in its Response to my Complaint, and thus must be seen to be in concession of the events as described by me in my Complaint.

The Board should be further aware that Mr. Sutherland's drinking habits had previously raised concerns among numerous other members of the Union, particularly as it pertained to the consumption of alcohol by him at the Union's office and even before and during meetings of the Union's executive boards.

Of course this has relevance to any member who sought to have a matter considered by the Union's top officials, when there existed a likelihood that the minds of these union officials were routinely clouded by the effects of alcohol.

If required by the Board, I can easily produce witnesses to substantiate the allegations of excessive drinking at the Union's offices referred to, above.

67. Further to the Union's submission here, the second Taylor decision was thus conclusive in its findings that the Employer had contravened the relevant provisions of the collective agreement regards the issue of benefit entitlement eligibilty determination as well as in regard to the discrepancies in the disability

definitions contained in the Manulife policies and the collective agreement.

68. Here the Union states that Arbitrator Taylor *"expressly declined to decide whether there were any discrepancies between the Collective Agreement and the policy provided for the period after 104 weeks,"* but fails to mention that Mr. Taylor's declination was wholely due to the fact that *"that issue was not addressed by the Employer."*

Mr. Taylor's decision however, in no way was an indication that the discrepancies contemplated beyond 104 weeks of disability in fact did not exist.

On the contrary, Mr. Taylor did find that

> ...the issue as to whether there exists a discrepancy between the collective agreement and longterm disability policy disability tests ...beyond 104 weeks is properly before (Mr. Taylor's) board.

69, 70 and **71**. Here the Union refers to its counsel's proposal, following the issuance of *"the Second Taylor Award,"* that the Union *"write to the arbitration board and invite it to schedule a hearing to determine if* (I) *was disabled within the meaning of the collective agreement beyond the date* (my) short-term disability *was cut off until now."* [Complainant's document No. 2.10]

The Board should be aware that there exists no evidence that this advice was <u>ever</u> acted upon by the Union.

Also glaring in its omission is any reference by the Union to a fax dated February 7, 2000 from David Blair to Rick Sutherland in which Mr. Blair refers to *"one aspect of* (the parties') *settlement discussions"* that Mr. Blair had previously discussed with Mr. Sutherland *"a few weeks"* prior to sending the fax. [Complainant's document No. 2.12]

Mr. Blair wrote:

> *"As part of the settlement, will the Union agree that it will not in future arbitrations on disability benefits refer to the second* (Taylor) *award. In other words, although the Union can argue that the first award is wrong, it will have to make that arguement as a matter of general principle and without reference to the opposite decision in the second* (Taylor) *award."*

This then became the critical and pivotal turning point in the Union's failed representation of me, and in fact became the basis for its settlement discussions with the Employer, as well as the surreptitious settlement eventually reached by the parties. [Union's Appendix 1- document No. 114]

It appeared that the Union, much like the Employer, was not pleased by the turn of events resulting from the *"Second Taylor Award."*

This is a plain indication that the Union had turned its mind away from the matter of my disputes with the Employer, and instead had begun to focus in earnest in finding a way in which the Union would not be bound by Arbitrator Taylor's second majority decision. This is clearly reflected in the parties' January 9, 2003 *Minutes of Settlement*, which indicates that Mr. Taylor's second award would be *"considered a nullity and it will not be referred to or relied upon by either party in any future proceedings."*(emphasis added) [Union's Appendix 1 - document No. 114]

Well, so much for the notion of binding arbitration!

Thus it appears that my interests began to take a definite backseat to those of the parties, and that furthermore, the Union's interests had begun to lie even more closely with, and parallel to those of the Employer's.

From this point on, my chances of ever succeeding in labour relations while being represented by my union were slim to none.

As noted here too by the Union, in reference to its prior and misguided

handling of Michael Nunas' claim, it would appear that any representation of me beyond 104 weeks of my disability would have been by definition, discriminatory to Mr. Nunas, for whom the Union had already made its arbitrary decision to abandon. In that sense, the Union's hands were effectively tied regards any advancement of my interests beyond 104 weeks of disability, notwithstanding the matter was, as noted above, *"properly before* (Mr. Taylor's) *board."*

The basis for the Union's abandonment of Mr. Nunas was the legal opinion provided by its counsel (and one I take great issue with, as the Board shall see) that the disability definitions' discrepancies contained in the insurance policy and the collective agreement were indistinguishable beyond 104 weeks and therefore the Union had little chance -and thus no obligation -in advancing an employee's interests beyond the first 104 weeks of disability.

The legal opinion provided to the Union regards these comparative disability defnitions is found at page 15, paragraph 2.19 in a letter from Victory Square Law Office to the Brewery Workers' Union dated March 21, 1996, and reads as follows:

> *"In the case of total disability after 104 weeks ("hard LTD"), the definition of totally disabled is not, in our opinion, significantly different than the definition contained in the Collective Agreement."*

Concerning the Union's legal opinion above, Mr. Nunas and I however would argue in the alternative, that far from being insignificant or indistinguishable, the disability definitions' discrepancies differences are enormously different.

A cursory perusal of the two definitions of disability beyond 104 weeks shows that some obvious discrepancies exist. Most notable is, that while the Manulife policy contemplates employment for which the applicant is *"reasonably fitted,"* the collective agreement contemplates employment for which he is *"reasonably qualified."* (emphasis added) [Complainants' document No. 1.8 - Second Taylor Award - page 9, Section III - chart]

There might be numerous jobs that a grievor is reasonably fitted for, however, being qualified for those jobs is quite another matter, possibly requiring training and education.

As an example and based on my writing skills and my analytical mind, it could be postulated that I am fitted to become a lawyer. However, without the years of education required to become a lawyer and the subsequent attaining of a law degree, I, by definition would remain unqualified. I ask the Board to give careful consideration to that fundamental distinction

Thus, far from being insignificant, the disability definitions are fundamentally different.

And further in regard to the existence of these discrepancies, I reiterate David Blair's own words, in his written submission to the arbitration panel on my behalf, -dated July 7, 1999 at pages 11 and 12, paragraphs 4.6 and 5.2 respectively -who with great eloquence and insight, stated:

> We submit the breadth of the discrepancy is irrelevant...the result of the discrepancies is clear. As Arbitrator Germaine observed in MacMillan Bloedel, supra, where there is a discrepancy between a collective agreement requirement and the provisions of an insurance policy such that coverage to which and (sic) employee is entitled may be properly denied under the policy, the Employer is liable for the benefit... (emphasis added) [Complainants' document No. 2.7]

73. The Union correctly refers here to BCLRB 244/2000 issued June 19, 2000, in which the Board upheld Arbitrator Taylor's second award.

74. Here the Union makes reference to the Employer's application for reconsideration of the Board's decision BCLRB 244/2000 above, but then

mistakenly refers to my own *"action against Manulife,"* noting *"a settlement with Manulife was a realistic possibility."* With respect, that statement amounts to little more than wishful thinking on the part of the Union.

In reality, my action against Manulife was encountering serious difficulties as a result of the stalling tactics Manulife was employing in its resistance to appear for discovery examinations. Despite the fact that the denial of the benefits occurred here (on the west coast), -and likewise I resided here, and furthermore the lawsuit was filed and registered here at the Vancouver law courts -nonetheless, Manulife was adamant its representatives in the matter (both corporate and legal) would have to come from Toronto, and that furthermore I would be required to fly them out here and back, put them up in a hotel, even buy them lunch!

All to the tune of about $3,000.00, which I obviously didn't have.

75. As stated here by the Union, the Employer's *"reconsideration application* (of B244/2000) *was held in abeyance while the parties attempted to reach a negotiated settlement. A mediation conference took place at the Labour Relations Board on October 11, 2000."* That abeyance and its associated delay in the proceedings would be held in effect until January 11, 2002.

The Board should take note that neither the holding in abeyance of the Employer's application above, nor the existence of the mediation conference also referred to above, was ever communicated to me by the Union.

In fact, I first became aware of this attempt by the Union to settle matters (as opposed to returning to the arbitration board in accordance with the Board's instructions to do so and found in its reiteration of the Conclusion to BCLRB 149/1999) on November 9, 2000.

At that time I placed a call to vice-chair Laura Parkinson (who was chairing the panel set to adjudicate the Employer's reconsideration application) and spoke with her assistant. Ironically I was advised, the Board had only just received its

"papers" in regards to settlement discussions by the parties, that very morning. That settlement discussions were even underway was news to me.

This was the first of several conversations I would have over the coming months with Ms. Parkinsons' assistant, inquiring as to the status of my grievances. During this period the Board made numerous enquiries of the parties as to the status of their settlement discussions.

It was not however, until my receipt of a copy of a letter from Ms. Parkinson to the parties dated September 10, 2001, that I became aware for the first time that the parties had in fact held matters in abeyance (at that point for almost a year). That abeyance was still in effect November 6, 2001 when Ms. Parkinson wrote again attempting to ascertain the status of the parties settlement discussions.

76. The thing that stands out in my recollection of this conversation with Mr. Puchmayr in his office in February 2001, was Mr. Puchmayr's total lack of understanding of my condition, exemplified by his offer to dispatch me for work.

I assumed -wrongly it appears -that Mr. Puchmayr was cognizant of the fact that I was still disabled. I had never indicated otherwise to the Union or to anyone else, for that matter. I took the time to explain to Mr. Puchmayr that I was still suffering from chronic back spasms that rendered me unfit to work.

In retrospect, and given the Union's absolute failure to notify me it had in fact agreed to hold matters relevant to my arbitration in seemingly perpetual abeyance as noted in item 75 above, it strikes me now that Mr. Puchmayr was being less than forthright with me when we met in February 2001.

But any feelings of suspicion I would develop concerning Mr. Puchmayr would not begin to fully materialize until the following September (2001) after finally learning the truth regards the Union's role in the holding up of the adjudication of the Employer's *Section 141* reconsideration application, having received a copy of Ms. Parkinson's September 10, 2001 letter to the parties enquiring of that matter, as noted above.

I will have more to say further on herein concerning my suspicions of Mr. Puchmayr, whom I have come to regard as a two-faced, duplicitous backstabber.

77. The discussions referred to here by the Union took place April 5, 2001 and resulted in an offer to me of $80,000.00 by Manulife to settle my lawsuit against it. [Complainants' Supplemental document]

The offer, unfortunately was contingent upon my acceptance of an offer of $15,000.00 from Labatt. The agreement stipulated it was *"not open for* (me) *to accept one party's offer, without also accepting the other party's offer."*

In my view Manulife, in putting forth this *"all-inclusive global settlement"* was seriously encroaching upon my collective bargaining rights -something I held it had no right to do. Of course the Employer held little regard for those rights, as exemplified by its willingness to drag these matters out for so long in the course of these labour relations.

The offer was good until May 11, 2001 and that date did in fact come and go without my acceptance of the offer.

78. A careful review of the parties' *Minutes of Settlement* provided to me by the Union [Complainant's document No. 2.13] and referred to here in the Union's Response presented a number of difficulties for me:

Items 2 (a) and (b) of the *Minutes*, purported in my view, to effectively make drastic changes to the Labatt collective agreement, changes I considered to be not beneficial to other members of my Union.

Item 3 actually called for an agreement by the parties to effectively nullify Arbitrator Taylor's *"Second Award."* I failed to understand how these negotiated requirements could in any way be construed to be in the membership's best interests.

Item 4 of the *Minutes,* which introduces the idea of a *"Medical Panel,"*

indicates that I was to claim that my long-term disability claim *"should have commenced after 104 weeks of weekly indemnity, beginning on or about September 1, 1996,"* -a notion which I knew not to be true and would naturally have trouble putting my name to.

Item 9 further determines that the Medical Panel *"will be an arbitration board..and ...shall have the powers of an arbitration board..."* and in effect would act as a replacement for and a substitute to the Taylor arbitration board.

Thus, this contemplated settlement was, in my view, little more than an attempt by the parties to undermine and thwart Arbitrator Taylor's duly convened panel and to replace it with a substitute board of adjudication. That appeared to contradict the Union's earlier position found at page 4, paragraph 2 of the *"Original Taylor Award,"* in which the Union *"argued that it is for* (the Taylor arbitration board) *to decide if the Grievor was disabled at the material time.."* [Complainant's document No. 1.10]

At paragraph 3 [Complainant's document No. 1.10] Mr. Taylor notes:

> The Union went on to say that this (arbitration) Board should decide **all** aspects of the Grievor's claim including his eligibility for so-called "soft LTD" and "hard LTD". The former is available for 78 weeks following 26 weeks of weekly indemnity. "Hard LTD" may be claimed from the 104th week of disability. (emphasis added)

The *Minutes of Settlement* moreover reflects on and lends added credence to my earlier observation that the Union had turned its mind away from the matter of my disputes with the Employer, and had begun instead, to focus in earnest in finding a way in which the Union would not be bound by Arbitrator Taylor's second majority decision.

This is a reasonable observation, and reflected in the *Minutes of Settlement* settlement actually reached in January 2003.

I reiterate my remarks found at page 14, paragraph 1, of my Complaint:

> Thus, the Union has clearly and actively sought to avoid advancing my interests beyond 104 weeks of disability in an extraordinary attempt to avoid *"future arbitrations"* of this kind for other disabled Union members, and to avoid the wrath of at least one member -the aforementioned Michael Nunas -who had been abandoned by the Union in September 1996 on the very basis it had no obligation to represent him beyond 104 weeks of his disability. [Complainants document No. 6.9]

79. Here the Union refers to its April 17, 2001 proposal of *"an alternative settlement applicable if the action against Manulife was to be settled by Mr. Hughes"*. With respect, that is not entirely correct.

As noted in item 77 above, what in fact was actually being required of me was that I let the Employer off the hook, for its role in the willful, surreptitious and manipulative orchestration of the denial by its insurance carrier of my righful claim to disability benefits (which of course, resulted in my illegal termination by the Employer) -and in so doing, I was to accept but a fraction of what I claimed was owed to me!

The settlement of my action against Manulife was thus absolutely contingent upon me settling all my disputes with the Employer. [Complainants' Supplemental document] And yet I remained adamant in my position regards those disputes: put succinctly, Labatt had some explaining to do. They still do!

Truly this *"alternative settlement"* proposal by the Union clearly reveals that the main focus of the parties was to reach an agreement that served to completely override *"the Second Taylor Award"*, notwithstanding that to do so would by necessity, require the Union's participation in an agreement with the Employer that could only be construed to be in variance to the collective agreement -all, I submit, as opposed to enforcing the provisions of the collective agreement as they have long existed, not only for my benefit but for other injured disabled members

of the Union.

Instead, the Union was contemplating an agreement that not only absolved itself of any further litigation in my case, but effectively shifted the burden of any and all *"future"* litigation in similar cases, to the sick and injured and disabled members of the Union who would no longer be able to rely on the Union for any protection from any future abuse by the Employer.

This unprincipled and willful abrogation of the Union's constitutional duty to protect its members from injustice and unfairness, was something I could not in good conscience be a party to.

83. The Fall of 2001 (a period referenced here by the Union) proved to be a pivotal turning point for me as far as my understanding of two critical issues:

1. My better understanding of the events leading up to the Union's abandonment of Mr. Nunas; and

2. My better understanding of the labour relations process, in general.

I will take the time here to elucidate for the Board a number of developments that occurred from this particular time frame that are crucial to its understanding of my thinking and my subsequent actions.

In respect to number 1 above, it was a day or two after the 9/11 attacks on the World Trade Center and Pentagon that I paid a visit to Mr. Nunas at his home in New Westminster.

It was then, and for the first time that Mr. Nunas showed me a number of documents he had in his possession relevant to his denial of disability benefits and subequent termination by Labatt in 1994.

It seemed pretty clear to me based on the content of these documents that, following the demise of Confederation Life in 1994 and the subsequent take-over by Manulife Financial as Labatt's insurance carrier, the Employer had engaged in

fraud in its failure to provide Mr. Nunas with an insurance policy that provided the benefits stipulated in the collective agreement.

In a nutshell, the Employer had appeared to have purchased a policy from Manulife that had no liability to -and thus no benefit to -Mr. Nunas.

Furthermore, it appeared the Union had an *"oral"* agreement in place regards the take-over by Manulife, one the Employer had failed to live up to. [Complainants' document No. 6.8]

Of course, I too recognized that the inherent deficiency of the Manulife policy was surely germaine to my own ongoing case, in which the Employer had long, emphatically stressed to Arbitrator Taylor, and as well to the Labour Relations Board, that its Manulife policy provided the stipulated benefits and **otherwise conformed** with the provisions of the collective agreement.

