THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2013 SKCA 93 Date: 2013-09-10

Between: Docket: CACV2205

Viterra Inc.

Appellant

- and -

Grain Services Union (ILWU-Canada) and
an Arbitration Board Chaired by William F.J. Hood

Respondent

Coram:
Richards C.J.S., Ottenbreit and Caldwell JJ.A.

Counsel:
Donald Jordan, Q.C. for the appellant
Ronalda Nordal for the respondent

Appeal:

From:	2011 SKQB 439
Heard:	October 30, 2012
Disposition:	Appeal dismissed
Written Reasons:	September 10, 2013
By:	The Honourable Chief Justice Richards
In Concurrence:	The Honourable Mr. Justice Ottenbreit
	The Honourable Mr. Justice Caldwell

Richards C.J.S.

I. INTRODUCTION

[1] This appeal concerns how Viterra Inc. pays overtime to certain of its employees represented by the Grain Services Union (ILWU-Canada) (the "Union"). More specifically, the central issue before the Court is whether Viterra is required to provide the employees in question with vacation pay on overtime at what are called "vacation entitlement rates" or whether it may compensate them at the lower rates prescribed by the *Canada Labour Code*, R.S.C. 1985, c. L-2.

[2] The collective agreements between Viterra's corporate predecessor, Saskatchewan Wheat Pool ("the Wheat Pool"), and the Union were silent on the question of vacation pay for overtime. However, it was the Wheat Pool's practice to provide the employees in some work units with such pay at vacation entitlement rates. This meant, for example, that an employee who was entitled to six weeks of vacation per year would receive 6/52, or roughly 12 percent, as vacation pay on his or her overtime earnings.

[3] Viterra (the corporate product of the Wheat Pool's takeover of Agricore United) negotiated new collective agreements with the Union. Those agreements were also silent on the issue of vacation pay on overtime. Viterra continued for over a year with the Wheat Pool's practice of paying some groups of employees vacation pay on overtime at vacation entitlement rates. Viterra management then discovered that not all employees were being treated consistently with respect to this issue. As a result, it decided to begin paying everyone at the rates mandated by the *Canada Labour Code*.

[4] This decision led the Union to file grievances. An arbitration board decided in the Union's favour. It held that an obligation to provide vacation pay on overtime at vacation entitlement rates was implicit in the wording of the collective agreements and that, in any event, Viterra was estopped from calculating vacation pay on overtime at *Canada Labour Code* rates.

[5] Viterra sought to overturn this finding by way of a judicial review application in the Court of Queen's Bench. The Chambers judge rejected its arguments, holding that both the Board's interpretation of the collective agreement and its application of the doctrine of estoppel were reasonable. Viterra now appeals from that decision.

[6] I conclude, for the reasons set out below, that Viterra's appeal must be dismissed.

II. BACKGROUND

[7] The Wheat Pool had 1,300 employees. About 900 of them belonged to the Union. This appeal concerns some groups of employees in the Country Operations/Maintenance and Head Office bargaining units.

[8] The collective agreements between the Union and the Wheat Pool for the relevant bargaining units (the "Old Agreements") did not specify either that vacations were to be with pay or what rate of pay was applicable for vacations. They said only this:

> ARTICLE 21 – VACATIONS
>
> 21.1 All employees shall be entitled to three (3) weeks annual vacation for each full year of service. Such vacations are to be taken at times mutually agreed upon between the Company and the employee.

21.2 1. Employees who have completed nine (9) years of service shall in the years of service subsequent to the ninth anniversary date of employment earn vacation at the rate of four (4) weeks per year.

2. Employees who have completed seventeen (17) years of service shall in the years of service subsequent to the seventeenth anniversary date of employment earn vacation at the rate of five (5) weeks per year.

3. Employees who have completed twenty-seven (27) years of service shall in the years of service subsequent to the twenty-seventh anniversary date of employment earn vacation at the rate of six (6) weeks per year.

21.3 In the case of termination of employment the Company shall pay to the employee any vacation pay owing to him/her in respect of any prior completed year of employment plus the vacation pay owing to him/her for the current year.

21.4 Extended vacation leave without pay may be given at the discretion of the Company.

[9] The Old Agreement for the Country Operations/Maintenance bargaining unit did not speak directly to the question of vacation pay for overtime. It provided for overtime rates of pay as follows:

ARTICLE 18 – HOURS OF WORK

…

3. The hours of work provisions for Managers and Assistant Managers and above shall be as follows:

(a) The standard hours of work and work week shall be forty (40) hours; five days per week. As a norm, employees shall be entitled to two (2) consecutive days of rest.

