BRITISH COLUMBIA
PUBLIC SCHOOL
EMPLOYERS' ASSOCIATION
SOLUTIONS AT WORK

Estoppel Toolkit

Public School Employer Collective Bargaining

October 2018

Contents

What is the Doctrine of Estoppel?

The equitable Doctrine of Estoppel is a flexible tool used by adjudicators to remedy injustices that may arise between parties to a contract.

The Doctrine of Estoppel was first applied in England in the 1800s to remedy injustices that could not be addressed through the enforcement of the strict terms of a contract. The doctrine of estoppel was adopted by labour arbitrators in Canada in the mid-1900s.

When Will the Doctrine of Estoppel be Applied?

The cases and commentaries contain various formulations of the essential elements of an estoppel. A common description of circumstances giving rise to an estoppel follows:

> "Where one party to a legal relationship has, by his words or conduct, made to the other a clear and unequivocal promise that was intended to affect the legal relationship between them, then once the other party has taken him at his word, and altered his position on the strength of the promise, this promisor is not allowed to go back on his word so long as it is inequitable for him to do so."

Over time, courts developed many different formulations of the doctrine of estoppel, each with their own particular requirements and associated equitable relief. In 1992, the BC Labour Relations Board adopted what has been referred to as the "modern doctrine of estoppel" as set out in a BC Court of Appeal case decided in 1988: *Litwin Construction (1973) Ltd.*, 29 BCLR (2d) 88. In essence, the "modern doctrine" of estoppel is not as concerned with the distinct forms of equitable relief historically available (estoppel, promissory estoppel, acquiescence, waiver) as it is with the fact that there may be conduct that is unfair or unjust. The focus of the doctrine is to prevent inequitable detriment.

Labour arbitrators have generally analyzed claims of estoppel in relation to the following framework:

a. One party has made an unequivocal representation which is intended to (or which is reasonably construed as intending to) affect the legal relations between the parties;

b. The party to which it is directed places some reliance in the form of some action or inaction on the representation; and

c. Detriment results from the reliance.

Representation

Several issues may arise in determining whether a representation has been made:

- **Representation by Conduct**

  Employers may be found to have made a representation by conduct where they have followed a certain practice over a number of years that is more generous than the collective agreement. The union can also make a representation by conduct by failing to grieve a longstanding employer practice that is less generous than the collective agreement.

  To determine whether a past practice amounts to an unequivocal representation by conduct, an examination of the nature, magnitude and surrounding circumstances of the practice must be undertaken. The practice must be consistent and known to the other party in order to amount to a representation.

  When considering whether a representation has been made, the circumstances must be viewed from the party raising the estoppel. However, it is not enough that the party raising the estoppel says it believed a representation was being made. That party's subjective belief must find support in the objective facts and circumstances. Put another way, the conduct must be capable of supporting a reasonable conclusion by the party seeking the estoppel that the other party is waiving its strict legal rights.

- **Representation by Words**

  Representation by words can include a party, either verbally or in writing, promising in bargaining, or at some other time, that it does or does not intend to take a certain course of action in the future. In order to quality as an "unequivocal representation," the representation must be made by a person with authority.

- **Unequivocal Representation**

  Regardless of whether the representation is made by words or through conduct, in order to found an estoppel, that representation must be unequivocal. Whether there has been an "unequivocal representation" is a question that can only be determined by looking at the facts in the case. The words or conduct must be capable of supporting a conclusion that the other party is waiving its strict legal rights.

Intention to Affect Legal Relationship

In order to found an estoppel, any representation that is made must be intended to affect the legal relationship between the parties. Sometimes this is described as a representation that a party will not rely on its strict legal rights.

Where the representation is made that a party will not rely on its strict legal rights as set out in the collective agreement, there is usually not much controversy with respect to this aspect of the estoppel claim. It can easily be seen that a representation that the employer will not rely on its strict legal rights in the collective agreement will be interpreted as being intended to affect the legal relationship between the parties. However, controversy arises where the collective

agreement is silent and the employer provides a benefit or institutes a practice not contemplated by the collective agreement.

The cases finding against an estoppel in these circumstances generally raise two issues. First, they state that in order for an estoppel to be found, there must be a term of the collective agreement which relates to the "representation." Second, they state that providing a benefit not provided for in the collective agreement does not signal an intention to affect the legal relationship between the parties.

Cases in which estoppel is rejected on the basis that the collective agreement is silent usually rely on the idea that the union should not be able to use estoppel to create a right it did not have before. Some arbitrators lean toward the school of thought that there should be no estoppel found where the collective agreement is silent because it would be inequitable to allow estoppel to found a right and inconsistent with management's right to unilaterally alter a practice continued pursuant to its right to manage the workplace.