Based on what I could infer from Mr. Nunas' documents, particularly the correspondence from the Union's counsel to Mr. Nunas' marital lawyer Wayne Guinn, it appeared the Union's argument for its position in not advancing Mr. Nunas' interests was virtually identical to that of the Employer's in that of my own case.

The Union's legal representative in Mr. Nunas' case -a Ms. Marni MacLeod - noted in her letter to Mr. Guinn dated April 23, 1996 that the Union had *"provided* (Mr. Guinn) *with* (Victory Square Law Office's) *opinion"*. [Complainants' document No. 6.6]

Mr. Nunas didn't appear to possess a copy of that legal opinion but I was able to get a sense of it from reading Mr. Guinn's letter to his client, written immediately after Mr. Guinn's meeting with Ms. MacLeod, April 22, 1996. [Complainants' document No. 6.5]

Now however, with the Union's legal opinion expressed in its letter to Rick Sutherland dated February 19, 1996 and provided here by the Union in its Response to Mr. Nunas' Complaint, one is able to better understand how Mr. Guinn could come to the mistaken conclusion that:

> *"There is no question that, after a certain number of weeks where an employee is off work for whatever reason, the* (Employer) *is at liberty to terminate that person's employment, pursuant to the Collective Agreement."* (emphasis added)

and that furthermore:

> *"The* (Employer) *is obligated to hold an insurance policy in full force and effect for you in accordance with the terms of the Collective Agreement. There is no question that was done and your claim is with the insurance company for failure to provide coverage for you."* (emphasis added) [Complainants' document 6.5]

The disclosure by the Union of its legal opinion here also provides ease of comparison to the written legal opinion provided to the Union in my own case, and I implore the Board to do so at this time.

For glaring in its omission and by comparison, is any mention whatsoever (in the Nunas opinion) of *Article 3:1:1: (c)* of the Labatt collective agreement, which specifically prohibits the breaking of an injured employee's seniority in the case of *"permanent layoffs"*. [Complainants' document No. 5.5]

It is our hope the Board will pay close and careful attention to this significant difference in these two, disparate legal opinions, in its consideration of the Union's assertion that our respective cases were treated with consistency by the Union.

Whether this omission by the Union's legal representative is an oversight or

was deliberate in its intention -i.e. ostensibly to obscure from Mr. Nunas' soicitor's view the Union's true and rightful obligation to protect Mr. Nunas -is open to conjecture.

It is our belief however, that the Union's failure to consider the full effect of *Article 3:1:1 (c)* was as such, an attempt by Rick Sutherland to mislead the Union's own Grievance Review Board into the believing that the Union had "no chance" of winning Mr. Nunas' grievance for unjust termination.

This idea is further evidenced by Mr. Sutherland's apparent omission of Marni MacLeod's proviso to her legal opinion in respect to the *"Employer's duty to accomodate Mr. Nunas' disability"*. [Union's Appendix 2 - document No. 15]

That important proviso is not included nor mentioned in the minutes of the Union's GRB's March 18, 1996 meeting in which the legal opinion was discussed and in which the Union made its decision to withdraw Mr. Nunas' termination grievance. [Union's Appendix 2 - document No. 18]

Thus, it would appear that Mr. Sutherland had already made up his mind as to how he wished the Union to proceed with respect to Mr. Nunas' termination grievance, and sought to obtain an opinion from his legal representatives that corresponded to his desire to see the Union abandon Mr. Nunas at the time of Nunas' greatest need of the Union's assistance.

And with respect to the denial of Mr. Nunas' LTD benefits, as stated above the Manulife policy provided no real benefit to Mr. Nunas. This matter was communicated to the Union by Mr. Nunas' lawyer with absolutely no effect.

Additionally, the Union had already delayed 21 months in filing a grievance on behalf of Mr. Nunas for those benefits before obtaining a legal opinion regards same, further indication that Rick Sutherland never had any intention of assisting Mr. Nunas in that matter.

The second important development for me during the Fall of 2001 (and noted

above) was my consulting of noted labour lawyer, Ib S. Petersen.

What prompted me to seek out Mr. Petersen though, was a call placed to me by someone from the Labour Relations Board during this period.

The call came a minute or two after I had just finished speaking with the Board's Clive Lytle, with whom I had spoken numerous times before.

The call came from a woman from the Labour Relations Board. She said she was calling to advise me that Mr. Lytle might have inadvertently neglected to mention to me that an application for Interested Party Standing might be avenue I wished to pursue.

Then came a period of time when I found it exceedingly difficult to find a competent labour lawyer to advise me -the Board is undoubtedly aware that labour law is a highly specialized area of law, and that there is the further complication that ensues as the majority of these practitioners, in terms of management vs. labour, tend to work 'one side of the street' or the other.

As someone contemplating an application for Interested Party Status, I found it next to impossible to find a labour lawyer who could so advise me.

(One lawyer, who was incidentally representing a friend of mine in his *Section 12* Complaint against Local 300, was completely up front with me in explaining that she could not even <u>speak</u> to me, as her law firm was a national one, and at one time or another one of its eastern offices had represented Labatt Breweries in some capacity)

Finally, a lawyer was kind enough to refer me to Mr. Petersen whom I was led to believe was of the highest caliber -in his knowledge of the law as well as in his integrity. Mr. Petersen, I was advised, was also reputed to be somewhat of a maverick. I have since come to regard Mr. Petersen with the utmost of respect.

I first met Mr. Petersen at a law office in Vancouver accompanied by Michael Nunas. In the brief time allotted to this initial interview, Mr. Nunas and I tried as best we could to recount for Mr. Petersen the events and circumstances of our

respective denial of benefits and our subsequent terminations by Labatt.

Mr. Petersen believed our cases to be "intriguing" and was unequivocal in his opinion that there was something truly extraordinary in the excessive delay of a grievance procedure that had gone on for more than 6 years without progressing beyond the preliminary stages.

It was Mr. Petersen who directed me to the Labour Relations Board's law library (at the Vancouver Public Library's main branch) to do research regards the labour relations process and forum.

After some initial research as per Mr. Petersen's suggestion, I met again with him, this time sans Mr. Nunas.

Through my research at the Board's law library I had become aware for the first time of the Board's discretion to sometimes consolidate applications, as has in fact been done with mine and Mr. Nunas' respective Complaints.

I wanted to meet again with Mr. Petersen to ascertain his opinion with respect to filing a *Section 12* complaint on Mr. Nunas' behalf, while seeking a consolidation by the Board with a separate application on my behalf for Intervener/Interested Party status in the matter of my two grievances which were, at that time still very much "alive".

I was essentially looking for an avenue in which I might bring Mr. Nunas' longstanding disputes with Labatt to the fore, ostensibly for the Board's scrutiny and adjudication. However, Mr. Petersen cautioned me that such a consolidation might have grave and unexpected consequences for both Mr. Nunas and I.

The rationale was that Mr. Nunas had clear issues of timeliness regards matters relevant to his particular case, and that insofar as I didn't have such issues, there was a very real risk and danger that the Board might dismiss both our applications/complaints purely on the sole basis of its perceived delay of Mr. Nunas' filing his complaint.

It was for that reason (and that reason alone) that I sought (unsuccessfully) to

raise an objection on mine and Mr. Nunas' behalf to the Board's recent decision to consolidate our respective *Section 12* complaints in my letter to the Board dated May 4, 2004.

My consultations with Mr. Petersen beginning in late 2001 will undoubtedly prove to be of particular interest to the Board, as it puts paid to Mr. Glavin's repeated and mistaken presuppositions throughout the Union's Response concerning my so-called *"feigned ignorance"* in the matters of my grievances, prior to those consultations with Mr. Petersen.

84. Here the Union states its *"settlement discussions between the Union and the Employer...were stalemated."* As I was neither privy to nor party to those discussions I am unable to comment on the nature of the parties' impasse, beyond my obvious displeasure in having to sit by, month after month while unbeknownst to me, the proceedings were being held in complete abeyance by the parties - representing a delay of 15 months in total -deliberately and intentionally stalled it appears, as the Union seemingly went about the business of purporting to uphold my collective bargaining rights.

However, the use here by Mr. Glavin of the word *"stalemated"* -a chess term - in reference to the *"settlement discussions between the Union and the Employer"* is of particular interest to me, as David Blair would likewise, also compare the parties' stalemate in his March 1, 2002 e-mail to Chuck Puchmayr to a *"chess match"*. [Complainants' Supplemental document]

In that context, and given the nature of the Union's eventual settlement of matters -which it must be agreed, provided absolutely no benefit whatsoever, to me -it follows that in the overall scheme of things I, like Mr. Nunas before me, was little more than a pawn -by which I mean: easily disposable!

85. Here there is no indication as to who *"informed"* the Union *"that discussions to settle Mr. Hughes' personal action against Manulife and the*

Employer held a reasonable prospect of success", nor what the basis for that optimism was. (emphasis added)

My recollection of this time involved further attempts by me to engage Charlie Puchmayr and Gerry Bergunder in discussion of the Michael Nunas situation, regards the Union's error in its continued allowance of Nunas' mistreatment by Labatt. These attempts however, were unfruitful due wholly to resistance by Puchmayr and Bergunder to even discuss with me any aspect of matters pertaining to Mr. Nunas.

As indicated in item 83 above, it was only after reviewing some of Mr. Nunas' personal documents that I was able to make the inference, that there existed the probability of the perpetration by the Employer of a fraud on the Union (and by extension, to Mr. Nunas) regards the purchase by Labatt in 1994 of an inferior insurance policy from Manulife Financial.

My sole intention in attempting to meet and discuss these matters with the Union's two most important officials, was to provide the Union with the necessary information it required to facilitate putting matters right for Michael Nunas. However, even I was not prepared for the level of resistance I encountered from Messrs. Bergunder and Puchmayr.

I recall one particular occasion that occurred about this time at the Union's office in Burnaby when both Mr. Nunas and I attempted to engage Mr. Puchmayr in a discussion of matters pertaining to the Union's abandonment of Nunas (and the likelihood that the same fate awaited me).

I specifically asked Mr. Puchmayr at that time if he intended to enter into an agreement with Labatt that included a nullification of the *"Second Taylor Award"* as provided in the *Minutes of Settlement* from the year before (2001) -essentially Rick Sutherland's deal [Complainant's document No. 2.13].

As Mr. Nunas will attest, Puchmayr's answer to me then was an emphatic "No!"

And yet that would turn out to be the very deal that Mr. Puchmayr on behalf

of the Union, would put his name to the following January 9, 2003.
[Union's Appendix 1 - document No. 114]

[At this point I take the time to alert the Board to a discrepancy found concerning the actual date of this document's signing. In the Complainant's Supplemental documents we provide a printout of an e-mail from counsel for Labatt indicating that matters had been concluded December 18, 2002 by then-plant committee chairman Tony Flegel]

86. The Union was served papers by the Employer on April 10,2002 regards a Petition by the Employer for judicial review of the Board's long-awaited decision (BCLRB B10/2002), [Complainant's document No. 1.5] a decision which resulted in the dismissal by the Board on the merits, the Employer's application for reconsideration of its failed *Section 99* appeal of *"the Second Taylor Award"* (BCLRB 244/2000) [Complainant's document No. 1.7]

Coincidentally, it was on that very afternoon that Gerry Bergunder finally conceded to meet with Mr. Nunas and me at New Westminster Quay, in order to hear us out regards what I considered to be some major, new developments in the Nunas/Hughes debacle (this is how I had begun to refer to our mutual mistreatment by the Employer).

As stated above in item 83 and upon review of Mr. Nunas' personal documents, [Section 6 of the Complainants' documents] it seemed fairly obvious to me that the Union had in place an oral agreement with the Employer ensuring that, following the take-over by Manulife Financial of Confederation Life on August 30,1994, that there would be "no interruptions in coverage" for eligible employees, such as Michael Nunas had been in 1994.

Unfortunately however, that scenario was inconsistent with Manulife's stated position that it had no liability to Mr. Nunas because pursuant to its agreement with Confederation Life, Manulife had no liability for LTD claims incurred prior to its take-over.

Thus, it became evident that Labatt had purchased an insurance policy that failed to conform to the collective agreement, at least in respect to Michael Nunas.

Was it only coincidental at that time, that in the matter of my grievances, the Employer's entire (and losing) defence of its conduct had amounted to little more than a recitation of what it considered its contractual obligations to be, and the Board will take note: that included the Employer's incessant touting of its Manulife insurance policy, which Mr. Taylor's majority panel had in fact, shown to be deficient in a number of ways, and to which the Employer must surely have been known to be deficient, at least as far as Michael Nunas was concerned.

And by the end of our meeting at the Quay with Gerry Bergunder in April 2002, Mr. Bergunder surely must have recognized the existence of these further deficiencies in the Employer's insurance that Mr. Nunas and I had brought to his attention. But apparently not, because he certainly failed to act on this information that essentially concerned the fraudulent disentitlement of a member of the Union to whom disability benefits were rightfully owed.

The Board should be too, aware that it was at this meeting with Mr. Bergunder that I elucidated for him my concerns with the Union's legal counsel, David Blair's conduct, particularly regards his original failure in providing Arbitrator Taylor's panel with a list of the comparative disability definitions contained in the Manulife policies and the Labatt collective agreement.

As noted in my Response to items 24, 25, 26 and 27 above, Mr. Blair's insistence that it was *"not possible"* to provide the arbitration panel with a document he in fact possessed constitutes, in my view, willful deception on David Blair and the Union's part. My efforts to bring this important and relevant information to Mr. Bergunder's attention in April 2002 were apparently in vain, as they resulted in no appropriate action on Mr. Bergunder's part.

As well, I confided in Mr. Bergunder at that time that I had grave concerns with the conduct of the Union's then-Business Agent, Charlie Puchmayr, based on a couple of telephone conversations I had had with Mr. Puchmayr in (I believe) November and/or December 2001.

My concerns revolved around perceived attempts by Mr. Puchmayr to elicit

remarks from me over the telephone that could be misconstrued and might well have resulted in the discontinuation by the Union of its efforts on my behalf to resolve my disputes with the Employer.

I confided to Mr. Bergunder (in Michael Nunas' presence) that I had developed a mistrust of Mr. Puchmayr as I believed he had been taperecording my conversations with him, and that furthermore I would in future refrain from speaking with Mr. Puchmayr on the telephone.

Pursuant to that mistrust, I never did have another telephone conversation with Charlie Puchmayr.

88. The Union makes reference here to my settlement with Manulife Financial and to the Release I signed in favour of Manulife in respect of all claims.

The Union notes that *"although the Employer was not a party to that Release document, the Release did name the Employer as a "principle of the Releasee"... with respect to weekly indemnity and long term disability* ***insurance benefits****"* under the relevant policies. (emphasis added)

The Board should take note that I make no claim here for any *"insurance benefits"* under any insurance policy. I do however, claim outstanding disability benefits as provided by the collective agreement and owed to me by the Employer.

In fact my lawyer was so instructed by me to purposely word the Release to Manulife in such a way as to provide me with a possible avenue in which I might continue to seek from the Employer, not **insurance** benefits, as noted here by the Employer, but **disability** benefits as stipulated in the collective agreement. The difference between these two, disparate types of benefit is easily recognizable and I implore the Board to give careful consideration to that important distinction.

It is important to recognize also, that at the time of the signing by me of the Release to Manulife, Arbitrator Taylor had already made a finding as to a number

of deficiencies in the coverage provided by the insurance policies, indicating the insurance the Employer had purchased **had not** provided the stipulated benefits or "*otherwise conformed,"* (to quote from Mr. Taylor's *"Original Award"*) with the collective agreement, thus it followed that it was likely the Employer was in fact, liable for the disability benefits it had agreed to provide in the collective agreement.

The fact remains that the Employer had had the opportunity to provide an insurance policy that complied with its contractual obligations to me -and was found in fact to have failed in that obligation, had not in fact provided me with the appropriate insurance.

Those findings by Arbitrator Taylor regards the Employer's failure to provide the disability benefits promised, surely must indicate the liability for those disability benefits lies (and continues to lie) with the Employer.

As I said to Arbitrator Taylor at paragraph 145 of my May 2003 application to him for Standing:

> It is abundantly clear the Employer has failed in its contractual obligations to me regards the social security benefits stipulated in the collective agreement -what remains to be determined is the extent of that failure and what is the proper amount of renumeration in lieu of that failure.

In any event, and as mentioned earlier in the Introductory remarks to this Reply, it is unlikely that a grievor could ever be successful in attaining **insurance** benefits from an employer whose sole business is wholly concerned with the manufacture and sale of **beer**.