(b) When the needs of the operation require it, employees may be required to work additional hours beyond those referred to in Section 1, above.

(c) The hours worked by employees shall be averaged over an eight (8) week period. All hours worked in excess of 320 hours in said eight week period shall be deemed to be overtime work.

(d) Employees shall be compensated for overtime work, as referred to in Section c), above, in the form of leave with pay at the rate of one and one-half (l 1/2) hours for each hour of overtime work.

(e) Compensatory leave as referred to in Section d), above shall be granted to employees within the eight (8) week period immediately following the period in which it was earned.

(f) The eight (8) week periods referred to in Section c), and e), above shall be designated by Management.

4. Where the work activity requires coverage beyond that which can be achieved in established hours of work for the unit, the actual daily hours of work and time off for meals for groups of employees or classes of positions affected shall be negotiated by the Company and the Union.

5. Banking of overtime will be based on authorized overtime worked during an averaging period shall be paid out at the rate of one and one-half (1 1/2) hours of pay for each one (1) hour of overtime worked.

   (a) Overtime may be credited to a time off in lieu bank by agreement between the employee and the Company. Overtime hours will be banked at the rate of one and one-half (1 1/2) hours of paid time off for each one (1) hour of overtime worked.

   (b) Banked time off referred to Article 18 5. a) above shall be by mutual agreement between the employee and management.

The Old Agreement for the Head Office bargaining unit had similar provisions.

[10] Regardless of what the Old Agreements did or did not say, there was a practice whereby some groups of employees in the Country Operations/Maintenance and Head Office bargaining units were given vacation pay on overtime based on individual employee's vacation rates. Thus, as indicated above, an employee entitled to six weeks of annual vacation would be compensated at the rate of 6/52 or roughly 12 percent, an employee entitled to four weeks of vacation would receive 4/52, or roughly 7.7 percent, and so forth.

[11] In the summer of 2007, the Wheat Pool acquired all of the shares of Agricore United, another grain handling company. Agricore United had some

2,400 or 2,500 employees. The combined Wheat Pool and Agricore United operation then carried on under the name Viterra.

[12] The Old Agreements expired on January 31, 2008 and were replaced with new contracts effective February 1 of that year (the "New Agreements"). The New Agreements were negotiated with Hugh Wagner (General Secretary of the Union) acting as the chief bargaining spokesperson for the Union and Dwayne Chomyn (Viterra counsel) taking the lead for Viterra.

[13] During the relevant negotiations, there was no discussion about the rate of vacation pay on overtime earnings. Nor was there any discussion regarding vacation pay for earned vacation, the rate of vacation pay or the mechanisms for calculating such pay.

[14] When finalized, the New Agreements did change the "time of service" thresholds for vacation entitlements. For example, under the Old Agreements, an employee had to work nine years before becoming eligible for four weeks of vacation. Under the New Agreements, this was changed to seven years. However, the language in the New Agreements with respect to vacation pay remained the same as it had been under the Old Agreements. In other words, the New Agreements did not deal expressly with the questions of whether (a) vacation was with pay, or (b) the rate of pay during vacation.

[15] Of most direct relevance for the purposes of this appeal, the New Agreements, like the Old Agreements, did not deal expressly with the question of vacation pay on overtime earnings. The New Agreement for the Saskatchewan Operations/Maintenance unit provided only this:

> 18.4 Overtime
> If an Employee is required to work in excess of the hours of a regular work schedule or compressed work week schedule as outlined in Article 18.2, the Employee will be paid one and one-half times (1 1/2 x) the Employee's regular rate for the additional hours worked.
>
> Employees who work twelve (12) or more hours in a day will be paid two times (2 x) the Employee's regular rate for the additional hours worked. This provision does not apply to Assistant Managers or higher classified employees.
>
> When the needs of the operation require it, employees may be required to work overtime.
>
> Employees shall be compensated for authorized overtime. The Employee and the Company may agree to accredit overtime to an overtime bank to be credited and taken at the rate of one and one-half (1 1/2) hours of paid time off for each one (1) hour of overtime worked.
>
> [emphasis added]

The New Head Office Agreement contained effectively the same language.

[16] Viterra continued, under the New Agreements, to provide vacation pay on overtime on the same basis as the Wheat Pool had paid it, *i.e.* it paid the employees in some work units at vacation entitlement rates. All other employees were apparently paid as per the requirements of the *Canada Labour Code*.

