BCLRB No. B12/2008

BRITISH COLUMBIA LABOUR RELATIONS BOARD

CITY OF VANCOUVER

(the "Employer")

-and-

CANADIAN UNION OF PUBLIC EMPLOYEES,
LOCAL 1004 (VANCOUVER CIVIC EMPLOYEES UNION)

(the "Union")

PANEL:	Ritu N. Mahil, Vice-Chair
APPEARANCES:	Alan D. Winter, for the Employer Leo McGrady, Q.C., for the Union
CASE NO.:	56519
DATE OF DECISION:	February 5, 2008

DECISION OF THE BOARD

I. INTRODUCTION

1 The Union applies under Section 99 of the *Labour Relations Code* (the "Code") for review of an arbitration award dated May 29, 2007 of John Steeves (the "Arbitrator"), Ministry No. A-069/07 (the "Award").

2 The Award dealt with a grievance about the Employer's cancellation of its longstanding practice of paying "Grease Time" to 21 backhoe operators in its Waterworks and Sewers Operations. Grease Time refers to one half hour of overtime per shift paid to the backhoe operators to service their machines.

3 At arbitration the Union advanced three grounds for its grievance; the only ground relevant to this application concerns the equitable doctrine of estoppel. Relying on the Labour Relations Board's decision in *West Fraser Mills Ltd. (100 Mile Lumber Division)*, BCLRB No. B199/2006 ("*West Fraser Mills*"), the Arbitrator concluded that the longstanding practice, without "something more", was insufficient to establish an unequivocal representation giving rise to an estoppel. He found there was no other different conduct tending to establish a representation and accordingly denied the grievance.

II. POSITIONS OF THE PARTIES

UNION'S POSITION

4 The Union submits that the Award is inconsistent with the principles expressed or implied in the Code because the Arbitrator failed to properly apply the law relating to estoppel.

5 The Union submits that the Arbitrator erred in law when, despite finding that it was "perhaps understandable" that the longstanding practice of Grease Time had created "an expectation among employees that it will continue", he required something more than a longstanding, consistent practice to give rise to a reasonable expectation of its continuation.

6 The Union calculates the approximate cost of Grease Time paid by the Employer over the past 30 years to the 21 affected employees to be over $2.5 million and submits this is evidence that this practice was beyond a mere indulgence and that it was carried out knowingly by the Employer. Further, the Union states that:

> ...the effect of the Arbitrator's decision...is that a longstanding practice alone could never be sufficient to constitute the necessary representation that this practice will continue...regardless of

> whether that practice could reasonably be construed as a commitment.

7 The Union asks the Board to set aside the decision of the Arbitrator and substitute its finding that a case for estoppel has been made out. Alternatively, the Union asks the Board to return the matter to the Arbitrator with appropriate directions as to the application of the principle of estoppel to this case.

EMPLOYER'S POSITION

8 The Employer submits that the Award is consistent with the principles expressed or implied in the Code and requests the Board dismiss the Union's application. The Arbitrator found there was nothing more than a consistent past practice, and rightly determined, consistent with the Board's decisions that this was insufficient to establish an estoppel. The Employer submits that the Arbitrator correctly applied the principles of the modern doctrine of estoppel as enunciated by the Board in *West Fraser Mills*.

9 The Employer argues the Union's application, in effect, seeks reconsideration of *West Fraser Mills*, which would be inappropriate. Indeed, the Employer submits that since leave for reconsideration of *West Fraser Mills* was denied, that decision was not inconsistent with the principles expressed or implied in the Code. Similarly here, the Award cannot be said to be inconsistent with the principles expressed or implied in the Code, because it applied the law of estoppel as enunciated in *West Fraser Mills*.

III. ANALYSIS AND DECISION

10 This decision is not a reconsideration of *West Fraser Mills*. Nor is there any suggestion that *West Fraser Mills* was wrongly decided on its facts. This case, however, raises an issue as to the scope of *West Fraser Mills'* application—in particular, whether certain comments on estoppel made in the course of the original panel's analysis are binding on arbitrators in their application of the doctrine to the facts before them.

11 Those comments, which were referenced by the Arbitrator at para. 34 of the Award, are as follows:

> *The mere existence of the practice alone is insufficient. The reason this is so is because absent something more, the practice alone can be construed either as an abridgement/waiver of legal rights or a mere indulgence. That is to say, a practice on its own is equivocal, not unequivocal.* ...Parties are only entitled to the protection of the equitable doctrine of promissory estoppel if it can be said to be reasonable to rely on a representation. (*West Fraser Mills*, para. 21; emphasis added)

12 From a reading of the whole of the Award, it appears the Arbitrator may have viewed the comments italicized above as binding in the circumstances before him—i.e., as requiring that, in assessing whether there was an unequivocal representation, he

must begin from the premise that a longstanding practice cannot be sufficient, without something more. At the close of his analysis on the estoppel issue (para. 41), he canvassed whether there was other, different evidence that tended to establish an unequivocal representation—the "something more". Having found no evidence of such additional conduct, he concluded there was no estoppel.