One final note here with respect to the disability benefits I claim are owed to me by the Employer, and as mentioned in my Complaint: *"...in no way do I seek double indemnity from the Employer. I do however, seek to have the Employer's*

liability to me properly determined...and to win my personal vindication regards its unlawful termination of me. I seek a just and reasoned conclusion to these matters.".

89. The Union states here that my settlement with Manulife *"was understood by the Union to resolve* (my) *outstanding grievance claiming entitlement to disability benefits from the Employer."* The next sentence reveals that the Union relied on the Employer's Manager of Human Resources, *"Andrew Muller* (who) *specifically advised* (Union official) *Tony Flegel..., that the Employer had been released of further claims against it."*

It is a pity that Messrs. Flegel and Puchmayr (or for that matter, any Union official) had not the foresight to contact me personally regards my confidential agreement with Manulife, for I would have obviously advised them of something quite different than that to which Mr. Muller was advising Mr. Flegel regards the Employer's continued liability to me. Unfortunately, the Union at no time sought my input on this matter; ever!

90. With respect, the *"telephone conversation"* referred to here by the Union in which I am alleged to have had *"around the time of* (my) *settlement with Manulife"*with *"the Union's Business Agent, Chuck Puchmayr"* never occurred.

In short, this is a complete fabrication on the part of the Union. As already noted in item 86 above, I had long curtailed all telephone conversations with Mr. Puchmayr the previous fall/winter, as a result of my suspicions he was taperecording our conversations while attempting to elicit statements from me that would effectively undermine my claim for disability benefits.

Thus, I have no idea who Tony Flegel <u>thought</u> Charlie Puchmayr was speaking to on the telephone *"around the time of* (my) *settlement with Manulife"* -but it certainly <u>wasn't me!</u> I in fact, had purposely avoided any and all telephone conversations with Mr. Puchmayr for some 6 or 7 months prior to the time

referred to by the Union, for the reasons referred to, above.

And furthermore, I take great issue with the Union's statements here concerning the advisements allegedly provided to me by Charlie Puchmayr concerning the effect on my grievances of the settlement of my legal action against Manulife. The Union's allegation with respect to this conversation simply has no basis in fact. The Board will further note the Union provides no evidence whatsoever, supporting its allegation.

For at no time did Charlie Puchmayr nor any other Union official ever advise me that a settlement by me of my action against Manulife would result in a resolution of "(my) *disability grievance against the Employer"*, nor provide the Union with *"no basis on which to proceed with the termination grievance"*, as stated here by the Union.

Undoubtedly, such an advisement might have influenced my decision to settle or not settle with Manulife. But **no such advisement** –no such *"telephone conversation"* with Charlie Puchmayr **ever** occurred. I cannot overstress this point to the Board.

91. I continue to disagree with the Union's position here as being both illconceived and fundamentally incorrect -as I always have and always will.

92. I continue to maintain that notwithstanding the Manulife Release **may** have *"released further claim against the Employer for disability benefits under the* (insurance) *policies,"* (emphasis added) as noted here by the Union, the same however, cannot be said of the Employer's liability for disability benefits under the collective agreement. I maintain that distinction allows me to continue in labour relations to seek and ultimately acquire those disability benefits, notwithstanding the Union's perceived denial and objection to that course of action by me.

93. Without my input to the Union's November 2002 GEB meeting in regard to my settlement with Manulife, it comes as no surprise to me that *"the Union saw no remedial benefit that realistically remained to be obtained* (for me) *at arbitration."*

The Union had long sought a way out of the conundrum it had created for itself, and thus was undoubtedly eager to embrace a legal opinion that provided it with an appropriate exit strategy. It is unfortunate that the Union's legal counsel, perhaps blinded by its own optimism that the Hughes debacle was finally coming to an end, had not properly scrutinized the language of the Manulife Release as it pertained to the Employer.

94. **None of that to which the Union refers to here ever occurred**.

There was no telephone message from Mr. Puchmayr. There was no attendance by me *"unannounced"* or otherwise at the Union hall in November or December 2002, or whenever the time that the Union alleges this meeting to have occurred.

No conversation with Mr. Puchmayr explaining *"that the Union saw no further action it could take...and that it was not proceeding with* (my) *grievances on that basis,"* **ever** took place.

I happen to know exactly when it was that I last saw or spoke to Charlie Puchmayr, for it was on that same day on April 30, 2002 that I declared my indigenous status at the courthouse in Vancouver. I was required by the Legal Aid Society to make that declaration in order to be eligible for its assistance with respect to the cost of disbursements in my on-going action against Manulife.

After my declaration to the court, I took a stroll to kill some time (waiting for the completion of the necessary paperwork) and while headed back to the courthouse in the 800 block of Hornby Street, coincidentally met Mr. Puchmayr and another Union official who were both in town attending to some Union business.

Since that chance meeting on the street in the Spring of 2002, I have had absolutely no contact with Charlie Puchmayr. As noted herein, I consider Mr. Puchmayr to be a two-faced, duplicitous backstabber and I naturally have avoided contact with him on that basis.

Thus it surprises me not that he would attempt to concoct meetings and conversations in order to make his and the Union's explanation of events seem reasonable and plausible.

The Board will take particular note that as the case in item 90 above, here in item 94, and below in item 95 as well, the Union provides no indication whatsoever, as to any reaction on my part upon receiving the news from Mr. Puchmayr of the Union's proposed, and eventually occurring abandonment by the Union of my grievances. The vacuum created by the absence of any credible response by me to these portions of the Union's *" Facts"* is truly palpable.

Regards this salient omission by the Union of any response by me to news that the Union would conclude matters with the Employer in the event I settled with Manulife, nor to my allegedly being advised by Charlie Puchmayr *"that the Union saw no further action that it could take to assist*(me) *and that it was not proceeding with* (my) *grievances on that basis"* as stated here by the Union.

I submit the dearth of any evidence of a notable reaction by me exists because in fact, the advisements above, were never rendered in the first place.

Does the Union truly expect the Board to believe that I would I have absolutely nothing to say about these matters?

Given my propensity to comment so freely upon the Union's inadequacies and conduct throughout its lengthy and failed handling of my grievances, does it not seem so entirely out of character, so **unreasonable**, that at the crucial times referred to here by the Union as it communicated to me its decision to abandon me, that I would remain silent, unmoved by such an advisement, putting forth no arguments, whatsoever?

Does that really sound like something I might do? Does that really sound like me? –somehow, I don't think so, and the Board may well come to the same conclusion.

Given the foregoing, I submit the Board ought view this important and **crucial** aspect of the Union's Response with a proper measure of suspicion and scrutiny.

As should the Board undoubtedly come to the obvious conclusion, that the portions of the Union's *"Background Facts Pertaining to Hughes' Complaint"* that refer specifically to meetings and telephone conversations that I am alleged to have had with Charlie Puchmayr, and that I absolutely refute herein, are decidedly vague in the Union's stated timeline.

Some examples are provided: Background Fact No. 90 begins with: *"Around the time of..."*. Background Fact No. 93 vaguely refers to a time comprised of and beginning with the Union's decision made by its GEB *"not to proceed with* (my)*grievances"* sometime *"in November 2002"* and then No. 94 continues that timeline with the even vaguer, *"Following the Union's decision, Mr. Puchmayr spoke to Mr. Hughes personally."*

95. As stated above in item 94, the discussions of matters I am alleged to have discussed with Mr. Puchmayr **never occurred**, thus I had no basis on which to appeal to the Union's GEB.

Furthermore, at my previous appearance before the GEB in November 1999, prior to my ejection from the meeting, the GEB had voted to welcome me back following the arbitration's conclusion.

Thus, it is highly doubtful I would have passed up such an opportunity had I been so advised by Mr. Puchmayr in late 2002. I would still welcome such an opportunity to set the Union's elected officials straight on a few matters, but I am still waiting for my invitation from Mr. Bergunder to do so, notwithstanding the still outstanding motion to *"welcome* (me) *back after the arbitration's finished."*

Thus in late 1992 I was essentially waiting patiently for the outcome of the Employer's judicial review of BCLRB B10/2002, as I continued to wait for the Union to get around to telling me what, if anything, it proposed to do next in its lengthy saga concerning my grievances; much the same as I had all along, and as I had been so instructed by the Union [Complainants' document No. 3.22, paragraphs 2 and 3]

Undoubtedly, had I not applied to Mr. Taylor when I did last May (2003) and gotten his response [Complainants' document 1.1] informing me that matters concerning my grievances had been settled, I might still be waiting for the Union's advisements!

So let me be clear at the outset, that had I been advised of all that the Union alleges I was by Mr. Puchmayr, then a vigorous dispute would have ensued and a *Section 12* Complaint from me would have been forthcoming, pronto.

In fact, I had previously already advised Mr. Puchmayr -when he advised me he was considering withdrawing my grievances, in one of our final telephone conversations in late 2001 -that should the Union attempt to withdraw or abandon my grievances, I would file a Complaint against the Union (such as this one) pursuant to *Section 12* of the *Labour Code*. Mr. Puchmayr's verbatim response to that advisement was to warn me:

"Don't threaten me!"

I believe I explained to Mr. Puchmayr at that time that my warning was not meant to be threatening in any way -it was in fact though, just a simple promise that I intended to act upon, given just cause.

Thus it is further unlikely that Mr. Puchmayr's alleged advisements to me in late 2002 would have been allowed to go unchallenged and undisputed by me.

In fact, had I known the Union was abandoning my cause, it would have saved me the considerable trouble and time I put into crafting the application for Intervener/Interested Party Status, that I submitted to Arbitrator Taylor in May 2003. [Complainants' document 1.1]

But I didn't know, and I couldn't have known because I had not been so advised by the Union, and my application to Mr.Taylor stands as plain and conclusive evidence of my ignorance of -and thus the nonexistence of -Charlie Puchmayr's alleged advisements to me at the relevant times, notwithstanding Mr. Glavin's spurious remarks to the contrary, concerning my motivation for writing directly to Mr. Taylor.

I reiterate: At no time did Charlie Puchmayr or any other Union official ever advise me that the Union intended to abandon my cause in the event I settled my action with Manulife.

96, **97**, **98** and **99**. Here the Union makes reference to the settlement reached in the matter of the Employer's outstanding application for judicial review of **BCLRB B10/2002** which had been a reconsideration of the Employer's dismissal of its *Section 99* appeal of the *"Second Taylor Award."* **BCLRB B244/2000**.

This settlement then would prove to be the final, futile chapter in the Union's lengthy and pointless representation of me in the matter of my two grievances.

In the interim since filing my Complaint last December 9, 2003, I received in April 2004 a package containing a number of documents, which are provided as Complainants' Supplemental documents, with the Board's permission.

The Board will recall I first made reference to such a package April 21, 2004 in an e-mail to case adminstrator Lancie Chung and later confirmed this message by providing the Board with a printed copy that I personally dated and initialed 05/05/04. [Complainant's Supplemental document]

The documents were contained in an envelope sent to me from the Brewery Workers' Union and included printouts of e-mail messages to and from the parties' counsel and from the Union's counsel David Blair to Gerry Bergunder at the Union hall. This unsolicited material was not accompanied by a covering letter, so I am left to my own devices as to what to make of the Union disclosing these documents to me privately and without providing same to the Board.

Two of the documents in question were previously provided to me by Mr. Bergunder when I attended the Union hall July 14, 2003 and are mentioned at No. 103 of the Union's *"Background Facts Pertaining to Hughes' Complaint"* and referenced in the Union's supporting documentation [Union's Appendix 1 – documents Nos. 116 and 117].

In its reference to the *"Settlement"* reached by the parties on January 9, 2003, one document stands out as particularly revealing as to the circumstances and moreover the terms of the Union's settlement with the Employer. I refer to an e-mail from Keith Murray, counsel for the Employer, to David Blair dated January 18, 2003. [Complainants' Supplemental document]

It appears from this particular document that the settlement of my grievances played a small part in (but nonetheless was contingent upon) the settlement of another, *"larger, unrelated grievance"*, unnamed in the e-mail.

The news of this grievance swapping by the Union is disturbing to me for a number of reasons:

Firstly and admittedly from my perspective, the Union has appeared to utilize my winning grievances as leverage to settle some other, completely unrelated grievance –and with no relief neither sought nor attained for me by the Union!

Secondly and pursuant to the foregoing paragraph, it follows that another grievor thus has attained some success denied to me, while figuratively standing on my shoulders to do so.

I will put forth an argument as to the unfairness and moreover, arbitrariness of the Union's grievance swapping later in this Reply.

Thirdly, it appears the parties' *"Settlement"* agreement was entered into and signed by the then-Labatt plant chairman Tony Flegel, who did so without first consulting the Union's counsel as to the wiseness of such a decision. The Employer's counsel Keith Murray writes (to David Blair), *"Tony wanted you to look… although he'd already signed it…"* [Complainants' Supplemental document]

It should come as no surprise to the Board that the parties' agreement reflects

the Union's true intentions all along –or at least since the issuance of Mr. Taylor's second majority decision in December 1999 -namely: to unburden itself of Mr. Taylor's insights and findings, albeit at the expense of injured and disabled Labatt employees, and to not be bound by Mr. Taylor's decision. I submit to the Board, that nothing could be more clearer.

100. The Union makes reference here to my May 23, 2003 application to Arbitrator Taylor for *"intervener and interested party status."* [Complainants' document No. 1.2] The Board should be aware that my decision to write directly to Mr. Taylor was predicated mainly on two factors:

First and foremost, and indicated in the Introduction to my application to Mr. Taylor, was the advice given to me by preeminent labour lawyer, Ib Petersen (in the Fall of 2001 when Mr. Nunas and I first consulted him) that to write directly to the arbitrator would be *"a more expeditious course of action"* as opposed to making such an application to the Board.

Secondly, and with no notification otherwise forthcoming from the Union, in the Spring of 2003 when I made my application to Mr. Taylor, I was under the mistaken impression that the matter of my two grievances was <u>still</u> before Mr. Taylor, and that he maintained his jurisdiction regards same. I carried that belief as a result of never having been advised otherwise by the Union.

As already stated herein, I submit and moreover maintain, that my application to Arbitrator Taylor is in itself, evidence of my erroneous belief, and by extension, the Union's failure to apprise me of the status of matters relevant to my two grievances.

103. The *"various documents from the Union's files,…(*and) *provided to* (me) *by the Union's then-President, Gerry Bergunder"* referred to here by the Union included the copies of private e-correspondence between the parties' respective legal counsel (mentioned above and referenced in the Union's supporting

documentation [Union's Appendix 1 – documents Nos. 116 and 117] The subject matter of these documents was in regards to my application for Standing to Arbitrator Taylor, and had been produced and created by their respective authors, after the fact.

The actual date of my attendance at the Union hall, referred to here by the Union was July 14, 2003. I was accompanied by Michael Nunas (whose grievance for unjust dismissal by BDL was filed at this meeting with Mr. Bergunder). [Complainants' document No. 6.16]

I was there to request again that Mr. Bergunder provide me with written proof of the Union's alleged settlement, something he had promised me he would do when I had last spoken to him the previous January 17, 2003.

(It is undoubtedly noteworthy that in its timeline of *Background Facts*, the Union makes absolutely no reference to this January 17, 2003 telephone conversation, a conversation which surely must be a further indication that I had not been notified of the parties' concluding of the matters relevant to my two grievances, notwithstanding Charlie Puchmayr's and the Union's allegations to the contrary.)

With Mr. Nunas present, Gerry Bergunder acknowledged my January call to him, but could not account for his secretary's failure to provide me with the documentation requested at that time by me.

That even at that late date (in July 2003), as I was continuing to request from Mr. Bergunder something in writing regards the Union's dispensation of my two grievances, and that his only response at that time was to provide me with private and confidential material that alluded to a settlement but didn't actually provide any conclusive proof of one, is a clear indication to me that the Union was not disclosing to me the truth of these matters, ostensibly perhaps, to put some time between events in the hope I might fall outside of the Board's proscribed

guidelines regards the timeliness in filing a *Section 12* Complaint.

I regard the Union's strategy along these lines to be pathetic and revealing of a level of quiet desperation on the part of the Union and some of its elected officials.

104. As stated by the Union here, I *"did not accept the response* (I*) had received from Arbitrator Taylor,"* and did in fact write to him again suggesting to Mr. Taylor that he was not functus in these matters, and requesting *"my May 23, 2003 application for standing be set for hearing forthwith."* [Complainants' document No. 1.0]

The Board should be aware that that letter was written on the advice of a lawyer Mr. Nunas and I had consulted in late July 2003. The lawyer in question has had extensive dealings with a third, and equally terminated-while-disabled former brewery worker, Richard Findlay, with whom the Board may well be familiar. Mr. Findlay's lawyer suggested to me that the Union's alleged 'settlement' of my grievances may perhaps instead be more properly characterized as abandonment by the Union. Armed with that new perspective I endeavoured to engage Mr. Taylor once again, but received no response from him.