[17] Mr. Chomyn testified that, when the New Agreements were negotiated, he had not been familiar with the Wheat Pool's practices concerning vacation pay. He indicated that, in March of 2009, he became aware that there were different practices in relation to such pay within the employment units covered by the New Agreements. Some of the employee groups were being paid vacation on overtime at vacation entitlement rates, but this was not a universal practice for former Wheat Pool employees. As well, the New Agreements covered workers previously employed by Agricore United. Those workers were not being paid overtime at vacation entitlement rates.

[18] Viterra then decided to standardize the approach for all employees covered by the New Agreements. In this regard, it determined that, going forward, it would calculate and pay vacation pay on overtime at the rates specified by the *Canada Labour Code*. That decision was made without consultation with, or notice to, the Union. It had the obvious effect of lowering rates of overtime compensation for some employees.

III. THE ARBITRATION BOARD DECISION

[19] The Union filed grievances alleging that Viterra had unilaterally changed the administration and payment of vacation pay on overtime contrary to past practice and the terms of the New Agreements.

[20] The majority of the Board of Arbitration (William Hood, Q.C., Chairperson and Paul Guillet, Union Nominee) found in the Union's favour. See: [2011] C.L.A.D. No. 151 (QL).

[21] The majority began its analysis by concluding that the Old Agreements implicitly said vacation pay was to be provided on overtime and paid at vacation entitlement rates. It said this:

> 78 . . . The evidence also establishes that based on the words used by the Union and SWP in prior collective agreements, the parties applied such words to mean that vacation pay was paid on overtime at the same rate as vacation entitlement. In our view, this practice was not gratuitous but came as a direct understanding of the parties to the prior collective agreements that vacation pay was to be paid on overtime and at the vacation entitlement rates (which were the only rates set out in the prior collective agreements). The Union and SWP could have specifically stated the vacation was with pay and that vacation pay at vacation entitlement rates was paid on overtime. The fact that they did not does not, in the circumstances, mean they did not agree to this by the words they chose in the prior collective agreements.
>
> 79 … The Union and SWP agreed that vacation pay was at the vacation entitlement rate in prior collective agreements. In reading the prior collective agreements, as a whole, it is apparent the parties to these agreements intended the rate of vacation pay on overtime was at the vacation entitlement rate and had they

> intended the vacation pay rate to be less for vacation pay on overtime they would have said so.

[22] The majority then went on to find that the language incorporated in the New Agreements (the same language as had been used in the Old Agreements) had the same effect:

> 81 The Union and the Employer directed their minds to the issue of vacation entitlement at the bargaining table during negotiations for the new Collective Agreements. As a result, the time of service thresholds were increased from the prior collective agreements. The Union and the Employer did not see fit to make any changes to vacation pay, the rate of vacation pay, or the rate of vacation pay on overtime, and no changes were made to this language in the new Collective Agreements. Both parties saw fit to incorporate the language used by the Union and SWP in the prior collective agreements. In our view, the fact that Mr. Chomyn believed there was not enough time for the Employer to deal with vacation pay does not mean vacation pay was not dealt with in the language chosen in the new Collective Agreements. In our view, using the same language in the new Collective Agreements as in the prior collective agreements, in these circumstances, is indicative that at the time the new Collective Agreements were made the parties agreed they did not intend to change vacation with pay at the vacation entitlement rates and vacation pay on overtime at the vacation entitlement rates.
>
> . . .
>
> 83 We are also of the view that, in the circumstances, the parties have seen fit, by choice and not by accident, to apply the new Collective Agreements to pay vacation pay on overtime at the vacation entitlement rates (until it decided otherwise). . . . We are of the view, all facts considered, that implicit in the new Collective Agreements is the agreement to pay vacation pay on overtime at the vacation entitlement rates to the groups of employees who were in receipt of such benefits under the prior collective agreements.

[23] Thus, in the view of the majority, the New Agreements themselves required Viterra to pay vacation pay on overtime and to do so at vacation entitlement rates.

[24] That decided, the majority turned its attention to the doctrine of promissory estoppel. It held that the Union and Viterra had entered the New Agreements on the assumption that vacation pay on overtime would not change. It said Viterra's conduct at the bargaining table had effectively

assured the Union that, by using the same language in the New Agreements as in the Old Agreements, the established practices would continue. The majority also placed special emphasis on the fact that Viterra had continued, for over a year after the New Agreements were in place, to provide vacation pay to some employees on overtime at vacation entitlement rates.