Other arbitrators have stated that the doctrine of estoppel does not depend on the existence of a contractual term on the issue in question, but merely on the existence of a legal relationship between the parties. Once a legal relationship is found to exist (as will necessarily be the case in a labour arbitration), then it does not matter whether the collective agreement is silent.

In cases where the collective agreement is silent, it is often argued that the employer's practice is a gratuitous benefit which cannot be enforced through an application of the doctrine of estoppel. This is consistent with the principle that a past practice does not, by itself, create a right.

Due to the inconsistency in the cases in this area, when the collective agreement is silent, a careful analysis of all the surrounding circumstances should be conducted to determine if an estoppel can be established.

Detrimental Reliance

Since the basic premise of the doctrine of estoppel is to avoid inequities resulting from a change in position or reneging on a promise, it is necessary for the party raising the estoppel to show how they have suffered an injustice as a result of the change in the other party's position.

Typically, the party relying on estoppel must show that it altered its position because of the representation by the other party. This usually takes the form of a lost opportunity to bargain collective agreement language on the issue.

Duration of Estoppel

A practice giving rise to an estoppel may be terminated with appropriate notice. Notice can be express or constructive.

The purpose of giving notice that the practice will end is to provide the party who would have suffered the injustice an opportunity to repair its position. What constitutes appropriate notice will therefore depend on the nature of the detrimental reliance.

Usually, where detrimental reliance takes the form of a lost opportunity to negotiate language into the collective agreement, arbitrators will find that the estoppel will endure for so long as the ability to bargain new language is in abeyance. There are three possible points in time when this could be said to occur: 1) the end of the current collective agreement, 2) the point in time when a legal strike or lockout occurs, or 3) the commencement of the new collective agreement.

While some arbitrators have stated that an estoppel endures only to the end of the current collective agreement, there are other cases supporting the view that an estoppel should endure at least until a legal strike or lockout has commenced or the commencement of the new collective agreement. However, the arbitrator may exercise its discretion to allow an estoppel to end at a different point in time. The parties may also agree on the duration of an estoppel.

Finally, an estoppel may extend into the life of the next agreement if there is no real opportunity for the parties to bargain on the issue in question at the next round of bargaining.

Giving Notice to End a Past Practice That Would Give Rise to an Estoppel

How Do I Determine if Estoppel Notice is Required?

If you have a past practice, consider whether it can amount to a “representation” (i.e., is it a consistent practice and known to senior union officials?). If it meets these criteria, then proceed to considering whether it is based on a term of the collective agreement.

If Collective Agreement is Silent — Serve Reasonable Notice to End Practice

If the past practice does not relate in any way to a term of the collective agreement, it may be considered a mere indulgence or discretionary benefit. Provided there are no other circumstances upon which the union can rely to establish an estoppel and provided the collective agreement does not state that all “present practices” must be continued for the life of the collective agreement, you may end the practice by giving notice to the union at any time. The amount of notice should be reasonable in the circumstances consistent with the proper exercise of the employer’s management rights.

If Collective Agreement Language is Ambiguous — Raise in Bargaining

If the past practice relates to a term of the collective agreement, the language of the collective agreement is **ambiguous** and the practice could be said to be giving meaning to the term of the collective agreement, then there is unlikely to be an estoppel and the best route to take is to bargain the issue at the next round of bargaining. The bargaining proposal can refer to the practice and state that the employer intends to end the practice and is proposing language to clarify the collective agreement.

If Practice is Contrary to Collective Agreement — Serve Estoppel Notice

If the past practice does relate to a term of the collective agreement and the language of the collective agreement is **clear** and the practice is **inconsistent** with the language, or if there are other circumstances which suggest the union would reasonably have concluded that the employer was waiving its right to make a change to the practice, then it is likely that an estoppel could be established and you should give notice to the union that you are going to end the practice. Notice should be given in advance of bargaining and with enough time for the union to prepare bargaining proposals on the issue.

If "Practice" is Really a Mistake in Administering Collective Agreement, Correct It

In some cases, you may become aware that you have been inadvertently administering the Collective Agreement improperly or inconsistently. In these cases, an estoppel may not be applicable and you should consider correcting the mistake going forward. If you become aware of a mistake in administering the collective agreement, you should seek advice from your BCPSEA labour relations liaison.

What is the Format of Notice That Should be Given if an Estoppel Could be Established?

The notice should describe the practice and state when it will end (i.e., at the start of the next collective agreement, or the end of the statutory freeze, or another time if appropriate in the circumstances).

Sample language for an estoppel notice is set out below:

> For the purpose of collective bargaining for renewal of the collective agreement that expired on [date], the Employer hereby places the Union on notice that commencing on the effective date of the new collective agreement, the Employer will apply the following articles of the collective agreement in accordance with the strict language of those articles as follows:
>
> 1. Article [#] — {provide description where applicable concerning the reversion to the strict requirements in the collective agreement}…

After Notice is Given, What Obligations Do the Parties Have?