13 Although in addition to *West Fraser Mills* the Award also refers to the Board's decision in *Fording Coal Limited*, BCLRB No. B2/2003 ("*Fording Coal*"), that decision simply held the arbitrator in that case had committed no reviewable error in his approach. (It should also be noted that the passage from the employer's argument set out in *West Fraser Mills* at para. 13 mistakenly attributes the arbitrator's comments in *Fording Coal* to the Board's review panel in that case.)

14 The Arbitrator in this case was also the arbitrator in *West Fraser Mills*, and appreciated that the question of whether there has been an unequivocal representation is a question of fact to be determined based on all the relevant circumstances: he opined in the *West Fraser Mills* award that the arbitrator's conclusion in *Fording Coal* was a correct one on its facts, but distinguished it *vis-à-vis* the case before him. As the Arbitrator correctly observed in the *West Fraser Mills* award (Ministry No. A-018/06):

> ...it is a question of fact, "judged in context", whether there has been conduct or an express commitment by one party that amounts to an unequivocal representation that led the other party to reasonably believe that an undertaking or commitment was given. (para. 14)

15 To be consistent with the Board's limited review jurisdiction, the earlier italicized passage from the Board's original decision in *West Fraser Mills* cannot be interpreted as determining that question of fact for all arbitration cases in all contexts where estoppel arising from a practice is alleged. Rather, the panel's comments must be taken as pertaining to the case before it, and meaning that a practice is *not necessarily* sufficient to establish an unequivocal representation, not that a practice can *never* be sufficient to establish an unequivocal representation, regardless of circumstances and context.

16 Put differently, the circumstances and context of a particular practice are relevant considerations in determining whether an estoppel is established (i.e., the "something more" referenced in *West Fraser Mills*). As the Union puts its argument in this case:

> The thirty to forty year practice, by a very cost conscious, responsible employer, of paying approximately 21 employees a total of $2.5 million, surely constitutes "something more" by any gauge or measurement.

17 In citing the Union's argument, I do not mean to make any judgment on the merits of the estoppel claim. For one thing, that would be inconsistent with the Board's limited review jurisdiction. Indeed, for that very reason, rather than articulating the approach as being that the nature and context of a particular practice may satisfy the

"something more" requirement—the approach that is preferable, and more consistent with the division of responsibility between the Board and arbitrators under Part 8 of the Code, that "something more" is not required by the Board. Whether a particular longstanding practice is sufficient to constitute an unequivocal representation will depend on the particular circumstances of a given case. Provided the arbitrator's conclusion is one that is "...reasonably possible for the Arbitrator to reach...without breaching fundamental Code principles", the Board will not interfere: *Corporation of the District of Surrey*, BCLRB No. B448/97 at para. 36 ("*District of Surrey*").

18 There is no principle of the Code that a practice cannot found an estoppel. To the contrary, in *Harbour Cruises Ltd.*, BCLRB No. B181/2004, the Board held:

> ...*the existence of a practice may be sufficient to found an estoppel* as a representation need not be made by words, and can be made by conduct. In order to establish an estoppel by past practice, there must be clear and unequivocal commitments (either oral, in writing or by conduct) made from one party to the party claiming estoppel. Further, the other elements necessary for a finding of estoppel must be present: 1) the representation was intended (or was reasonably construed as intended) to affect the legal relations between the parties; 2) the party to which it is directed places some reliance in the form of some action or inaction on the representation; and 3) detriment results therefrom. (para. 44; emphasis added)

19 Accordingly, the original panel's comments in para. 21 of *West Fraser Mills*, cited earlier, must be taken as part of its analysis pertaining to the case before it, not as establishing a general requirement for arbitrators. To establish such a requirement would be to determine matters relating to the "law of the contract", which is both beyond the Board's statutory review jurisdiction and undesirable in policy terms: *District of Surrey.*

20 In this regard, while the reconsideration panel in *West Fraser Mills Ltd. (100 Mile Lumber Division)*, BCLRB No. B311/2006 (Leave for Reconsideration of BCLRB No. B199/2006 at para. 4 ("*B311/2006*") denied leave for reconsideration of the original decision, it is important to note that it did so on a limited basis and based on Code principles. The panel held that "...the particular factor justifying Board review of the Award was the Section 2(e) consideration in paragraph 27 of the Original Decision". That consideration arose from the original panel's conclusion that the arbitrator had relied on the employer's failure to raise the matter in collective bargaining, in support of his finding that it had made an unequivocal representation. The original panel held that:

> ...the fact that the Employer did not raise its intention to alter its practice cannot be considered to be evidence of an unequivocal representation that the Employer would continue the...practice (para. 26).

It observed that the approach of the original panel in *West Fraser Mills* in this regard was consistent with the duty in Section 2(e) of the Code to promote the orderly, constructive and expeditious resolution of disputes:

> If parties are required to first raise in collective bargaining an intention to alter a practice the likely result would be that both parties would come to the bargaining table armed with a proposal to eliminate all practices not expressly provided for in the collective agreement and require the other party to bargain for their reinstatement. That would be a recipe for more collective bargaining disputes. (para. 27)

21 This Code concern is not present in the case at hand: neither the Arbitrator nor the parties on review relied upon the Employer's failure to raise the matter in bargaining as supporting a finding that it had made an unequivocal representation.