[25] Dale Hallson, Viterra's nominee on the Board, wrote a dissenting opinion. In his view, the New Agreements did not address the rate of vacation pay on overtime and the Wheat Pool's past practices could not be used to create a contractual obligation in that regard. He also disagreed with the majority's approach to estoppel because, as he saw it, the majority had used the doctrine to create a positive legal obligation rather than to prevent Viterra from relying on a specific contractual provision.

[26] In the discussion which follows, I will refer to the majority's decision as the decision of the Board.

IV. THE QUEEN'S BENCH DECISION

[27] Viterra brought a judicial review application in the Court of Queen's Bench and sought to quash the decision of the Board. As indicated, it was not successful.

[28] The Chambers judge applied the reasonableness standard of review and concluded that both the Board's interpretation of the New Agreements and its application of the doctrine of promissory estoppel satisfied that standard.

V. ANALYSIS

[29] Viterra takes issue with both wings of the decision of the Chambers judge. It says she erred in finding that the Board's interpretation of the New Agreements was reasonable. It also says that she erred in her assessment of the Board's application of the doctrine of estoppel. I will deal with each of these points in turn.

A. The Interpretation of the New Agreements

[30] Viterra submits that the Board's interpretation of the New Agreements was unreasonable and improperly based on the past practices of the Wheat Pool. It contends there is nothing in the language of the New Agreements which justifies the interpretation placed on it by the Board. In order to properly examine this issue, it is necessary to look somewhat more closely at the Board's line of reasoning.

[31] The Board began, at para. 78 of its decision, by noting that the Old Agreements said nothing about whether the Wheat Pool was obliged to pay employees while they were on vacation. It reasoned that, because the Wheat Pool had provided vacation pay at the employees' existing wage rates (rather than at the rates set out in the *Canada Labour Code*), a paid vacation benefit was "implicit" in the Old Agreements themselves and that, "based on the words used in the [Old Agreements]", vacation pay on overtime had to be paid at vacation entitlement rates. The Board then went on to say that, because the relevant language of the Old Agreements had found its way into the New Agreements, the wording of the New Agreements also reflected a binding

understanding that vacation pay on overtime would be at vacation entitlement rates.

[32] For my part, I am respectfully unable to see any reasonable train of logic in either the Board's analysis or in its bottom line conclusion with respect to the meaning of the New Agreements. The fundamental reality is that the Old Agreements were silent about (a) whether vacation was to be with pay, (b) what rates of pay were applicable to vacation time, (c) whether vacation pay was payable on overtime, and (d) the rate at which vacation pay was to be calculated on overtime. The same holds true for the New Agreements. They say nothing at all about these issues. As a result, I do not understand how an obligation to provide vacation pay on overtime at vacation entitlement rates can be seen as something which flows from the Agreements themselves. There is simply no contractual language in which such an obligation can be grounded.

[33] In this regard, I acknowledge that the Board did refer to Article 21.4 of the Old Agreements as being one of the foundations of its reasoning. Article 21.4 provided that "[e]xtended vacation leave without pay may be given at the discretion of the Company." The Board said this provision implied that earned vacation was to be "with pay." It then observed that this provision had not found its way into the New Agreements but that Article 13.1 of the New Agreements allows for leaves of absence without pay for "valid reasons as set out by Corporate Policy." This language was also said to imply that vacation pay on overtime under the New Agreements is to be paid at vacation entitlement rates.

[34] The Board's comments about Article 21.4 of the Old Agreements are appropriate because, if *extended* vacation is to be *without* pay, it would seem to follow that *earned* vacation would be *with* pay. The situation with respect to the wording of Article 13.1 of the New Agreements is much less clear because it makes no reference to vacations and refers only to "leaves of absence" being without pay.

[35] Nonetheless, and in any event, there is no logical connection between a contractual obligation that regular vacation time is to be with pay and the separate issue of the *rate* of pay which is applicable to vacation time. The Board's reasoning conflates these two matters and somehow assumes that a contractual obligation to compensate employees during their vacations means that they are to be compensated at regular rates of pay as opposed to those specified in the *Canada Labour Code*. Further, and more importantly, the Board's reasoning involves the additional leap of logic that, because the New Agreements were found to implicitly require employees to be paid during vacation, these employees are entitled to be paid vacation pay on overtime *at vacation entitlement rates*. This, in my respectful view, is a basic error in legal reasoning. The conclusion does not follow from the premise. In short, the Board's decision projects far more onto the language of the New Agreements than that language can reasonably bear.