After notice is given that a practice will end, the employer should ensure that the practice continues for the duration of the notice. The onus is on the union to propose collective agreement language in bargaining that preserves the practice. Alternatively, the union may grieve the notice and ask an arbitrator to find that the employer's practice actually supports an interpretation of the collective agreement, rather than merely creating an estoppel.

If the union serves estoppel notice on an employer, the employer should contact BCPSEA. BCPSEA will work with the district to consider whether it agrees that estoppel applies or whether it takes the view that the practice the union says it will no longer tolerate is actually compliant with the collective agreement. If the employer agrees that the practice is contrary to the collective agreement, it can choose to discontinue it and revert to the language of the collective agreement, or make a proposal in bargaining to amend the collective agreement to be consistent with the past practice.

What Happens at the End of the Notice Period?

At the end of the notice period, the employer is no longer obliged to continue the practice, subject to any commitments made by the parties in the round of collective bargaining conducted after notice was given.

Case Examples

- **Representation by words: Statements made during collective bargaining**

  Zellers Inc. v. UFCW, Local 1518, December 22, 2000 (Jackson)

  In bargaining, the union sought language allowing union representatives to attend the workplace without advance notice to the employer to inspect working conditions. The employer sought language requiring advance notice. The union negotiator said that the advance notice language was unnecessary because the union's practice was to always give advance notice.

  The arbitrator found that there was a representation by the union that it would always give advance notice and the employer relied on that representation when it decided not to press for that language in the collective agreement. The arbitrator found that it would be inequitable to allow the union to attend the store without advance notice, given its statement in bargaining.

- **Representation by conduct : Failing to object to a stated course of action**

  City of Penticton, May 15, 1978 (P. Weiler)

  In 1975, the parties agreed in bargaining to a change in life insurance benefits which was to become effective "as soon as the necessary arrangements can be made with the insurance carrier." The historical practice of the employer was to make such arrangements as soon as the new formal agreement had been signed by both parties. Historically, the parties had been able to sign the formal collective agreement shortly after the memorandum of agreement was ratified; however in 1975, issues arose which resulted in the formal collective agreement remaining unsigned until March 4, 1976.

  In late 1975, an employee died and his estate was paid the amount set out in the former collective agreement. The union did not object. In February 1976, because the formal collective agreement had not yet been signed but the ratified agreement contained retroactive wage increases, the parties negotiated an interim wage increase which would take effect in the absence of a signed collective agreement. Wages were retroactive but the increased life insurance was not included in that agreement. When the parties sat down on March 4, 1976 to sign the formal agreement, the employer advised the union that it would make arrangements to have the life insurance take effect April 1, 1976. The union knew the employer had not made arrangements before then to increase the life insurance and did not object.

  An employee died on March 20, 1976, after the agreement had been signed but before the increased life insurance was to take effect. The union then took the position that the employer had a contractual commitment to provide the increased life insurance benefit. The employer argued that the union had, by its conduct, lulled the employer into the belief that it would not object to the employer waiting until after the collective agreement was formally signed to make arrangements to obtain increased insurance coverage. The union was found to be estopped from arguing a strict reading of the collective agreement.

- **Representation by conduct: Union's failure to file grievances**

  Surrey School District and STA, July 28, 2008 (Kinzie)

  The district had a longstanding practice of assigning a TOC to complete an absent teacher's assignment for the first semester instead of posting the vacancy for a term-specific assignment for the balance of the school year. The employer provided the union with bulletins and reports from which the union could have discovered the employer's practice. The arbitrator found that the union should have been analyzing the reports to ensure that they did not disclose any breaches of the collective agreement. The employer was entitled to assume that the union had undertaken such an analysis and had decided not to object to their practice. The arbitrator found that it would be unfair to permit the union to challenge that practice for the balance of the school year.

- **Representation by conduct: Employer's past practice and grievance settlement**

  Eurocan Pulp and Paper and CPU, Local 298, February 1, 1990 (Hickling)

  The collective agreement provided that employees working more than nine hours would be provided with a hot meal ticket at the employer's expense. This provision was introduced when shifts were eight hours in length. Years later, the employer introduced a compressed work week which involved the adoption of a 12 hour shift. One condition of the compressed work week was that it would involve no extra cost to the company. The parties agreed that the collective agreement did not require the employer to provide the hot meal ticket to employees working a 12 hour shift. However, the employer found that employees were reluctant to work on their designated day off without an additional incentive. As a result, it began to offer a hot meal ticket after nine hours work to employees working on their day off. This practice was not written down, nor was it evenly applied. One group of employees grieved that the benefit had not been applied to them. The employer settled the grievance by extending the benefit to all employees.