22 The reconsideration panel in *B311/2006* also stated that the decision did not evince an intent on the part of the Board to broaden review of arbitral estoppel decisions; rather, review will remain narrow, on the limited basis set forth in *District of Surrey*. This tends to indicate that *West Fraser Mills* represents somewhat of a "high water mark" of Board intervention in arbitration awards, relative to the Board's usual policy of deference to arbitrators' conclusions in matters not involving the law of the statute.

23 Generally, the Board has left factual conclusions such as the existence of an unequivocal representation to arbitrators to determine based on all the circumstances. Indeed, the Board has intervened where arbitrators have placed artificial constraints on their analysis in this regard. As described in *District of Surrey*:

> (iii) Estoppel
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> In an early decision, the Board exercised its arbitration award review jurisdiction in respect to the doctrine of estoppel. It did so for compelling labour relations reasons: *Corporation of the City of Penticton*, BCLRB No. 26/78, (1978) 18 LAC (2d) 307 ("*Penticton*"). The Board relied in particular on the unique nature of collective bargaining and collective agreements and the requirement in the Code that arbitrators "have regard to the real substance of the matters in dispute" (Section 82(2) of the Code).
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> Somewhat ironically, some fourteen years later the Board found it necessary to ensure that the doctrine of estoppel being applied in labour relations matters was keeping abreast of the developments in the Courts regarding estoppel. In *B.C. Rail*, the Board noted the Courts' movement away from a compartmentalized approach to estoppel, to a more broad-based focus on what is unfair or unjust in the circumstances according to

> "a sound sense of the equities, rights and conduct of the parties": *Litwin Construction (1973) Ltd.*, (1988) 29 BCLRB (2d) 88 (BCCA), cited in *B.C. Rail*, at pp. 25-26. *B.C. Rail* also referred to the requirement that the application of the doctrine of estoppel be approached from the perspective of the party raising the estoppel: *ibid*, p. 27, citing *Bowen*. (paras. 15 and 17)

24 In *Corporation of the City of Penticton*, BCLRB No. 26/78 ("*City of Penticton*"), the Board intervened because the arbitrator had considered himself bound to apply the then narrower judicial conception of estoppel. In doing so, the arbitrator was held to have failed to carry out his mandate in what is now Section 82(2) of the Code to "...have regard to the real substance of the matters in dispute...".

25 In my view, the case at hand is somewhat analogous to *City of Penticton*. If the passage from *West Fraser Mills* reproduced earlier is interpreted as precluding arbitrators from finding an estoppel based on a longstanding practice—regardless of its nature, magnitude and circumstances—it could prevent arbitrators from approaching their factual inquiry in an unfettered manner, and having regard to the real substance of the dispute. That could result in no unequivocal representation being found, even where the practice was, in fact, reasonably construed as one. (There is no dispute that whether particular conduct is sufficient to amount to an unequivocal representation is to be judged from the point of view of the party raising the estoppel: *District of Surrey*; *Fording Coal*)

26 The passage from *West Fraser Mills* was certainly not the only element of the Arbitrator's analysis. However, it has a prominent place in the Award, and the analysis then follows a "compartmentalized" structure in accordance with it. Having found that the Employer's conduct was a longstanding practice, the Award determined that "something more" was necessary; it then looked for some different type of conduct or representation (para. 41), found none, and therefore dismissed the estoppel claim. It does not appear to have assessed whether the longstanding practice in the context of its nature, magnitude, and surrounding circumstances—(i.e., without "something more")—was sufficient to amount to an unequivocal representation from the Union's perspective.

27 Accordingly, I conclude the Award is inconsistent with the principles expressed or implied in the Code, because it applies the law of estoppel in a manner that is inconsistent with Section 82(2) (*City of Penticton*), and with the division of responsibility between arbitrators and the Board in Part 8 of the Code (*District of Surrey*).

28 I add that this conclusion implies no fault on the part of the Arbitrator, who merely endeavoured to follow faithfully the Board's jurisprudence in a system of review that involves both elements of supervision and elements of deference—and thus also potential difficulty in assessing the precedential effect of reasons in a particular case. Such a review system fulfils important policy objectives (as described in *District of*

Surrey) but inevitably involves some difficulty as well (see e.g., *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, [2002] S.C.J. No. 31).

IV. SUMMARY AND CONCLUSION

29 Whether a particular longstanding practice is sufficient to amount to an unequivocal representation is a question of fact for arbitrators to assess in light of all the relevant circumstances, including the nature of the practice and its context.

30 I am not persuaded it would be appropriate to decide the merits of the estoppel issue, as that would be inconsistent with the Board's role under Section 99. This matter is remitted back to the Arbitrator to reassess the estoppel issue in light of this decision: i.e., he is not precluded from considering factors such as the nature, magnitude and surrounding circumstances in determining if there was an unequivocal representation. This ruling revives the Arbitrator's jurisdiction and permits him to reach the same or a different conclusion.

LABOUR RELATIONS BOARD

RITU N. MAHIL
VICE-CHAIR