[36] Notwithstanding all of this, there is another, and more fundamental, point which needs to be emphasized here. Not all employees in the Operations/Maintenance and Head Office bargaining units received vacation pay on overtime at vacation entitlement rates. Only the members of some work units were compensated in this way. Therefore, according to the Board's reasoning, precisely the same contractual language carries two

entirely different meanings. For some employees, it means that vacation pay on overtime is earned at vacation entitlement rates. For other employees, it means that such pay does not accumulate on that basis. For my part, I am unable to understand how all of this can hold together in a reasonable way. Contractual language must mean the same thing for all of the employees to whom it applies.

[37] I note, as well, that in the process of interpreting the Agreements, the Board placed some emphasis on the fact that, after the New Agreements were in place, Viterra continued to provide vacation pay on overtime at vacation entitlement rates. The Board said this was "consistent with what the parties intended at the time the [New Agreements] were made." With respect, I am unable to see the logic in this line of reasoning either. It confuses the interpretation of the New Agreements with the estoppel argument. The Union and Viterra agree that, in the negotiations underpinning the New Agreements, there was no discussion about vacation pay on overtime earnings or the rate of vacation pay on such earnings. Thus, as explained above, and given that the New Agreements contain no wording dealing with vacation pay on overtime, I am unable to see how Viterra's continuing provision of such pay at vacation entitlement rates can be said to inform the meaning of the New Agreements themselves.

[38] I observe too that the Board seemed to have been moved by the possibility that if Viterra's argument about the meaning of the New Agreements was accepted then Viterra would also be able to back away from paying wages during vacation at regular rates and would be entitled to pay them at the lower *Canada Labour Code* rate. In this regard, the Board said, "We would not accept that the Employer is gratuitously paying vacation pay at

the vacation entitlement rates." In my respectful view, this line of analysis is also misplaced. The question of pay rates for vacation time was not before the Board and Viterra has not suggested that it intends to change the existing approach to such pay rates. Indeed, at para. 5 of its decision, the Board expressly noted that "[Viterra] does not take issue with the payment of vacation pay and continues to pay employees at their current rate of pay while on vacation." More importantly, however, this line of concern simply fails to engage the root question before the Board in relation to the meaning of the New Agreements: Do their terms require that vacation pay be provided on overtime at vacation entitlement rates?

[39] Accordingly, I agree with Viterra that the Board's interpretation of the New Agreements was unreasonable and that the Chambers judge erred in finding otherwise. It follows that I need not deal with Viterra's argument to the effect that the Board improperly used evidence of past practice to inform its interpretation of the New Collective Agreements.

B. Estoppel

[40] Viterra also argues that the doctrine of promissory estoppel cannot be engaged to prevent it from providing vacation pay on overtime at *Canada Labour Code* rates. It says the Board made significant errors in its application of the doctrine and that the Chambers judge erred in finding that the Board's approach had been reasonable.

[41] The basic features of the doctrine of promissory estoppel are solidly established. In *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50, the Supreme Court said that the doctrine engages when there is both

(a) a representation intended to affect legal rights and be acted upon, and (b) reliance on that representation. Sopinka J. explained the nature of the doctrine as follows at p. 57:

> The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position. In *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607, Ritchie J. stated, at p. 615:
>
> > It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.
>
> This passage was cited with approval by McIntyre J. in *Engineered Homes Ltd. v. Mason*, [1983] 1 S.C.R. 641, at p. 647. McIntyre J. stated that the promise must be unambiguous but could be inferred from circumstances.

[42] The Supreme Court's recent decision in *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616 confirms that labour arbitrators are entitled to employ the doctrine of estoppel even though it is equitable in nature.

[43] The *Nor-Man* decision also indicates that courts are to accord arbitrators a healthy measure of deference in relation to their efforts to apply estoppel in the labour relations context. This is revealed in the following passages from the decision of Fish J.:

> [45] On the contrary, labour arbitrators are authorized by their broad statutory and contractual mandates — and well equipped by their expertise — to adapt the legal and equitable doctrines they find relevant within the contained sphere of arbitral creativity. To this end, <u>they may properly develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievances of which they are seized.</u>
>
> . . .