  In subsequent negotiations, the union proposed that the employer's policy be added to the collective agreement language. The employer disagreed, saying that to do so would make it a contractual commitment that it did not wish to be bound to. The parties agreed to disagree.

  The arbitrator confirmed that simply because an employer has afforded a benefit to employees for many years does not create an estoppel where benefits were granted as a matter of grace. The fact that a party has followed a particular course of action does not necessarily import a promise that it would continue to do so. However, in this case, the union was not relying solely on past practice. It was also relying on the employer's response to a grievance launched by employees who felt the policy should be applied to all employees. The arbitrator found that in these circumstances it was reasonable for the union to assume that the commitment continued.

- **Representation by conduct: Past practice contrary to clear term of collective agreement**

  CN Railway Co. v. Beatty, [1981] O.J. No. 3137

  The collective agreement provided that sick benefits were not payable until the fourth day of absence. Notwithstanding this provision, the employer consistently followed a longstanding practice of providing benefits to certain groups of employees from the first day of absence.

  The arbitrator found that the employer's past practice reasonably induced the union to believe that the entitlement of employees to sickness benefits would not be governed by the strict terms of the collective agreement but instead by its longstanding practice, which was more generous. The arbitrator found that it would be inequitable to allow the employer to revert to insisting on the strict terms of the collective agreement.

- **No representation: Past practice inconsistent and therefore equivocal**

  BC Rail and UTU, June 27, 1997 (Hope)

  The employer notified the union that it would be changing certain operating procedures such that UTU employees would no longer be required to cut the helper locomotives in and out of trains. Instead, the CUTE 1 Locomotive Engineers would do this work. The UTU argued that the employer's longstanding practice in relation to work assignments constituted a representation that the practice would continue.

  The arbitrator stated that where a party raises conduct as the basis for an estoppel, the conduct must be capable of supporting a conclusion that the party with the practice is waiving its strict legal rights with respect to the matter at issue. The arbitrator found that the UTU failed to establish an unequivocal practice that was capable of constituting a representation by the employer that it was waiving its right to make the operational change in dispute. This was because there was evidence that the UTU employees had not been exclusively assigned this work in the past. As such, the union could not rely on what was at best an equivocal practice to found an estoppel.

- **No representation: Past practice in exercising management rights equivocal**

  City of Surrey and Surrey Firefighters Association, February 26, 1997 (Glass)

  The employer had a long standing staffing practice in its fire department of replacing absent Lieutenants with qualified bargaining unit members. The employer decided to discontinue that practice and the union grieved, claiming that the employer's past practice created an estoppel.

  The collective agreement did not contain any language regarding the replacement of absent Lieutenants. The employer's management right to make staffing decisions in relation to the matter in issue had not been restricted by collective agreement language.

The union argued that the 20 year staffing practice created a reasonable expectation on the part of the union that the staffing practice would continue. The arbitrator found that where an employer's practice is derived from management's right to manage, operate and direct the workforce and respond to changing operational conditions, it is extremely difficult for the union to assert successfully that the practice constitutes the kind of representation or assurance necessary to create an estoppel. As a result, the union's grievance failed.

- **No representation: Past practice of providing gratuitous benefit equivocal**

  Cassiar Mining Corp. and USW, Locals 6356 and 8449, March 20, 1986 (Hope)

  The employer had a longstanding history of providing room and board facilities to single employees. The parties negotiated the fee the employer could charge employees for room and board, but the collective agreement did not expressly require the employer to provide room and board. In earlier negotiations the employer had resisted language which would have required the provision of room and board. In order to cut costs, the employer eliminated the room and board facilities for single employees and the unions grieved, arguing both that the collective agreement implicitly required the employer to provide room and board and that even if it did not, the employer was estopped from eliminating the room and board benefit.

  The arbitrator asked the following questions: 1. Was there some conduct on the part of the employer that induced the union to believe the employer's legal right to eliminate bunkhouse and cafeteria facilities would not be enforced? 2. If so, would it be inequitable to allow the employer to insist on exercising that right?

  The arbitrator found that although there was a longstanding practice of providing the benefit, the employer's past actions in refusing to include a guarantee in the collective agreement and refusing to entertain a previous grievance of the removal of room and board privileges were enough to establish that it would not be reasonable for the union to believe that the employer had waived its right to eliminate the room and board benefit.

  Victoria Times Colonist (1984), 17 L.A.C. (3d) 284

  The employer had a 20 year practice of paying the wages of employees on the union's bargaining committee for collective bargaining sessions held when they would otherwise have been working. The collective agreement only provided that employees on the union's bargaining committee would be granted a leave of absence. The arbitrator found that the collective agreement did not require the leave of absence to be paid.

  The arbitrator found that the employer's practice was not one that was in forbearance of a right it had under the collective agreement, rather it was simply a gratuitous benefit not required by the collective agreement and no estoppel was established.