105. After *"receiving no…response"* to my August 5, 2003 letter to Mr. Taylor, as noted here by the Union, I attempted unsuccessfully to contact Mr. Taylor by telephone September 5, 2003 to ascertain if, in fact he would provide me with a response to my letter. With no response forthcoming from him, and no further response from Gerry Bergunder –this, despite his July 14th reiteration that he <u>would</u> provide me with a written response, <u>and still hadn't</u> –thus, with no other alternative I then began the arduous task of crafting this *Section 12* Complaint.

I submit the blame for any perceived delay on my part in filing this Complaint must inevitably be laid at the feet of Gerry Bergunder for his role in not providing me in a timely fashion with the information I required and was, in fact requesting

from him regards my grievances and their dispensation, and as early as January 17, 2003 (see item 103, above).

That date is in fact, a mere eight days following the parties' signing of its Minutes of Release settlement, and one week prior to the final conclusion of all matters pertaining to my grievance for disability benefits and my grievance for unjust termination.

Mr. Bergunder's arbitrary disregard for my requests to him is further evidence that the Union's treatment of me was both perfunctory and unprofessional. Mr. Bergunder's conduct in failing to provide me with proper written notification must be viewed with an appropriate measure of suspicion.

For had it not been for those delays encountered as a result of Mr. Bergunder's failure to accommodate my repeated requests to him, I undoubtedly could have dispensed with my application to Mr. Taylor completely, and simply filed this Complaint.

And whereas I'd been consistent in my intention to get matters back before the arbitration panel, had I truly known that that avenue had been closed to me by the Union, then it would have been redundant on my part to have continued to pursue matters along those lines, and the logical course of action for me would have been to file this Complaint at an earlier time than was possible.

I wish to add one final correction to the Union's *Background Facts*: the original filing date of my *Section 12* Complaint was October 31, 2003, not the 28th as stated here by the Union.

(ii) BACKGROUND FACTS PERTAINING TO NUNAS' COMPLAINT:

I now turn to address the Background Facts pertaining to Michael Nunas' Complaint as set out in the Union's Response. As in the case of my Complaint above, I will only comment on the matters with which Mr. Nunas takes issue or, in the alternative those matters which require more substantial mention, and likewise do so in corresponding numerical order.

2. In fact, Mr. Nunas was injured on the afternoon of May 26, 1992 on his way home from the store when the motorcycle he was riding was struck head-on by a pickup truck traveling in the opposite direction to Mr. Nunas, attempted to make a left turn in front of him.

Mr. Nunas was thrown from his bike and his head struck the pavement with enough force to render him unconscious. In addition to the head injury, Mr. Nunas received numerous injuries to his neck and spine, as well as to both his upper and lower extremities.

His claim for weekly indemnity was accepted by Labatt's insurance carrier Confederation Life beginning May 29, 1992.

3. On June 14, 1993 Mr. Nunas did sustain further injuries *"in another motor vehicle accident*, as stated here by the Union, that in the words of Gerry Bergunder writing to Nunas in February 1999, *"impact*(ed) *on* (Nunas') *previous injuries"*. [Complainants' document No. 6.13]

However, what is not mentioned here by the Union is that in the Spring of 1993, just weeks prior to his second MVA, Mr. Nunas' disability benefits had been cut off by Confederation Life and, notwithstanding he had sustained further injuries *"impacting on* (his) *previous injuries,"* Mr. Nunas' disability benefits were not restored by the carrier until the following November, 1993.

This is an appropriate point in which to remind the Board that as in my case, and as determined by Arbitrator Colin Taylor at page 13, paragraph 3, of his

"Second Award":

> ..the insurer...made a decision (regards eligibility determination) which the Employer should have made and it made that decision by a different disability test than is provided in the collective agreement. [Complainants' document No. 1.8]

Furthermore, it appears from Mr. Bergunder's letter noted above, that the Union didn't become involved in the matter of Nunas' disqualification by Confederation Life until *"sometime around September 1993."*

And notwithstanding Mr. Bergunder's mistaken assertion that *"sometime around September 20th/93 Confederation Life cut off* (Mr. Nunas') *LTD Benefits (Manulife)"*, the Union indicates in an earlier letter dated May 31, 1996 to Mr. Nunas' marital lawyer [Complainants' document 6.8] that sometime around November 10, 1993 Mr. Nunas *"had received a cheque in the amount of $17,000.00 to reimburse him for the benefits he had been denied,"* -it is obvious that a cheque for that amount would far exceed a mere two months worth of LTD, and in fact, is more representative of about <u>six</u> months worth of denied benefits dating back to April 1993.

There is no indication in Mr. Bergunder's letter of February 11,1999 as to why the Union procrastinated for several months to involve itself in Mr. Nunas' situation. But a further error exists with Mr. Bergunder's reference to Manulife in 1993, as <u>Manulife</u> would not actually take over as insurance carrier for Labatt until August 30, 1994.

4. To be more precise, Mr. Nunas' disability benefits were terminated by Confederation Life on May 13, 1994 at which time Nunas was in or about his 102nd week of continuous disability.

So whereas the Union states here that *"the insurance carrier* (Confederation

Life) *concluded that Mr. Nunas did not satisfy the policy's definition of being disabled from "any occupation" as was applicable to determine eligibility for benefits after 104 weeks,"* (emphasis added) the reality is that Mr. Nunas never actually reached that point before being cut off by an insurance carrier that was applying (as in my case) a more stringent disability test than provided for by the collective agreement and did so when in fact, that determination was not the insurer's to make, but the Employer's. (see Arbitrator Taylor's finding - item 3, above)

5. Mr. Nunas' letter of termination is in fact dated January 16, 1995 (ironically, the day before my disability benefits were terminated, again pursuant to Arbitrator Taylor's finding, a determination as to eligibility made wrongly by the insurance carrier).

However, Mr. Nunas' actual date of termination was December 22, 1994, although he was not informed of the Employer's decision to terminate him at that time until the first week of 1995, following the New Year's Day holiday.

Mr. Nunas had contacted the Employer at that time to try to arrange for a cash advance on that year's vacation allotment, but instead was told he had indeed, been terminated three days before Christmas day and had no further claim to any holiday pay.

6. No explanation has ever been provided as to why the Union delayed 10 days in filing Mr. Nunas' grievance complaining of his unjust termination, nor as importantly, why the Union failed to file a grievance for the nonpayment of his LTD benefits, as the Union would later do (a mere 6 months later) in my case.

7. As the Board has already seen, the Union delayed in its acquisition of a legal opinion on these important matters a further 13 months until February 19, 1996. [Union's Appendix 2, document No. 15]

8. Here the Union refers to its letter dated August 28, 1995 to Mr. Nunas advising him to seek his own counsel regards a possible action against Manulife Financial (Confederation Life's replacement). [Union's Appendix 2, document No. 9]

Therein at page 1, paragraph 3, in regards to the reason for Mr. Nunas' disqualification of his LTD benefits by Confederation Life more than 15 months earlier, the Union states: *"**We don't know why**"*.

Then on page 2, paragraph 2 of the same letter, the Union refers to the possible existence of *"time limiting provisions in the insurance policy,"* adding, *"...we do not know when the time limit on your right to commence an action against the Insurer expires. It is possible it has already passed."* (emphasis added)

We submit this is clear and compelling evidence of the Union's perfunctory and unprofessional conduct in its untimely assessment of Mr. Nunas' predicament during that period of time.

As indicated above, the Union delayed beyond a reasonable amount of time in its consideration of these important matters applicable to Michael Nunas.

9. Here the Union refers to the legal opinion provided to it by counsel regards Mr. Nunas' termination and the prospects for winning in arbitration his grievance for same. The Union also comments upon the denial of his LTD benefits, although at this date in February 1996, some 21 months had elapsed since his benefits had been cut off, and yet no grievance for those LTD benefits had been filed, as was in my case. [Union's Appendix 2, document No. 15]

The Union's legal opinion in Mr. Nunas' case [Union's Appendix 2, document 15] would prove to be the determining factor in it's woeful decision to abandon Mr. Nunas and thus requires close and careful scrutiny not only as to its content (and by comparison to the content of the legal opinion provided to the Union in my case) [Complainants' document No. 2.1] but also in the way in which it was presented to the Union's Grievance and Executive Boards, and even more importantly to this Complaint, to Mr. Nunas' lawyer.

10. As stated here by the Union with respect to Michael Nunas' disability benefits entitlement, the legal opinion offered considered the discrepancies between the collective agreement language and the insurance policy language, and notwithstanding the discrepancies actually existed for the period beyond 104 weeks, somehow concluded that beyond 104 weeks of disability the collective agreement language and the policy language *"were unlikely to be found materially different,"* and *"therefore the Union was advised that the matter of Mr. Nunas' entitlement to benefits was unlikely to be found arbitrable…"* (emphasis added)

The logic employed here by the Union flies in the face of its later submissions to Arbitrator Taylor, in my case. Again, it is instructive to review and restate Union counsel David Blair's submissions to Mr. Taylor regarding the existence and relevance of the inherent discrepancies between the policy language and that of the collective agreement.

In his July 7, 1999 submission to Mr. Taylor, [Complainants' document No. 2.7] David Blair wrote at paragraph 4.3:

> We submit there is no more critical aspect of weekly indemnity and long-term disability insurance coverage than the disability definitions, and these are both quite different.

Then at paragraph 4.6, in regards to *"...the issue of whether there exists a discrepancy between the collective agreement and LTD policy tests beyond 104 weeks.."*, (emphasis added) Mr. Blair stated that:

> ..there is a discrepancy...We submit the breadth of the discrepancy is irrelevant. If it is possible that the Grievor would be denied in litigation against the insurer coverage to which he is entitled under the collective agreement, the Employer has breached the collective

agreement... (emphasis added)

However, the most obvious and egregious difference in these two legal opinions (ironically provided to the Union but 1 month apart from each other in early 1996 by Victory Square Law Office) is the omission of absolutely any reference to *Article 3:1:1 (c)*of the Labatt collective agreement, which as stated in this Reply to item 10 of the Union's *Background Facts Pertaining to Hughes' Complaint* above, provides absolute protection of an employee's seniority in the case of *"sickness or injury"*.

For the Board's convenience I have once again set out the relevant portions of *Article 3:1:1 (c)*, below:

> *Article 3:1:1* Seniority service records for the purpose of permanent layoffs shall not be considered broken by reason of:
>
> .....
>
> (c) Sickness or injury or transfer from one department to another.

As stated above, the failure by the Union's counsel to include or make any mention of this important provision in its legal opinion with respect to Mr. Nunas, whose medical evidence clearly supported the notion that he hadn't yet recovered from his injuries, is further evidence of gross negligence by the Union and its representatives, and should rightfully be cause for some alarm to the Board.

For in light of the Union's assertion in its Response to Mr. Nunas' (as well as my) Complaint, that our respective disputes with Labatt were treated with consistency by the Union, this failure to apply, **nay** invoke *Article 3:1 (c)* in respect of Mr. Nunas must be seen for what it is: an egregious and willful act of negligence and abrogation on the part of Rick Sutherland and the Union to absolve itself from having to represent Mr. Nunas pursuant to the collective agreement and the Union's own *Constitution and By-laws*.

11. This act of **gross negligence** was further exacerbated by Mr. Sutherland's undutiful presentation of this legal opinion concerning Mr. Nunas' termination, to the Union's Grievance Review Board on March 18, 1996 and referred to here by the Union. [Union's Appendix 2 - document No. 18]

It is of interest to note that the respective authors of mine and Mr. Nunas' disparate legal opinions (Marni MacLeod and Rob Fredericks, both of Victory Square Law Office) were both in attendance at the aforementioned meeting.

Perhaps equally noteworthy is that it was Mr. Fredericks, who provided the Union with its legal opinion in my case, yet had not officially done so at the time of the GRB meeting, above, but would do so a mere three days later.

I submit the timing of the issuance of Mr. Fredericks legal opinion was likely designed to deprive the Grievance Review Board the opportunity to make a thorough comparison of the two legal opinions at its meeting. Yet without the ability to make that comparison, the GRB was effectively rendered impotent with respect to making a reasonable determination as to the **consistency** with which the Union was treating Mr. Nunas and me.

The question put forth by the Union to its legal representatives in the case of Mr. Nunas was:

> *"Can the Union succeed in a grievance against the Employer to rescind the termination of Mr. Nunas' employment?"*

The answer, as provided by Ms. MacLeod's opinion was *"No,"* with the added important proviso:

> *"unless the Union can show that the Employer did not fulfil* (sic) *its duty to accommodate Mr. Nunas' disability."* [Union's Appendix 2, document No. 18]

But a simple review of the minutes of the meeting in question reveals that the proviso noted above was not included for the benefit of the Grievance Review Board –regards the matter of Mr. Nunas' termination grievance, the minutes state simply and succinctly: *"No chance.."*

Accordingly, a recommendation was made to withdraw without prejudice Mr. Nunas' grievance for unjust dismissal.

The Board will undoubtedly agree that the failure by Mr. Sutherland and his legal consultants to duly advise the GRB of the proviso regards the Employer's *"duty to accommodate Mr. Nunas' disability"* and, coupled with the complete lack of any reference, whatsoever to *Article 3:1:1 (c),* must surely render the legal opinion sought by Mr. Sutherland and subsequently implemented by the Union in its abandonment of Mr. Nunas, with serious and fundamental flaws in its reasoning.

But what truly defies logic, is that Rick Sutherland, himself -having negotiated the relevant collective agreement language numerous times over a period of, perhaps 20 years or more -somehow failed to bring this significant provision to the attention of his lawyers and to the Union's Table Officers.

This bit of chicanery on the part of Rick Sutherland to influence the Union to allow the Employer's termination of Mr. Nunas to go unchallenged held obvious and devastating consequences for Michael Nunas.

Additionally, it was not for a further 6 months that Mr. Sutherland would even notify Nunas of the Grievance Review Board's decision to recommend the Union not proceed to arbitration in the matter of his termination.[Complainants' document No. 6.9])

12. As stated here by the Union, on April 22 1996, Ms. MacLeod met with Mr. Nunas' marital lawyer Wayne Guinn, and armed with her flawed, legal opinion managed to convince Mr. Guinn that Nunas' only chance to recover his LTD benefits was for him to sue Manulife Financial.

Mr. Guinn obviously had no reason to believe the Union was acting in any way that could be construed as not in Mr. Nunas' best interests, and thus was undoubtedly interested to hear *"that* (Mr. Nunas') *claim must be pursued against the insurance company,"* as stated here by the Union.

Moreover, it is clear from the content of his letter to Mr. Nunas and referred to here by the Union, that in respect of Nunas' termination by Labatt, Ms. MacLeod had obviously not broached the subject of *Article 3:1:1 (c)* to Mr. Guinn, allowing him instead, to proceed under the misapprehension that:

> *"There is no question that, after a certain number of weeks where an employee is off work for whatever reason, the (Employer) is at liberty to terminate that person's employment, pursuant to the Collective Agreement."* (emphasis added) [Complainants' document No. 6.5]

Then in regards to Mr. Nunas' denial of LTD benefits, Mr. Guinn again displays his profound ignorance of matters concerning whether that denial was arbitrable or not, when he opines:

> *"The* (Employer) *is obligated to hold an insurance policy in full force and effect for you in accordance with the terms of the Collective Agreement. There is no question that was done and your claim is with the insurance company for failure to provide coverage for you."* (emphasis added)

We submit it was the Union's own legal advisor Marni MacLeod (with instructions from then-Business Agent Rick Sutherland) who, although knowing otherwise, managed with cunning, deception and subterfuge to convince Mr.

Guinn that his client's circumstances provided -as Gerry Bergunder would later write in his explanation to Mr. Nunas of the Union's specious reasoning at that time, *"no forum through which the Union* (could) *proceed."*

[Complainants' document No. 6.13]

In short, Mr. Nunas, as well as his solicitor Mr. Guinn, were duped by Mr. Sutherland and the Union's legal representative into believing something that was not so, and by the time he had come to understand and appreciate fully the nature of that fraudulent deception, Mr. Nunas had unfortunately exceeded the approved guidelines with respect to timeliness for the filing of his Complaint.