> [48] Collective agreements govern the ongoing relationship between employers and their employees, as represented by their unions. When disputes arise — and they inevitably will — the collective agreement is expected to survive, at least until the next round of negotiations. The peaceful continuity of the relationship depends on a system of grievance arbitration that is sensitive to the immediate and long-term interests of both the employees and the employer.
>
> [49] Labour arbitrators are uniquely placed to respond to the exigencies of the employer-employee relationship. But they require the flexibility to craft appropriate remedial doctrines when the need arises: Rigidity in the dispute resolution process risks not only the disintegration of the relationship, but also industrial discord.
>
> . . .
>
> [51] Reviewing courts must remain alive to these distinctive features of the collective bargaining relationship, and reserve to arbitrators the right to craft labour specific remedial doctrines. Within this domain, arbitral awards command judicial deference.
>
> [emphasis added]

[44] This does not mean that arbitral decision-making in this regard is beyond the supervisory reach of the courts. As Fish J. said at para. 52 of *Nor-Man*, "[a]n arbitral award that flexes a common law or equitable principle in a manner that does not reasonably respond to the distinctive nature of labour relations necessarily remains subject to judicial review for its reasonableness."

[45] In *Nor-Man* itself, the Supreme Court was dealing with a situation where a union sought a bonus week of vacation for an employee and, in so doing, relied on the terms of the collective agreement. The employer refused the request. An arbitrator held that the employer's method of calculating vacation benefits had, in fact, been in breach of the collective agreement. However, he also held that the union was estopped from asserting its strict rights under the agreement because of its long-standing acquiescence in the employer's mistaken application of the relevant provisions of the agreement. In dealing with the union's argument that the arbitrator had not made a factual

finding that it had intended to affect its legal relationship with the employer, Fish J. said this:

> [60] I would reject that submission as well. The question is not whether the labour arbitrator failed to apply *Maracle* to the letter, but whether he adapted and applied the equitable doctrine of estoppel in a manner reasonably consistent with the objectives and purposes of the *LRA*, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of Ms. Plaisier's grievance.

[46] With that background, it is now useful to look more closely at the Board's decision. It began, at para. 89, by saying that it was "completely reasonable" for the Union to have assumed there would be no change under the New Agreements with respect to the calculation of vacation pay on overtime. This was said to be the case because, notwithstanding its past practice, Viterra had not raised this issue in the negotiations leading to the finalization of the Agreements. The Board said that, if Viterra had wanted to discontinue the Wheat Pool's practices in this regard, it should have informed the Union. As a result, the Board concluded that the "representation" requirement for promissory estoppel had been established. It explained its thinking as follows:

> 90 The first part of the doctrine of equitable estoppel has been made out. The Employer, by its conduct in not raising the issue at the bargaining table and by accepting the same language that previously provided vacation pay and vacation pay on overtime at the vacation entitlement rates, gave what would have been reasonably seen by the Union as an assurance that similar language would constitute an agreement to the same practice. All of this was done with the intentions the parties would enter into the new Collective Agreements to govern their legal relationship.
>
> . . .
>
> 95 Typically, this [a change in compensation for overtime] would be done by proposing language that would identify vacation pay on overtime as calculated at the lower rate in the Code instead of at the vacation entitlement rates in the Collective Agreements. Failure to do this resulted in the reasonable and justifiable assumption that vacation pay on overtime would not change and would be calculated at the same rate as vacation pay on the basis of vacation entitlement.

[47] The Board then turned to the issue of reliance. In so doing, it said that the Union had relied on Viterra's decision to adopt the language of the Old Agreements into the New Agreements as meaning that the calculation of vacation pay on overtime would not change. The Board concluded that it would be "unfair and unjust" to allow Viterra to move away from its established practices in this regard. It explained its reasoning in this way:

> 96 In our view, the second part of the doctrine of estoppel concerning reliance to one's detriment has also been made out, as the Employer gave no inclination of any desire to make vacation pay on overtime an issue in negotiations, and then agreed to adopt the same language both parties had previously applied to provide the benefit of vacation pay on overtime at the vacation entitlement rates. It would be unfair and unjust to permit the Employer to go back on the assumptions underlying their dealings. To do so would deprive the Union of its right to bargain on this issue for the term of the new Collective Agreements and be stuck with a detrimental result that was never intended. It is reasonable, in the circumstances, that if neither party sought any change in the rate of vacation pay on overtime, the parties would proceed as they did. It is unfair, in the circumstances, for the Employer now to unilaterally impose a change when the change was not sought or intended at the time the Collective Agreements were made.