We further submit Rick Sutherland's and the Union's misrepresentative approach to deprive Mr. Nunas of an arbitration of his disputes with Labatt and the deception employed by Mr. Sutherland and his legal counsel therein, reveals the existence for the potential of the perpetration of a fraud upon the Board, and as such should be sufficient grounds for the Board to wave any restrictions imposed on Mr. Nunas by its timeliness guidelines in the bringing about of this *Section 12* Complaint, as recommended by the Union in its written Response.

We submit the Union's representation of Michael Nunas to be fraudulent, and as such deserves the Board's most careful and thoughtful consideration in deciding whether or not to allow Mr. Nunas' Complaint herein to proceed. We recommend to the Board, it does.

13. As noted in item 11 above, Mr. Sutherland delayed a full 6 months before writing to Mr. Nunas to notify him of the Union's Grievance Review Board's decision to recommend the Union not proceed to arbitration in the matter of his termination. [Complainants' document No. 6.9]

Of particular interest here is that on this occasion, Mr. Sutherland wrote directly to Mr. Nunas, in apparent contradiction of the Union's own decision to confine its communications concerning Mr. Nunas to his solicitor, Wayne Guinn.

That decision was in fact, communicated in a letter from Marni MacLeod to Mr. Guinn dated April 23, 1996. [Complainants' document No. 6.6]

Following an apparent attempt by Mr. Nunas on that day to communicate with Victory Square Law Office by telephone, in which *"he expressed some concern that either* (Victory Square) *did not receive full information concerning his case or that some information was missing,"* Mr. Nunas was summarily rebuffed in Ms. MacLeod's letter to Mr. Guinn.

Ms. MacLeod wrote to Mr. Guinn:

> *"Please explain to Mr. Nunas that since he is represented by you, we are responding to you and will not be returning his telephone call. We also ask that all future communications to the Union* (or us) *respecting this matter be conducted in writing by you. **We will respond in kind**. We also confirm that we have advised our client that all future communications concerning Mr. Nunas will be conducted through you. Mr. Nunas apparently called the Union office this morning as well."* (emphasis added)

The tone and the meaning of this letter (for Mr. Nunas) was unmistakable: it was a matter of, don't call us; we'll call you!

And of course, it alleviated the necessity for Rick Sutherland to have any further contact with Mr. Nunas, something I'm sure was a large relief to Mr. Sutherland.

The Board should keep in mind that this letter was sent to Mr. Guinn nearly 5 months before Rick Sutherland got around to writing directly to Mr. Nunas, notifying him of the Union's abandonment of his termination grievance. Thus, it was only natural for Mr. Nunas to attempt to bring information he considered important to his case to the attention of Mr. Sutherland and the Union's legal advisors.

His rebuke by the Union is a clear indication that the Union had no interest in anything Mr. Nunas might have to contribute to the discussion of the denial of his LTD benefits, nor to his subsequent termination by Labatt.

The Board should undoubtedly take further note of this blatant example of the Union's arbitrary indifference and absolute insensitivity to its disabled (at that time) member, Michael Nunas as exemplified by Ms. MacLeod's pithy letter to Wayne Guinn.

14. The Union refers here to Mr. Guinn's October 1, 1996 reply on behalf of his client, Michael Nunas, *"to advise that Mr. Nunas would attend the next GEB meeting to appeal the withdrawal of his termination grievance"* as stated here by the Union. Noted here too, by the Union is Rick Sutherland's response to Mr. Guinn *"on October 4, 1996 with a letter advising of the date and time for the meeting."*

What the Union fails to mention is that in the course of that letter to Mr. Guinn, Mr. Sutherland states unequivocally that *"under our Constitution, Mr Nunas is entitled to representation, providing said representation is a member in good standing of our union,"* effectively precluding Mr. Guinn absolutely from attending the meeting to properly represent his client's interests. (emphasis added) [Union's Appendix 2, document No. 26]

This was in apparent contradiction to the Union's previously stated intention to confine its *"communications concerning Mr. Nunas"* to Mr. Guinn, as noted above in item 13, in which the Union's legal representative stated:

> *"We also confirm that we have advised our client that all future communications concerning Mr. Nunas will be conducted through you."* (emphasis added)

What's clear from his October 4th letter to Mr. Nunas' lawyer above, is that

Mr. Sutherland did not wish to have a one-on-one encounter with Mr. Guinn.

This notion was already exemplified by Mr. Sutherland's earlier absence from the meeting with Mr. Guinn that he was scheduled to attend the previous April 22nd or 23rd, an absence, the Board will take note, for which the Union offers no explanation in its Response to Mr. Nunas' Complaint.

We consider this conduct by Rick Sutherland to be a further example of his proclivity to "duck-and-run" from important matters, electing instead to hide behind the skirts (most appropo in reference to Ms.MacLeod) of his lawyer.

15. In accordance with the Union's contradictory denial to Mr. Guinn's attending the Union's GEB meeting, noted in item 14 above, Mr. Nunas did not attend the November 21, 1996 meeting, as stated here by the Union. Indeed, to do otherwise, and without adequate representation from his solicitor, would have undoubtedly been pointless and counterproductive for Mr. Nunas.

It is doubtful Mr. Nunas was even aware of the denial by Mr. Sutherland to allow him to attend accompanied by his solicitor as the matter was being dealt with solely by Mr. Guinn, as per the Union's prior instructions.

16. As stated here by the Union, in 1997 Mr. Nunas had recovered sufficiently to return to work and the Union *"attempted to dispatch him for available work."*

What's not mentioned here by the Union is its failure in 1997 as well as in 1998 to find Mr. Nunas any position in any of the bargaining unit's plants. It appeared to Mr. Nunas at that time that he had somehow fallen onto some kind of blacklist as a result of a poor reference by Labatt regards his sustaining injuries from his numerous motor vehicle accidents.

Mr. Nunas' suspicions were in fact, later confirmed for him by Gerry Bergunder who, as the Union's then-president stated in his February 1999 letter to Mr. Nunas:

"I do agree that because of the Labatt situation, the industry appears to have "blacklisted" you." [Complainants' document No. 6.13]

We would add (and in fact do so in Mr. Nunas' Complaint) that the Union's conduct in its misrepresentation of Mr. Nunas' termination by Labatt largely contributed to the *"Labatt situation"* that Mr. Bergunder refers to, above.

For had the Union properly dealt with the matter of Mr. Nunas' unjust termination in the first place, then it is doubtful he would have encountered the difficulties he did in returning to gainful employment.

But the sad reality is that in 1995 and 1996 the Union effectively hung Mr. Nunas out to dry, figuratively speaking, washing its hands of him, completely.

As noted by the Union's flawed legal opinion in item 9 above, obtained from Victory Square Law Office by Rick Sutherland, and reinforced by Mr. Sutherland in his undutiful presentation of that opinion to the Union's Grievance Review Board, and coupled with Mr. Sutherland's recommendation to withdraw without prejudice Mr. Nunas' grievance for unjust termination (see item 11, above) -Mr. Nunas had indeed, *"no chance"* of attaining any semblance of justice in the matters of his denied LTD benefits and subsequent termination.

17. With respect, the Union is incorrect in its assertion that Mr. Nunas had delayed for two years before *"reviv*(ing) *the issue of his termination grievance"*.

As noted in the Introductory remarks to this Reply (concerning Nunas), Mr. Nunas had waited patiently for a conclusion to the arbitration of my grievances pursuant to Mr. Sutherland's advisement to him regards same in 1996.

Mr. Nunas received no *"assistance"* from me, as stated here by the Union, rather I simply advised him that he was required to attend a meeting of the Union's Executive Board, pursuant to a constitutional requirement to avail himself of the Union's internal dispute mechanisms.

In the course of that advisement to Mr. Nunas, I naturally extended an invitation to him to accompany me, and thus included him in my writen request to attend the Union's GEB meeting.

Mr. Nunas' purpose for attending the meeting was as a result of his repeated denial of employment in the brewing industry -with no intervention on his behalf by the Union -throughout the previous two years, when he had recovered from his injuries sufficiently to attempt to return to work, but was not being given an opportunity to do so. That and the appearance of discriminatory conduct by the Union in its advancing my interests while allowing his to die, unattended.

As well and given the committment he had received from Rick Sutherland in 1996 above, Mr. Nunas naturally felt he had a stake in the outcome of my grievances.

I must add further, that the recommendation (to me) to attend said meeting had originated with Charlie Puchmayr, and was further recommended to me by Gerry Bergunder.

Prior to those recommendations I had no knowledge of the constitutional requirement to avail oneself of the Union's internal dispute resolution procedures, and apparently neither did Mr. Nunas prior to my advising him of same.

18. As noted in Reply to the Union's *"Background Facts Pursuant to Hughes' Complaint"* in item 49 above, the minutes of the REB meeting referred to here by the Union do not reflect what actually occurred at this meeting.

19. As already stated herein, Gerry Bergunder delayed three months in responding to Mr. Nunas' November 11, 1998 letter.

Furthermore, Mr. Bergunder's letter dated February 11, 1999 to Mr. Nunas, as referred to here by the Union, contained numerous inaccuracies, not the least of which was Mr. Bergunder's mistaken assertion that there was *"no forum through*

which the Union (could) *proceed"* on Mr. Nunas' behalf regards the denial of his benefits nor his subsequent termination by Labatt. [Complainants' document No. 6.13]

The Board will undoubtedly come to this same conclusion (regards Mr. Bergunder's error) as these matters were in fact, subsequently addressed by Arbitrator Taylor (in my case) in his *"Second Award"* issued in December 1999, [Complainants' document No. 1.8] and more recently by Arbitrator Robert Pekeles in his recent May 6, 2004 arbitration award of Mr. Nunas' 2003 termination by Labatt's subsidiary, BDL. [Union's Appendix 2 - document No. 62]

I will have much more to say about the importance of Mr. Pekeles' award herein, and the importance of his findings regards the termination of a disabled employee pursuant to collective agreement language that is standard, not only in BDL's collective agreement, but in Labatt's as well!

20. Here the Union refers to the great lengths it went to *"successfully dispatch Mr. Nunas within the industry,"* with no mention of the Union's absolute failure to do so throughout 1997 and 1998 when Mr. Nunas was repeatedly denied employment opportunities *"within the industry"*.

As noted in item 16 above, the Union's failure was apparently as a result of Mr. Nunas' blacklisting by Labatt, a situation that manifested purely as a result of the Union's prior 1996 abandonment of him.

The Union's failure to properly address the matter of his disabledness at that time left Mr. Nunas stigmatized either as someone who, due to his injuries, would likely not be **"ever"** able to work again, or in the alternative, a malingerer.

Neither scenario was conducive to Mr. Nunas' receiving a fair chance to prove he had recovered from his injuries sufficiently to return to gainful employment in the brewing industry.

There is no evidence to show the Union had exhibited the necessary foresight to properly assess Mr. Nunas' situation in 1995-96, instead choosing to simply

wash its hands of him, despite the obvious and serious ramifications such an abandonment would likely provide for Mr. Nunas' future prospects.

It was not until the Spring of 1999, following Mr. Nunas' October 1998 petition to the Union's REB, that the Union finally took the trouble to obtain a medical assessment for Mr. Nunas as noted here by the Union, ostensibly to establish his fitness for work.

Had the Union done so at the appropriate time in 1997, Mr. Nunas' might have been given an opportunity two years sooner to establish some seniority in one of the bargaining unit's numerous plants.

Also omitted here is any reference (but made note of in Mr. Nunas' Complaint) to the terms imposed by BDL and agreed to by the Union, and conditional upon Mr. Nunas' hiring at BDL, which were more stringent and excessive than those applied to even the 'greenest' of permit card workers.

Those more stringent terms and conditions were discriminatory to Mr. Nunas, who had been a member in good standing of the Union for more than 19 years.

Finally, Mr. Nunas began work at BDL July 26, 1999, not *"in August 1999"* as stated here incorrectly by the Union.

21. As stated here by the Union, Mr. Nunas did in fact sustain a workplace injury (a rupture of his abdominal wall) on September 23, 2002, and required not one but two surgeries to repair. The dates of those procedures were November 22, 2002, and June 20, 2003 and Mr. Nunas remained disabled and unable to work throughout that entire period as a result of his injury.

Mr. Nunas was terminated by BDL on June 10, 2003, while on WCB and awaiting the necessary (and WCB approved) second surgery.

Thus, Mr. Nunas' termination by BDL was implemented by the Employer at a time in which the Employer had to be cognizant of his disabledness.

As noted in his Complaint, Mr. Nunas' termination by BDL was therefore the

second time in less than a decade that he'd been terminated by either Labatt or its subsidiary, despite the Employers' first-hand knowledge that he was injured and disabled.

As stated in Mr. Nunas' Complaint, this type of willful mistreatment of Mr. Nunas constitutes and is indicative of *"persistent and calculated discriminatory conduct"* by these Employers, and thus on that basis, requires intervention by the Board.

22. We raise an important issue here concerning the grievance filed and arbitrated and referred to here by the Union, in contrast to the earlier grievance filed but abandoned by the Union regards Mr. Nunas' termination by Labatt:

As stated here by the Union, the grievance of Mr. Nunas' termination by BDL did include the addition of another employee who, likewise was terminated while on leave previously granted by the employer.

This of course, indicates that there was no reason why, in the course of its arbitration of the Hughes grievances, the Union could not have simply added Mr. Nunas' name to my grievances and in so doing represent equally both our respective interests simultaneously.

In other words, the Union had the opportunity to 'kill two birds with one stone', yet failed to take advantage of that fact as it proceeded (ostensibly) on my behalf while abandoning Mr. Nunas.

This might be an appropriate time to remind the Board that, notwithstanding the Union's repeated attempts (as noted in its correspondence and throughout the minutes of the Union's many meetings, as well as its Response to the Complaints) to frame or characterise my grievance for disability benefits as a simple denial of weekly indemnity, consistently omitting mention of the LTD portion of the grievance -pretty much the same as the Employer did in my case -in fact, the

grievance specifically referred to the denial of LTD.

I submit that this omission by the Union is in accord with the Employer's attempt (and foiled by Mr. Taylor in his *"Second Award"*) to limit the scope of the arbitration of the *Article 9* grievance to just the denial of weekly indemnity.

Arbitrator Taylor, in his *"Second Award"* made a point of addressing that very issue at page 7, as set out below:

> There is no jurisdiction, said the Employer, for this Board to consider the Union's submission with respect to the definitions of disability for long-term disability purposes.
>
> The Employer said the arbitration was limited to the denial of weekly indemnity benefits.
>
> That submission is answered by the grievance which expressly refers to weekly indemnity and long-term disability. (emphasis added)
>
> [Complainants' document No. 1.8]

23. Although the Union correctly refers here to its successful arbitration of Mr. Nunas' arbitration before Arbitrator Robert Pekeles, it incorrectly states the date of Mr. Pekeles' decision as March 25, 2004, the actual date of the arbitration hearing, when in fact Mr. Pekeles' decision was rendered May 6, 2004.

Mr. Pekeles in fact, not only *"restored Mr. Nunas' employment at BDL,"* as stated here by the Union, he in fact, ordered Mr. Nunas *"be made whole."*

The Board should take note that as of this filing of the Reply to the Union's Response, Mr. Nunas has in fact, not been made *"whole"* as ordered by Mr. Pekeles, as the matter of the monies he would have earned had he not been terminated by BDL are, some 11 weeks later, still outstanding and have yet to be paid to him.

It follows that Mr. Nunas has not been made whole.

24. Here the Union "presume(s)" wrongly that its representation of Mr. Nunas as an employee of BDL is not now the focus of his *Section 12* Complaint as referred to in the first paragraph of his Complaint to the Board, as stated by the Union.

On the contrary, the Union's *"successful representation"* in respect of its recent arbitration of Mr. Nunas' termination by BDL has great relevance to both Mr. Nunas' and my mid-nineties terminations by Labatt, and as such remains an integral and important part of both our respective Complaints.

This notion is reinforced by the remarkable similarities of the collective agreement language that Mr. Pekeles' decision turned upon in the recent BDL case, with the language found in the Labatt collective agreement. That and the fact as noted by Mr. Pekeles, that in the case of BDL, as in the case of Labatt, the plant did not close.

The relevant provisions are set out below for easy comparison by the Board.

The BDL collective agreement language concerning an employee's seniority is set out at page 7 of Mr. Pekeles' award and provides as follows:

> *Article 3.01* Seniority is defined as the length of an employee's service with the Company, calculated as the elapsed time from the date he was first employed, unless his seniority was broken, in which event such calculation shall be from the date that he returned to work following the last break in his seniority.
>
> *Article 3:02* Seniority shall not be considered broken by reason of
>
> .....
>
> (c) Sickness or injury.