[48] Viterra submits that the Board improperly invoked the doctrine of promissory estoppel and applied it in an unreasonable fashion. More particularly, Viterra says the doctrine is only available as a defence against an estopped party's enforcement of its strict legal rights under the collective agreement. Here, it says the Board employed estoppel to create a legal right. Viterra also contends that, because Mr. Chomyn (Viterra's representative at the bargaining table) did not know about the Wheat Pool's practices with respect to vacation pay on overtime, he could not have represented that such practices would continue. Similarly, Viterra says the Union could not have relied on anything that Mr. Chomyn did or said in the course of the negotiation of the New Agreements because vacation pay was not the subject of either the Old or New Agreements and because the issues of vacation pay or vacation pay for overtime were not raised during the course of the negotiations.

[49] In making these submissions, Viterra relies heavily on *Re Smoky River Coal Ltd. v. United Steelworkers of America, Local 7621* (1985), 18 D.L.R. (4th) 742 (Alta. C.A.). It involved a circumstance where, over the course of five successive collective agreements, the employer followed the practice of paying maintenance workers one-half hour of overtime per day if they reported prior to the commencement of their shifts and after the completion of their shifts to discuss maintenance and make reports. The practice amounted to a standing offer which employees could accept by reporting shift by shift. It was never incorporated into the collective agreement nor was it the subject of any discussion during the negotiation of the successive agreements. The employer ultimately discontinued the practice and the union filed a grievance on behalf of the affected workers. An arbitrator found that the practice could not be ended and, in so doing, applied the doctrine of promissory estoppel.

[50] The Court of Appeal for Alberta rejected this line of analysis. Stevenson J.A., writing for the Court, said that "…the creation of positive obligations is not the office of promissory estoppel. The function of promissory estoppel is not to make gratuitous promises binding in all respects" (p. 745). Stevenson J.A. held that the position of the union was a "…bald attempt to turn a policy of practice into a term of a contract when the parties never bargained that it be such" (p. 746). In his view, the arbitrator had misconceived the role of promissory estoppel by allowing it alone to effectively found a claim. This approach was recently confirmed in *Calgary Fire Fighters Assn. (I.A.F.F., Local 255) v. Calgary (City)* (2011), 333 D.L.R. (4th) 563 (Alta. C.A.).

[51] This, however, is not the only view of promissory estoppel which is reflected in the authorities. In fact, there are quite a wide variety of opinions

(found mostly in the arbitral jurisprudence) concerning the place of estoppel in collective bargaining relationships. Much of this is helpfully explained and summarized in *Telus Communications Inc. v. T.W.U.* (2010), 201 L.A.C. (4th) 15 (Sims) and *Maple Lodge Farms Ltd. and U.F.C.W., Local 175, Re* (1991), 24 L.A.C. (4th) 211 (Brown).

[52] Sitting at the other end of the spectrum from *Smoky River Coal, supra* is the decision of the Ontario Divisional Court in *Re Canadian National Railway Co. and Beatty* (1981), 128 D.L.R. (3d) 236. It concerned a situation where a collective agreement provided for sick benefits commencing on the fourth day of absence from work in the case of certain kinds of illness. But, for over 30 years, the employer had paid workers' wages for the full duration of their absences due to illness, with no waiting period. The employer announced its intention to, in effect, apply the provisions of the agreement as they were written and the union grieved. It said the employer was estopped from relying on the strict terms of the collective agreement because of its past practice. Arbitrator Beatty agreed that the employer was estopped even though the matter in issue did not involve an express provision in the collective agreement. The Divisional Court rejected a judicial review application aimed at quashing his decision. Justice Osler said this at p. 245:

> I am aware of no decision by the Court of Appeal to the effect that the doctrine of estoppel by conduct may not in a proper case be applied by an arbitrator. As I have already stated, this is such a case. The reliance by the union on the company's long-established practice and the company's failure to indicate or request any change in that practice led the union not to make any proposals on its part regarding the maintenance or the alteration of that practice and represented an act by the union to its detriment. That act justified the invocation of the doctrine.