In comparison, the Board will undoubtedly take note that in the case of the Labatt collective agreement as set out below, the collective agreement language is

even more specific in its reference to *"**permanent layoffs**"*, and the inclusion of an employee's *"**transfer from one department to another**."*

I have taken the liberty of highlighting those passages for the Board's added convenience.

> *Article 3:1:1* Seniority is defined as the length of an employee's service with the Company, calculated as the elapsed time from the date he was first employed, unless his seniority was broken, in which event such calculation shall be from the date that he returned to work following the last break in his seniority.
>
> Seniority service records **for the purpose of permanent layoffs** shall not be considered broken by reason of:
>
> .....
>
> (c) Sickness or injury **or transfer from one department to another**.

In his insightful analysis of BDL's 2003 termination of Mr. Nunas, Arbitrator Pekeles observed that:

> When an employee is on layoff due to an absence of work, he/she can look for and secure alternate employment. A person who is sick or injured may well not be able to do so.

Mr. Pekeles went on to say that:

> There is a good arguable rationale for an approach that preserves the employment status of those on leave due to sickness, injury or

> parental leave, when the employment status of other employees without work is not preserved.

Mr. Pekeles determined that because he *"was absent from work by reason of his injury,"* Mr. Nunas' seniority was not *"broken"*.

Mr. Pekeles went further noting that in the absence of any language which expressly permitted Nunas' termination while he was on this particular leave of absence, the Employer could not terminate Mr. Nunas while he was on that leave.

Thus, Mr. Pekeles effectively sustained the argument that I had long put forth - and consistently ignored by the Union -concerning the rights conveyed upon Mr. Nunas and me by the Labatt collective agreement, rights long conveniently denied by the Employer, and ignored by Rick Sutherland and the Union.

As I stated in my Complaint to the Board:

> *"As a result of my disability, numerous employment opportunities available to non-disabled members of my Union have been forever lost to me."*

It is indisputable that the same logic applies likewise in the case of Mr. Nunas' termination by Labatt. Unfortunately, try as hard as I might, I have thus far been unable to convince Rick Sutherland et al as to the rightness of my position.

Perhaps now though, with the issuance of Arbitrator Pekeles' recent award, the Union may at long last see the errors it has committed in its representation on mine and Mr. Nunas' behalf.

However, that still appears unlikely as the Union, in the context of its 47 page Response to our Complaints, makes absolutely no mention, whatsoever of *Article 3:1:1 (c)* of the Labatt collective agreement.

Thus, the **omission** of a **significant provision,** ***Article 3:1:1 (c),*** sustained and propagated through a legal opinion provided by counsel to the Union in February/1996 in respect of Mr. Nunas' 1994 **termination** by Labatt, was subsequently also provided to Mr. Nunas' lawyer, and to the Union's Grievance Review and Executive Boards, and in addition was never brought to the attention of Arbitrator Taylor in my case, and finally, as noted above, and so true to form, has received no passing mention in the Union's Response.

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C - UNION'S "OVERVIEW OF THE LAW"

I now turn to address the Union's Response relevant to the law as it pertains to *Section 12* of *the Labour Code*.

Here, Mr. Glavin has me at an obvious and distinct disadvantage, given his extensive experience as a labour lawyer and my layman's status in these matters. I have done some limited research of other *Section 12* Complaints and have attempted to acquire some understanding of what the law permits and moreover, what it requires of a union.

It is beyond dispute that a union is permitted such a wide latitude in its conduct to render it nearly impossible for a Complainant to achieve any success in a Complaint of this type. The tiny percentage of successful *Section 12* Complaints to the Board bears out this notion.

But in the case of the Brewery Workers' Union regards its representation of Mr. Nunas and me, I am confident the Board will undoubtedly come to the correct conclusion that a breach of *Section 12* has indeed, occurred.

To that end, I will endeavour to cite some instances in which the Union has breached its duty to Mr. Nunas and to me, and do so in the context of the Union's *"Overview of the Law"*.

(i) ***BAD FAITH = PERSONAL HOSTILITY, COERCION, LIBEL, DUPLICITY...***

As noted by the Union here in setting out a portion of *Rayonier Canada,* [1975] 2 C.LR.B.R. 196:

> ...a union is prohibited from engaging in any one of three forms of misconduct in the representation of employees. The union must not be actuated by **bad faith** in the sense of **personal hostility**...or **dishonesty**. There can be **no discrimination**...Finally, a union cannot act **arbitrarily, disregarding the interests of one of the employees in a perfunctory manner**...(emphasis added)

The Board has already heard a description herein of the personal hostility Rick Sutherland expressed to me at the Union's REB meeting in October, 1998.

Not contested by the Union in its Response is Mr. Nunas' assertion that he was subjected to coercion by Mr. Sutherland to influence Nunas' disassociation with me, an indicating that Mr. Sutherland perhaps held some feelings of personal hostility for me. The Union's concession here is duly noted.

The Union pays little attention to Gerry Bergunder's libelous and threatening letter to me dated January 17, 2000, which in fact, appeared to be instigated by Rick Sutherland, and in which Mr. Bergunder accepts and publishes Rick Sutherland's mean-spirited version of events without even bothering to first contact me to ascertain mine.

That's a denial of natural justice to me, and as such reveals much about the underlying hostility that the Union has held for me purely as a result of my calling into question the misrepresentation afforded me and my friend Michael Nunas.

These two gentlemen -Sutherland and Bergunder -have been instrumental in my becoming a virtual pariah in the union that I've been a faithful member of for more than 30 years.

Consider Mr. Sutherland's 1996 surreptitious and duplicitous issuance to me of a withdrawal card that I had no need for, and had not applied for.

Not only was I denied the opportunity to bring a charge against Mr. Sutherland in regards to this matter, a review of a postmarked envelope recently received from the Union reveals the existence of a large "**[W]"** ajacent my name, indicating the Union has continued to hold my membership in suspension mode, despite numerous protests by me -ignored, of course -to have this matter affecting my standing in the Union, properly rectified. [Complainants' Supplemental document]

This matter has had the effect of denying me a ballot in Union elections, and as such exemplies further bad faith from this Union.

(ii) ***...AND THEN THERE'S DAVID BLAIR***

Then there is the shameful matter of David Blair's dishonesty exemplified by his deception in attempting to mislead Arbitrator Taylor in the course of the Union's representation of me.

Notwithstanding the Union's assertions to the contrary, I continue to maintain that the Union's former counsel, David Blair's July 7, 1999 misleading submission to Arbitrator Taylor (in which Mr. Blair stated that it was *"not possible"* to provide Mr. Taylor's panel with a *"detailed **list** of discrepancies"* for comparison between the disability tests contained in the insurance policies and the Labatt collective agreement) is clear and compelling **evidence** of the Union's blatant and flagrant misrepresentation of me in the course of its arbitration of my grievances.

[At this point I suggest the Board reviews items 24, 25, 26 and 27 above, in my Reply to the Union's *Background Facts Pertaining to the Hughes Complaint*.]

Mr. Blair had recklessly failed to provide Mr. Taylor et al with his *"detailed **list** of discrepancies,"* and when that failure was brought to light, Mr. Blair sought

to provide Mr.Taylor with a plausible reason for his failure. Unfortunately, he didn't have one, and so he made up an excuse that he hoped would be acceptable to Mr. Taylor.

The bad faith, the *"dishonesty"* exemplified here on the part of David Blair in his willful attempt to **mislead** and **deceive** an arbitrator into believing the Union didn't have the *"detailed **list** of discrepancies"* in its possession, when in fact it had and moreover, Mr. Blair knew it had, remains in my view, a reprehensible and fraudulent, obstruction of justice on Mr. Blair's part, rightfully deserving of the Board's highest censure.

This is conduct far beneath a man whom, I believe, holds the highest office in his professional association, *the Canadian Association of Labour Lawyers*, (C.A.L.L)

(iii) INCONSISTENCY = DISCRIMINATION

With respect to the **discrimination** afforded the Complainants, the Union's attempts to persuade the Board that none exists is patently unreasonable . As well, the Union has not ever denied allowing the Employer to terminate the employment of **two** injured and **disabled** members of the Union.

I will examine more closely the Union's inconsistency with respect to our terminations by the Employer in a later section of this Reply.

(iv) "GROSS NEGLIGENCE" AND A "DETAILED LIST"

The Union states also that *"Section 12 does not protect members from simple negligence..; rather only mistakes amounting to gross negligence are in breach of section 12.."* (emphasis added)

Again, I draw the Board's attention to my remarks contained in my Complaint citing Mr. Blair's recklessness, with respect to his denial to Arbitrator Taylor's panel of the *"detailed list of discrepancies"* that Mr. Blair had in fact, possessed:

> Mr. Blair's failure to provide Arbitrator Taylor with a document that held conclusive proof of the very thing which he was purportedly endeavouring to establish in fact -i.e. that there existed discrepancies between the disability definitions contained in the collective agreement and the Manulife policies - might well be construed as reckless: i.e. gross negligence.

Surely, Mr. Blair's reckless conduct in the matter above, constitutes **gross negligence** on his part for failing to provide the arbitration board with this crucial piece of evidence that he, in fact possessed -but would later deny possessing.

The Board will, too, take note that the Union makes no denial of or apology for David Blair's recklessness in not providing Mr. Taylor with a (and here I stress to the Board that these are Mr. Blair's own words) *"detailed list of discrepancies"* between the disability definitions contained in the collective agreement and the Manulife policies.

On the contrary, in the Union's Response to this *"most serious allegation of impropriety"*, -this *"accusation"* -Mr. Glavin attempts to *"call into question* (my) *credibility"* on this matter.

Mr. Glavin should know that his attempt to impugn my credibility by insisting on framing the issue as respective of when the insurance policies were disclosed to the Union, is deeply resented by me.

For, my purpose in addressing the matter of the non-disclosure of the policies was only in reference to David Blair's own submission to Arbitrator Taylor, in which Mr. Blair concluded that providing Mr.Taylor with a *"detailed **list** of discrepancies"* between the disability definitions contained in the collective agreement and the Manulife policies was *"an approach **not possible** here due to non-disclosure of the policies."*

That, and the fact that the matter of when the policies had actually been disclosed to the Union by the Employer had been raised in Mr. Taylor' *"Original Award"* at page 27, under the heading (Roman numeral) V -yet still remains

inconclusive.

(v) COMPLAINANTS' STATUTORY RIGHTS

Also stated here by the Union in its *"overview of the law of Section 12"* is the notion that *"a union can engage in settlement discussions and withdraw or settle a grievance, even without a grievor's consent,"* citing *Re Sieklik,* BCLRB Letter Decision No. B429/97.

That may well be so, but, as indicated by the Employer's counsel, Keith Murray in his December 18, 2002 e-mail to David Blair, the settlement of the Employer's judicial review of BCLRB No. B10/2002 reached on my behalf by the Union was *"settled as a piece of a larger settlement between the parties that involved an unrelated grievance."* (emphasis added) [Complainants' Supplemental document]

Thus, it appears from the foregoing that the Union engaged in a form of grievance swapping, utilising that which David Blair had earlier characterised in a similar e-mesage as *"what we* (the Union) ***won*** *an* (sic) *arbitration"* as ***"a lever"*** (to quote Mr. Blair once again) to effect a settlement involving an unrelated grievance, as noted above. [Complainants' Supplemental document]

As the documents referred to above were in fact, received from the Union more than 4 months supplemental to the filing of this Complaint, I now take this opportunity to comment on the matter of the Union's apparent swapping of my winning grievances for other some consideration of ***"an unrelated grievance"***, as appears to be the case here.

To that end, I refer the Board to the case of *Centre hospitalier Régina Ltée v. Labour Court,* [1990] 1 S.C.R. 1330, in which the Supreme Court of Canada dealt with a case where as part of signing a new collective agreement, the union abandoned an outstanding discharge grievance. This has obvious relevance to my case if it is indeed, found that the union swapped my good discharge grievance for some other consideration.

The court quoted from *"The Duty of Fair Representation: A Theoretical Structure"* (1973), 51 Tex. L. Rev. 1119, at pp. 1175-76 where Julia Clark stated:

> "The concern for job security might warrant a rule that would prohibit swapping discharge grievances altogether"

The Court held that although it did not accept that rule in absolute terms, the Union **must** recognize the employee's individual rights:

> "Accordingly, without necessarily accepting this statement in absolute terms, a union must recognize the importance of an employee's individual interest when exercising its discretion whether or not to proceed with a grievance against a dismissal or disciplinary sanctions". (emphasis added)

The Complainants, however, submit that a rule against swapping valid discharge grievances has now become absolute.

In *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324*, 2003 SCC 42, the court recently held at paragraph 28 that **human rights** and other **employment-related statutes** establish a floor beneath which an employer and union cannot contract.

The court further stated at paragraph 29 that:

> the **statutory rights** of employees constitute a bundle of rights to which the parties can add but from which they **cannot derogate**. (emphasis added)

The Board has previously applied the principle in Parry sound, *supra*, that the parties cannot contract out of the statutes. In Nicholas James *(August 20, 2001),*

B.C.L.R.B. Decision No. 330/2001 James Nicholas had filed a grievance alleging that the employer had failed to pay statutory holiday pay and overtime in accordance with the requirements of the Employment Standards Act (the "Act"). The payments, however, were not required by the terms of the collective agreement between the Employer and the Union

The union refused to advance his grievance. One of the reasons given by the union was that filing an appeal of an agreement reached amicably by both sides would render the future relationship of the parties untenable if one side cannot rely on the other to bargain in good faith and to uphold its side of the agreement.

The Board held that the union and the employer could not contract out of **statutory rights** regardless of whether the agreement was reached in good faith:

> [32] The Union did not want to jeopardize its relationship with the Employer by, after the fact, challenging a term to which it had agreed.
>
> [34] However, a union's interest in honouring a deal is not a complete answer to a Section 12 complaint in this area. **If an issue is raised as to whether the agreement meets the statutory minimums**, then, regardless of whether the parties negotiated the language in good faith, the union must turn its mind to the issue and make a reasoned judgement on whether to proceed with the grievance. (emphasis added)

Furthermore, as section 84(1) of the *British Columbia Labour Relations Code*, R.S.B.C. 1996, c. 244, s. 84(1) requires that the employer have a <u>just</u> and <u>reasonable</u> cause for dismissal or discipline of an employee, **the parties can no longer swap discharge grievances** because that would thus constitute a <u>contracting</u> out of my **statutory rights**.

(vi) ***CONSIDERING ARTICLE 3:1:1 (c)...***

In its *"overview of the law of Section 12"* the Union further notes pursuant to *Re Judd,* BCLRB No. B63/2003 that:

> Section 12...is designed to ensure the union exercises its judgement based on **proper considerations**. (emphasis added)

Surely in the case of Mr. Nunas and me, those **proper considerations** should have rightfully included the assessment and moreover, the invoking of *Article 3:1:1 (c).*

But, as evidenced by the legal opinion provided to the Union (in the case of Mr. Nunas' termination by Labatt) and noted elsewhere herein, **no consideration, whatsoever** was ever paid to this protective provision of the Labatt collective agreement.

We submit that with absolutely no consideration paid by the Union to the meaning and moreover, the effect of *Article 3:1:1 (c),* it follows the Union has likely exercised its judgement based on an **improper** consideration.

(vii) ***"SUPER SENIORITY"***

The Union cites the *Re Judd* decision again with respect to *"what constitutes representation in bad faith,"* and again, as it refers to *"that* (which) *it considers to be in the best interests of the bargaining unit as a whole."*

The Union as exemplified above, shows no evidence at all of giving any proper consideration to the relevant workplace considerations.

I base this assertion on the Union's misguided and illogical reasoning in my

case and that of Mr. Nunas', to literally sacrifice our collective bargaining rights (as well as our Human Rights) ostensibly in order to support -but not protect, mind you - the rights of other former employees whose rights had been maintained up to and including the moment these former employees had **agreed** to a **cancellation of their rights** pursuant to *Article 15:5* of the Labatt collective agreement. [Complainants' document No. 5.5]

I submit he Union's reasoning with respect to its reference to what it now terms, *"super seniority"* was conceptually flawed right from very beginning. That notion is further borne out by Arbitrator Pekeles' May 6, 2004 award to Michael Nunas, in which Mr. Pekeles essentially upholds my long-held position that a collective agreement provision that conveys a specific right, absent of any contradictory language is purposeful in its intent and application.

The Board should know too, that my first encounter with this term *"super seniority"* was not in 1997 with David Blair nor Rick Sutherland as alluded to by the Union, [Union's Response - *Background Facts Pertaining to Hughes' Complaint* - item No. 30] but rather, when I recently read it in Mr. Pekeles' award dismissing Mr. Nunas' (2003) termination by BDL.

Interestingly in that case, it was the Employer putting forth an (**unsuccessful**) argument relying on the same old, trite theory of *"super seniority"* relied upon in this case by the Union.

Thus, the Union appears to be adopting a position it knows in advance to be a losing proposition.

Clearly, this is a Union without a consistent, well defined and adhered to set of principles.

The Union's reasoning, in purporting to advance the interests of certain unnamed members of the Union is specious and illogical, given its settlement of my grievances actually represents a rolling back of a benefit that's been in place at Labatt for more than 30 years: i.e. the right to grieve a denial of disability

benefits.

And, as the Board shall shortly see, the principles applied to Mr. Nunas and to me were **not** necessarily the same as those applied to other employees at Labatt, and throughout the bargaining unit.

(viii) *"THE UNION'S THOUGHTFUL JUDGEMENT"*

The Union points to its *"obtaining the advice of legal counsel"* as *prima facie* evidence that the Union has considered the merits of our grievances and arrived at a thoughtful judgement.

On the face of things that might be so. However, a closer scrutiny and comparison of the two, disparate legal opinions actually provided to the Union with respect to Mr. Nunas and me, reveals the existence of a major and **egregious inconsistency**: i.e. the omission of any reference, whatsoever in the legal opinion prepared in respect to Mr. Nunas, to *Article 3:1:1 (c)* of the Labatt collective agreement.

The Complainants submit the Union's omission in this regard effectively renders this aspect of the Union's argument as specious and patently unreasonable.

(ix) *PROPER CONSIDERATIONS*

Notwithstanding that *"the correctness of the legal opinion is not the issue,"* as stated here by the Union, the Board will still undoubtedly agree that the actual legal opinion provided to the Union with respect to Mr. Nunas was **inconsistent** in its absolute and reckless failure to properly consider nor invoke the **one,** crucial provision of the collective agreement that applied and referred specifically to an injured, disabled employee's seniority: namely, *Article 3:1:1 (c).*

But whereas it might be true that the Union may not be required to be right in its assessments of matters, surely the Complainants can now count on the Board to hold itself to a higher standard, given the immense weight of the evidence that

supports a notion that the Union was selective and **discriminating** in its 'careful' consideration of some, but not **all** matters relevant and pertaining to the Complainants' respective terminations.

We submit the Union's nonconsideration of some of the relevant matters is thus proven by the Complainants, and thus it follows that the Union did not exercise its judgement based on proper consideration of matters.

If anything, the evidence supports the notion that the Union's consideration of matters was quite improper.

(x) THE BOARD'S JURISDICTION

It is once again instructive to return to the Union's own submission here with *Re Judd,* BCLRB No. B63/2003:

> Section 12...is designed to ensure the union exercises its judgement based on proper considerations. **If it does**, it has done what it is required to do by Section 12 and the Board has no **jurisdiction to overturn** or **change** the **Union's decision**. (emphasis added)

And in the alternative, as is the case, we take the foregoing to mean that the Board does indeed, have jurisdiction to overturn the Union's decision, and rightly should.

We would add however, from a purely judicial point of view, that in such a complex and decade-long pair of cases involving disability benefits and unjust terminations such as these, the Board is likely obliged to assert its jurisdiction and to render a decision favourable to the Complainants, in the event a contravention of the requirements of *Section 12* is so proven.

This may well require the Board to wave its guidelines with regards timeliness

and delay in filing, with respect to Michael Nunas' Complaint, notwithstanding the howls of protest from the parties such a waving might undoubtably produce.

However, given the level of inconsistency, discrimination, and outright misrepresentation shown to have occurred at the hands of the Union, and the likely indication that there exists the potential for a fraud to be perpetrated on the Board, to not provide Mr. Nunas with a fair and impartial hearing would be almost adding insult to his numerous injuries.

It would further indicate that Mr. Nunas was still being flagrantly penalized by the parties, first for being disabled, then for recovering.

(xi) "INEXTRICABLY LINKED"

The Board needs no reminding that Mr. Nunas' Complaint arises out of his termination by BDL, for which he is well within the Board's acceptable timeliness guidelines.

Mr. Nunas **links** his Complaint regards his termination by BDL with his prior termination by Labatt and also makes comparison to my termination by Labatt.

Thus the Union's conduct must be viewed as a whole, as it pertains to and encompasses the Complainants' linked and moreover, collective experience with respect to the denials of benefits, and **unjust terminations** of which there are **three** here to be considered.

And the Board in fact, has wisely decided to consolidate our respective applications, as Vice-Chair Mr. Hassan himself, has already concluded in concurrence with my letter to the Board stating that, the Complainants are *"inextricably **linked**"*.

In his recent letter to the Interested Parties, dated May 11, 2004, Mr. Hassan noted at page 1, paragraph 3,:

> I reviewed both applications. Mr. Nunas' application relies greatly

> upon documents filed with Mr. Hughes' application. Although the applications involve **different Employers**, they involve the **same Union** and **similar issues**. The applications are **inextricably linked**, as Mr. Hughes and Mr. Nunas concede in their letter of May 4, 2004. Consolidating the applications and hearing them together can best utilize the Board's resources. Notwithstanding the fact that the applications have been consolidated, Mr. **Hughes'** and Mr. **Nunas**' **complaints will each be decided on their own merits**. (emphasis added)

It follows from the foregoing that the Board has thereby alleviated and relieved Mr. Nunas of his obligation to file his *Section 12* application with respect to his termination by Labatt in 1994 within any suggested, (<u>but not binding</u>) <u>nonstatutory</u> filing date.

The Board should therefore, dismiss forthwith this aspect of the Union's objection to Mr. Nunas' Complaint.

****

D - ANALYSIS

Its quite a rosy picture that Mr. Glavin paints and that's his job, in a nutshell - to keep a nice, shiny veneer of seemingly reasonableness, behind which the Union may continue its deplorable representation of injured and disabled members at Labatt and elsewhere. It's called 'keeping up appearances' and it appears to represent a considerable amount of this Union's efforts: i.e. in maintaining an outward posture of 'reasonableness'

It might <u>appear</u> then, <u>on the face of things</u>, that the Union was discharging its duties with respect to the Complainants' grievances in a manner consistent with *the Labour Code*.

However, appearances <u>can</u> be deceiving -and deception proves to be a recurring theme for this union; deception followed by denial.

(i) ***THE UNION'S DECEPTION...***

The deception on Arbitrator Taylor initiated by David Blair immediately comes to mind, as does the deception indicated by the Union's timing of and deliverance to Mr. Nunas' lawyer (as well as to its own Executive and Grievance Review Boards) of its flawed and deficient legal opinion concerning Mr. Nunas.

Obviously from my personal point of view, the most flagrant example of the Union's deception is with respect to its Response (and by extension, to the Board), with the Union's unsupported reference to numerous meetings and conversations I am alleged to have had (but never occurred) with the Union's former Business Agent, Charlie Puchmayr.

(ii) ***UNION'S PRELIMINARY OBJECTION - TIMELINESS RE: HUGHES' TERMINATION***

I too, recognize that shorn of those discussions' legitimacy, one major aspect of the Union's timeliness argument in my case falls by the wayside.

The other aspect, which deals specifically with my termination grievance has been sufficiently addressed elsewhere herein.

But irrespective of the reasoning behind the Union's stated intentions or objectives for my termination grievance -whether 'notionally' or otherwise, the determining factor here is that at all material times the grievance for termination was "alive". Not 'notionally alive' but, really "alive"!

That undisputed fact must surely call into serious doubt the issue of delay raised by the Union's preliminary objection to the timeliness of my Complaint with respect to the termination grievance.

That, and the Board's own policy of dismissing as premature, those *Section 12* complaints whose grievances are deemed to be still "alive" -the same explanation was given to me by the Labour Relations Board's own information officer, and referred to elsewhere, herein.

(iii) ***...AND THE UNION'S DENIAL***

Undoubtedly the Board will conclude, that when one looks down, closer beneath the Union's facade of decorum and specious reasonableness in these matters, when one disregards Mr. Glavin's presupposition with respect to my so-called *"feigned ignorance"* and his unsubstantiated references to meetings and discussions with Charlie Puchmayr 'sometime' in 2002, one comes face to face with the indisputable truth: that this Union allowed this Employer to mistreat two of its disabled members, and are now hard pressed to come up with a logical and seemingly reasonable explanation for its dereliction of its duty to protect us, in any sense of the word.

These matters essentially involved the Employer's waging of a vicious campaign against two innocent and disabled members of the Union, that involved the breaking of numerous provisions of the collective agreement, as well as numerous acts of fraud and human rights violations by the Employer, with no significant opportunity ever provided by the Union for the vindication of these members nor justice in these matters.

The denial by the Employer of disability benefits to, and the subsequent unjust termination of two, disabled employees ought not be viewed so lightly nor so 'reasonably' as the Union's Reponse would suggest.

The Union's Response reeks with an overabundance of hubris that belies a Union that over a period of more than 7 years, *"doggedly"* or not, was somehow unable to move an arbitration past the preliminary stage.

Given that sad fact of life, the Union's position with respect to its overall representation of the Complainants, must be seen as truly indefensible.

****

E - UNION'S INCONSISTENCY

(i) WHAT GOES AROUND...

The Union makes much of what it refers to as its consistent approach to the Complainants' respective disputes with Labatt in comparison to each other.

We would argue however, that the only consistency afforded us has been the consistent mistreatment we've received at the hands of the Employer and the Union's consistent turning a 'blind eye' to that mistreatment.

And irrespective of the similarities which Mr. Glavin refers to as *"superficial"* in our respective cases, the likeliness of our both being terminated while disabled is not *"superficial"* in the least. Nor is that matter disputed by the Union.

However, with respect to the Union's arbitration of Mr. Nunas' 2003 termination by BDL, we raise the issue of the Union's inconsistency in its own representation of him in that matter in comparison to the matter of his and my mid-nineties terminations by Labatt and the representation provide by the Union in both those prior cases.

We note the Union makes no real mention of the similarities between those terminations past and the recent overturned BDL termination.

The Union's inconsistency in its invoking on Mr. Nunas' behalf of a provision of the (BDL) collective agreement that it failed to invoke on his (and my) behalf with respect to the Labatt termination(s) raises an issue of discriminatory conduct perhaps never before encountered by the Board.

Because, the Union's application of collective agreement language (to Nunas' winning BDL termination grievance) that was near identical to that in the Labatt agreement but **not invoked** by the Union, further exemplifies the Union's discriminatory conduct.

Indeed, and even shorn of my participation, this might be the first *Section 12* Complaint ever to disclose discriminatory conduct by a union while, paradoxically only involving a single member.

(i) ***ARTICLE 3:1:1 (c)***

The point here, of course, is that <u>had</u> the Union applied and invoked *Article 3:1:1 (c)* in respect to our terminations at Labatt in the mid-nineties, it is doubtful (and, moreover inconsistent with Mr. Pekeles' interpretation of near-identical language in the recent BDL case) that our terminations by Labatt would have likely ever been upheld.

However, the Union did **not** invoke *Article 3:1:1 (c)* and for specious and illogical reasons. The inconsistency by the Union is duly noted, here.

Another aspect of *Article 3:1:1 (c)* perhaps not considered by the Union in the context of its Response to our Complaints but duly worth noting here, is the provision's application to employees transfered from one department to another.

To further make this point, I have once again provided the relevant provision with the required emphasis:

> *Article 3:1:1* Seniority is defined as the length of an employee's service with the Company, calculated as the elapsed time from the date he was first employed, unless his seniority was broken, in which event such calculation shall be from the date that he returned to work following the last break in his seniority.
>
> Seniority service records for the purpose of permanent layoffs shall not be considered broken by reason of:
>
> .....
>
> (c) Sickness or injury **or transfer from one department to another**.

(ii) ***JAMES DECHKA***

The Board should know, that this aspect of *Article 3:1:1 (c),* while not having been applied to the Complainants, **has** been consistently applied to maintenance workers throughout the bargaining unit with obvious and flagrant discriminatory results for the injured employees not provided with the provision's inherent protection (i.e. the Complainants).

James Dechka, a junior employee at Labatt, was hired in May 1992 two days after the hiring of Jim Dunn (referred to in items 37, 40 and 42 above, in the Reply to the Union's *Background Facts Pertaining to Hughes' Complaint*) and as such was more than **50** names junior to the Complainant Michael Nunas.

Mr. Dechka, currently an elected member of the Labatt plant grievance committee, was ostensibly hired as the plant's carpenter. As such, he was able to avoid termination in the 1995 'downsizing' implemented by the Employer at that time.

However, the Employer continued its decimation of jobs in the plant and when the carpenter's position later became redundant (as would likewise, Mr. Dechka's position on the plant seniority list), *Article 3:1:1 (c)* was invoked by the Union, thereby allowing Mr. Dechka to **transfer** to a job in the bottleshop whereby his seniority remained unbroken, pursuant to *Article 3:1:1 (c)*.

It would thus appear that the Union has one rule it applies to its junior maintenance members, and something altogether **different** with respect to its senior, injured and disabled members.

It follows perhaps, that if Mr. Nunas and I had been a pair of nondisabled maintenance workers as opposed to being simply **disabled,** the Union might have given us the proper, due consideration we deserved and in fact, were denied.

This one, conspicuous example of the Union's inconsistent approach to *Article 3:1:1 (c)'s* interpretation and more significantly, its application, stands out as perhaps the most salient feature of the Union's **discriminatory** conduct with

respect to Mr. Nunas and me. It clearly puts paid to the delusive and desparate notion that the Union has conducted itself with consistency and careful consideration of the matters relevant to the Complainants' disputes.

We submit that the discriminatory conduct by the Union is thereby proven and the Board must find for the Complainants.

****

F - SUPPOSITIONS AND THEORIES....

(i) "FEIGNED IGNORANCE"

The Union advances theories concerning my conduct based on its own misguided suppositions with respect to what I allegedly knew and understood about the status of my grievances, their litgation and the Union's position in respect of it, particularly during *"the period in 2003,"* as referenced by the Union at page 37 of the Union's Response.

Mr. Glavin writes:

> The period in 2003 when Mr. Hughes alleges a lack of satisfactory response from the Union is more properly characterized as Mr. Hughes' challenging the position of the Union in **a manner that he has used in the past**. The documentary record offers several examples where Mr. Hughes has **written directly** to an **arbitration panel** or the **Labour Relations Board** attempting to make use of his own **feigned ignorance**...(emphasis added)

The Union's flagrant attempt above, to 'improperly characterize' as something less than genuine, my initial straightforward pleas for assistance and intervention, from the Board and from Arbitrator Taylor, is truly, in my view a spurious attack

by Mr. Glavin, and hardly worthy of a response.

To so callously disregard the integrity of my early correspondence, which also includes my letters to Rick Sutherland and Gerry Bergunder -and even some to the Employer and to Manulife (not produced here) -in my view is a low blow from a desparate adversary.

The Board will take note that the Union is raising an issue that essentially impugns and indeed, attacks the very integrity of my past personal correspondence to it (the Board), thus it follows by implication, that the Union likewise calls into question this document, as well.

I take issue with Mr. Glavin's remarks and the implied bad faith that such an accusation carries.

The Board should know, my letters and submissions seeking its assistance were written out of pure naivete and genuine interest (as have been my numerous telephone conversations with the Board's information officer, Mr. Lytle), and the content reflects as much.

Thus I have no problem standing by virtually all I have had to say throughout the past 10 years, and would add that the content of *"the documentary record"* referred to here by the Union, consistently reveals my true understanding of matters and my intentions at the relevant times. And what times those were!

(ii) ***9 YEARS AFTER....***

When I look back over the more than 9 years these matters have been in play, I see that period divided into roughly 5 disparate segments:

1. **Disabled, Disqualified and Dismissed** - Jan/17, 1995 - Jan/21, 1997. This period begins with the interruption of my disability benefits, continues through my termination in July 1995, and concludes with my first rib resection performed at V.G.H. January 2, 1997.

2. **Rehab, a Lawsuit, and Labour Relations** -Jan/21, 1997 - Jan/ 2001. To

comply with statutory time limtations, my lawsuit was filed at the end of segment No.1, above. Two weeks after my surgery I attended my meeting with Messrs. Sutherland and Blair, and on February 14/97 the arbitration of my grievances begins. Everyday during this period was challenging for me, both physically and mentally, in terms of the constant pain and the psychological stress that would long be my accompaniment throughout my ordeal.

3. **The Puchmayr Years** - Jan/2000 - August/2002. Beginning in early 2001, I had long become resigned to the fact that there was little more that I could do apart from waiting for the Union to conclude the discharge of my two grievances. I had been on social assistance at that point nearing 6 years, and was struggling to maintain a lawsuit against the Employer's insurance carrier, with increasing difficulty given my lack of resources.

But things changed pivotally for me in the latter months of 2001 as a result of my consulting labour lawyer, Ib Petersen, and the character and the content of my subsequent correspondence is duly reflected in that change.

4. **Respite/The Manulife Settlement** - Aug/2002 - Jan/2003. This began a significant period for me as the infusion of cash from the Manulife deal allowed me to resume my treatments at the *Institute for the Study and Treatment of Pain* (I-STOP) and to consult further with Mr. Petersen. I delivered a medical/legal report to the Union and waited for the Union to advise me of the next steps it would take in the arbiration of my grievances. I would learn from the Labour Relations Board's counsel, Sherryl L. Bassarab that the Employer's application for judicial review of BCLRB No.**B10/2002** was set for hearing January 10, 2003.

5. **No Response from Mr. Bergunder** - Jan/17, 2003 -the present. After learning that the matter of the Employer's application for judicial review of BCLRB No.**B10/2002** had been adjourned, I called Gerry Bergunder January 17th to inquire as to the status of my grievances and to request his response to same in writing. No response was forthcoming from Mr. Bergunder and so I proceeded as previously advised by Mr. Petersen and applied for Intervener/Interested Party

status directly to Arbitrator Taylor on May 23, 2004.

(iii) ***THE UNION SUPPOSES***

At page 37 of its Response, the Union puts forth the suppositive argument that:

> ...by writing to Arbitrator Taylor on May 23, 2003, **Mr. Hughes** was attempting to revive a matter that he **knew** the Union had concluded was at an end...(emphasis added)

That statement erroniously treats as fact the Union's unsupported and unsubstantiated allegations, with respect to numerous meetings and discussions with the Union's former Business Agent, Charlie Puchmayr -discussions I have refuted herein, and declared to have never occurred.

Thus, it follows that a major and significant component of the Union's Response to that portion of my Complaint concerning the Union's *"lack of satisfactory response"* to me during *"the period in 2003"* is revealed as and amounts to little more than, an unfounded theory by the Union.

(iv) ***THE UNION THEORIZES***

Thus, the Union presents an interesting theory to account for a conspicuous and marked silence from me in reaction to the disturbing news that it was to curtail its involvement with respect to my grievances. The Board however, will easily see that the Union's argument relies entirely on two unfounded and moreover, unproven suppositions:

1. unsupported and unsubstantiated, alleged meetings and conversations with Charlie Puchmayr and,

2. that the ignorance of matters and protocol exemplified by my earlier correspondence was *"feigned"* and likewise so was my application to Mr. Taylor

in May 2003.

But as noted above in **3. The Puchmayr Years**, my understanding of matters pertaining to my grievances had increased dramatically only after I had found and consulted noted labour lawyer, Ib Petersen in the Fall of 2001.

The Board will easily recognize that the critical difference between my earlier submissions and that of my May 2003 application for standing to Arbitrator Taylor (and for that matter, these Complaints), is Ib Petersen's input.

It was Mr. Petersen who advised me of the grounds upon which I might rely in such an application.

Thus, Mr. Glavin's attempt to portray me as some kind of wily and informed grievor is completely unfounded. Because prior to all this, I had little knowledge and even less experience of the grievance/arbitration process.

But notwithstanding Mr. Glavin's bogus assessment of me, the Board will undoubtedly come to the logical conclusion that my earlier submissions were written out of **unfeigned ignorance,** and that fact is reflected by my relatively uninformed and even misguided attempts to bring the truth of a few matters I thought relevant to my grievances, to the attention of the Board and to Mr.Taylor.

In contrast to Mr. Glavin's assertions, my earlier submissions really only served to demonstrate my complete lack of understanding of the arbitration/labour relations process and revealed the genuine fear I held, that the Union would ultimately abandon me as it had in fact, Michael Nunas.

Thus, there exists a critical difference between my correspondence prior to my first meeting Mr. Petersen, and that which followed my introduction to him.

The Board too, will agree I'm sure, that my 2003 application for standing to Arbitrator Taylor attempts to comply with the Board's criteria for such applications, and as such, is a far more comprehensive and well-thought out document, than by comparison, anything written by me that preceeded it -quite a different animal, I'd say.

The distinction is notable, and it is the input of Ib Petersen and his advisements to me in the late months of 2001 that makes the difference.

(v) CHARLIE PUCHMAYR

Given Mr. Puchmayr was the unfortunate steward of my grievances right up to and including the moment he put his name to the parties' settlement in January 2003, this *Section 12* Complaint belongs to him as much as as it does to Rick Sutherland and current Union Business Agent, Gerry Bergunder.

Indeed, the Flegel/Puchmayr deal (after Tony Flegel, the other signator to the Union's settlement) as it shall henceforth be known, appears to be a knife in the back for disabled members of the Union. Knowing these two guys personally, their participation in this deal surprises me not in the least.

There is little more I can add with respect to Mr. Puchmayr beyond my recently being advised that in the early part of this year, good ol' Charlie was stumbled upon one evening by the Union office's janitorial staff, as he went about the business of shredding Union documents, and without such authorization.

I'm further advised that Mr. Bergunder, out of necessity, thereby had all the locks changed to the Union's headquarters in Burnaby.

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G - NEW ISSUES RAISED

The Complainants have identified two issues raised by the Union's Reponse. They are:

1. The improper discharge of Complainant Hughes' grievances with respect to the Flegel/Puchmayr deal and,
2. A significant inconsistency found in comparison between the disparate legal opinions provided to the Union with respect to the Complainants.

(i) ***THE FLEGEL/PUCHMAYR DEAL - SOMETHING STINKS IN HERE***

As already indicated in ***C (v),*** above, the settlement of the Employer's judicial review of BCLRB No. B10/2002 reached on my behalf by the Union appears to have been *"settled as a piece of a larger settlement between the parties that involved an unrelated grievance."* (emphasis added) [Complainants' Supplemental document]

It appears from the foregoing that the Union engaged in a form of grievance swapping, utilising my winning grievance as a lever to effect a settlement that involved an unrelated grievance, as noted above.

But whereas Messrs. Flegel and Puchmayr may have been all too willing to give the Employer its judicial review for little more than a song, Mr. Nunas and I are of the opinion that we and the affected members of the bargaining unit deserve better representation from the Union than that which the Flegel/Puchmayr deal affords.

We therefore ask the Board, to direct the parties to disclose and provide to the Complainants the nature of and the circumstances surrounding that *"unrelated grievance"* noted above, and to provide reasons for abandoning my interests in favour of another member(s).

(ii) ***DISPARATE AND INCONSISTENT***

The inconsistency identified by the Complainants between the disparate legal opinions provided to the Union in our respective cases and noted elsewhere herein, provides conclusive proof that the Union engaged in **discriminatory** treatment with respect to Mr. Nunas and me.

In *Re Andrews v. Law society of British Columbia*, [1989] 1 S.C.R. 143 the court stated:

> **Discrimination** is a distinction which, **whether intentional or not** but based on grounds relating to personal characteristics of the

> individual or group, **has an effect which imposes disadvantages** not imposed upon others or which **withholds or limits access to advantages** available to other members of society. (emphasis added)

The same principle applied in *Re Andrews v. Law Society* is consistent with and applicable to the Union's dereliction of its duty with respect to the legal advice it obtained for Michael Nunas.

As stated herein, Rick Sutherland improperly obtained a legal opinion that was more reflective of his desire to see the Union protected from blame and possible liability, than of a dutiful concern for the rights of the member in question.

Thus it follows, that with respect to this issue of discrimination and proven inconsistency by the Union, the Board should undoubtedly find for the Complainants.

(iii) ***ARTICLE 3:3 - THEORY***

And finally, while still on the subject of discrimination and liability, it is appropriate to address Mr. Glavin's remarks concerning an argument put forth by me with respect to the Union's liability.

Mr. Glavin writes at page 40, under the heading **(vi) Article 3:3**:

> Mr. Hughes offers a theory of the Union's conduct that is based upon Article 3:3 of the (Labatt) collective agreement. The Complainant says that the Union declined to pursue his termination grievance because by advancing the grievance the Union would risk liability for any discriminatory aspects of Article 3:3 that might be found...The theory that the Union was somehow avoiding its own potential for liability is divorced from the facts and defies logic.

With respect, I offered no theory, but merely quoted from the legal opinion that the Union had obtained from its own legal counsel. That legal opinion provided that:

> ...the Union could argue that the provision (Article 3:3) discriminates against disabled employees and is contrary to the B.C. Human Rights Act...If a discrimination argument were successful, however, an arbitrator might apportion liabilty to the Union for agreeing to the discriminatory provision. (emphasis added)
> [Complainants' document No. 2.1]

And later at page 17, paragraph 4.7 of the same document, under the heading, *"Discriminatory Aspects of Article 3:3"* the Union is further advised it

> ...may share the blame for the discriminatory aspects of this clause. In addition, any failure to protect Hughes from discrimination may constitute a breach of the Union's duty of fair representation: *Cameron v Teamsters Local 213,* BCLRB No. 46/81.
> [Complainants' document No. 2.1]

Thus, the notion that the Union was possibly *"avoiding its own potential for liability"* is not so *"divorced from the facts"* at all, as stated by Mr. Glavin, but actually originated with the Union's own counsel.

It is reasonable to assume the Union's counsel had considered the ramifications of the scenario contemplated and accordingly, had brought this possible pitfall to the attention of its client, Rick Sutherland.

This is not a theory at all, but an astute observation of the Union's reasoning and its thinking and of its application to the subsequent course of action it would inevitably follow.

(iv) THE PEKELES DECISION

Beyond all else, it is Arbitrator Robert Pekeles' recent decision with respect to his overturning of Mr. Nunas' 2003 termination by BDL that provides the most compelling reason to find for the Complainants in the case before the Board.

For unlike Rick Sutherland et al, Mr. Pekeles had no difficulty in coming to his reasonable conclusion that nondisabled employees have opportunities not available to the disabled.

It has been unfortunate for Mr. Nunas and for me that to date I have been unable to convince Mr. Sutherland nor his supporters of the unfairness of the position the Union has maintained with respect to the treatment afforded disabled members of the Union.

And I have not been alone in that endeavour. I am advised at least one Union official has, in the past, castigated Rick Sutherland for his harsh and unprincipled abandonment of disabled Local 300 members. Here I refer to Union member, Byron Coatta.

Mr. Coatta is the Union official (unnamed but referred to in my Complaint) who advised me he had heard Rick Sutherland make denigrating remarks in reference to Mr. Nunas and me.

A cursory review of Mr. Pekeles decision reveals the existence of 4 critical points that hold obvious and profound relevance to the unjust terminations suffered by the Complainants at Labatt in the mid-nineties.

These matters deserve serious consideration by the Board.:

1. *Article 3.02* of the BDL collective agreement, a provision providing seniority protection for an injured employee (and cited by Mr. Pekeles in his decision) is nearly identical to *Article 3:1:1 (c)* of the Labatt collective agreement.

2. Absent of any language that expressly permits the termination of an employee on disability leave, Mr. Pekeles determined that an employer cannot terminate that employee while he remains on that leave.

3. Mr. Pekeles determined that an employee who is sick or injured may well not be able to look for and secure alternate employment as might a nondisabled worker, and thus required protection of his seniority.

4. The plants in question didn't close, but in fact, remained operational.

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H - SUMMARY

The numerous inconsistencies referred to herein by the Complainants point to and moreover, reveal the existence of numerous incidents of discriminatory conduct by the Union in the course of its representation of the Complainants.

As stated, we are inextricably linked by time, and circumstance and a familiar cast of characters. They include:

(1) **Rick Sutherland**: currently the Union's Secretary Treasurer and chairman of the Labatt grievance committee, and was the Union's Business Agent throughout the '90s until January 2001 after being defeated in a Union election by,

(2) **Charlie Puchmayr**: who would serve only one (1) term as the Union's Business Agent (from 2001-2004). Charlie was kept apprised by me of the Nunas/Hughes terminations beginning in October 1995.

In October 1998, (when Michael Nunas and I attended a meeting of the Union's Regional Executive Board to voice our displeasure regarding the Union's handling of our respective complaints) Mr. Puchmayr was present and serving as the Union's Secretary Treasure and as such was a member of the Union's Regional and Executive Boards.

At that time, the Union's Executive Boards were presided over by,

(3) **Gerry Bergunder**: who began serving the first of his 2 three-year terms as president of the Union in January 1998. It was Mr. Bergunder who suggested to me that Mr. Nunas and I bring our respective complaints to the Union's Regional Board meeting in October 1998 and in fact invited us to do so.

After six years serving as the Union's president, Mr. Bergunder was recently elected to the position of Business Agent for the Union. But prior to his election as president in the fall of 1997, the Union was presided over by,

(4) **Tom Smith**: who aside from his duties as president of the Union from January 1992 to January 1998, was also the chairman of the Labatt grievance

committee during the time in question when the Employer (Labatt) was terminating Mr. Nunas and me.

Tom Smith was the only witness the Union called to testify at my preliminary arbitration hearing before Colin Taylor in February 1997. Currently Mr. Smith serves as a member of the Labatt grievance committee.

Beginning in January 1995 the Labatt grievance committee was comprised of Tom Smith, a maintenance worker named Martin MacCormick and,

(5) **Tony Flegel**: whom I believe was a continuous member of the Labatt grievance committee all throughout the '90s and was in fact the committee's chairman beginning in 2001 and continuing up until his recent defeat in the Union's plant elections.

A copy of a private e-mail from the Employer's counsel Keith Murray to David Blair dated December 18, 2002 (and recently provided to me by the Union) indicates that the parties settled the outstanding issues related to my grievances *"as a piece of a larger settlement between the parties that involved an unrelated grievance,"* and that *"Tony Flagal* (sic)*...signed it."*

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I - CONCLUSION

Thus, there can be no mistaking -from the filing of our respective grievances to the dispensing with and eventual abandonment of those grievances -it is these five Union members that have, at one time or another, controlled and affected the course and more importantly, the outcome of mine and Michael Nunas' disputes with the Employer.

But for too long these men have sheltered behind the Union's internal machinations and its legal representatives, unwilling to come forward to confirm their respective roles in the fiasco known as the Nunas/Hughes debacle.

We ask that the Board provide us the opportunity to hear from these Union officials, to question them and to ascertain the truth of the matters referred to in

our consolidated Complaints. We ask for some accountability from these men.

For without such an opportunity, the matter of the unjust terminations of two, disabled Labatt employees will undoubtedly have been effectively 'swept under the carpet' by the parties, and a great injustice will have been imposed upon Mr. Nunas and me.

And for what? What possible meaning can we reasonably deduce from the events of the past decade of turmoil to which we have been subjected?

What's been gained, and alternatively how much have the Complainants in fact, lost to the process?

The Board will have to make that determination and as well determine the fairness of the treatment afforded Mr. Nunas and me by the Union these past ten years as it pertains to *Section 12*.

We are confident we have provided the Board with enough material herein to make the proper determination that the Union has, in fact breached *the Labour Code of British Columbia*.

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J - AMENDMENTS TO THE REMEDIES SOUGHT

We wish to amend the remedies sought by the Complainants to include:

1. That the settlement reached by the parties of the two Hughes grievances be overturned and that,

2. The matter of the arbitration of the two Hughes grievances be referred to Arbitrator Pekeles, who the Board is reminded, was the adjudicator in both the *Section 99* appeals of the two Taylor arbitration awards, and thus has a history and a familiarity with the case,and that,

3. Michael Nunas' name be added to the two Hughes grievances, above.

[The Board will take note that Mr. Pekeles ruled that Mr. Nunas be made whole, and also reserved jurisdiction as to what that constituted should the parties fail to resolve that matter between them. As of this writing, Mr. Pekeles' order remains unfulfilled and thus Mr. Nunas requests that the matters herein be referred to Arbitrator Pekeles for his review forthwith.]

All of which is Respectfully Submitted,

Nicholas Hughes and Michael Nunas

cc: Fiorillo Glavin and Gordon (counsel for the Union) Attn: Anthony Glavin

cc: Harris and Company (counsel for the Employers) Attn: Peter Csiszar & Chris Leenheer