[53] *Canadian National Railway* has generated a good deal of debate in the labour relations jurisprudence. A number of arbitrators have followed the case and been prepared to invoke the doctrine of estoppel to prevent an

employer from backing away from a long-standing practice, even if that practice is not directly related to the interpretation or application of a term of a collective agreement. See, for example, *Maple Lodge Farms Ltd. and U.F.C.W., Local 175, supra*; *Sterling Place and U.F.C.W., Locs. 175/633 (Bailey) (Re)* (1997), 62 L.A.C. (4th) 289 (Pineau); *Re Domglas Inc. and United Glass and Ceramic Workers, Local 203* (1983), 9 L.A.C. (3d) 125 (Kennedy). On the other hand, some arbitrators have refused to follow *Canadian National Railway* because, in their view, it takes an overly aggressive approach to the applicability of the doctrine of estoppel. See, for example: *Dana Canada Corp. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 27*, [2006] O.L.A.A. No. 723 (QL) (Brown); *Coca-Cola Bottling Co. and U.F.C.W., Loc. 393W (Re)* (2003), 117 L.A.C. (4th) 238 (Marcotte). A number of the key issues thrown up by the decisions in this area have been explored by M.A. Hickling in *Labouring with Promissory Estoppel: A Well-Worked Doctrine Working Well?* (1983), 17 U.B.C. L. Rev. 183.

[54] Of course, *Smoky River Coal* and almost all of the arbitral decisions on the issue of estoppel were decided before the ruling in *Nor-Man*. As a result, they must be read with some care and with regard to the fact that, as noted above, the Supreme Court has now said that labour arbitrators may "…develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievances of which they are seized." For purposes of resolving this appeal, it is also significant that, in *Nor-Man*, the Supreme Court was not troubled by the

arbitrator's failure to make a finding that the union had intended to effect its legal relationship with the employer. Rather, the question for the Court was whether the arbitrator had "…adapted and applied the equitable doctrine of estoppel in a manner reasonably consistent with the objectives and purposes of the *LRA*, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of Ms. Plaisier's grievance." It follows that this is the root issue in this appeal as well. It is not, as effectively suggested by Viterra, whether the Board applied the doctrine of estoppel in the same way as would a court of law in a non-labour relations context.

[55] In this regard, I note that the most fundamental elements of the doctrine of promissory estoppel are a representation by words or conduct and a detrimental reliance on that representation. The Board found, not unreasonably it seems to me, that Viterra's silence at the bargaining table, against the background of its past practice, was a representation that it would continue to compensate the employees in issue for vacation pay on overtime at vacation entitlement rates. See: Ronald M. Snyder, *Collective Agreement Arbitration in Canada*, 4th ed. (Markham: LexisNexis, 2009) at p. 47. The Board also found, again not unreasonably, that the Union had relied on this representation to its detriment. (The Board made no express reference to the evidence bearing on this point but it would appear *Nor-Man* dictates that this was not fatal.) In the end, therefore, the basic character of the doctrine of promissory estoppel is reflected in the Board's decision.

[56] That said, it is of course true that the Union does not resort to promissory estoppel as a means of preventing Viterra from exercising a legal right which is expressly set out in a collective agreement. However, at the same time, this is not a situation where the practice which is the subject of the

estoppel stands is wholly unrelated to, or disconnected from, the terms of an agreement. Both of the New Agreements provide that "Employees shall be compensated for authorized overtime." The question of how vacation pay should be calculated on overtime is thus part and parcel of the administration of an express term of the Agreements. All of this brings the situation here much more in line with orthodox thinking about estoppel than would be the case if the circumstances were like those dealt with in *Canadian National Railway*, *i.e.* circumstances where the employer's action which is the subject of the estoppel arises beyond the four corners of the agreement.

[57] On this same front, I note alternatively that there are a number of arbitral authorities which proceed on the basis that the "legal relationship" which can engage the doctrine of estoppel in this context is not restricted to one defined exclusively by the terms of the applicable collective agreement. Rather, they suggest that the legal relationship modified by the representations of an employer or a union can, in appropriate circumstances, be seen to be the bargaining relationship that exists between the union and the employer as a result of a certification order. See: Donald J.M. Brown, Q.C. and David M. Beatty, *Canadian Labour Arbitration*, looseleaf, 4th ed. (Aurora: Canada Law Book, 2009) at 2:2214. However, this is not a determinative point in this case and not one which I need necessarily endorse in order to resolve this appeal.

[58] In my view, another key to the conclusion that the Board's decision was reasonable is the nature of the matter in issue between Viterra and the Union. That issue is compensation. This is significant because the labour relations reality is that compensation—here the rate of pay for vacation on overtime—is typically not changed in a unionized workplace in the absence of bargaining.

Arbitrator Pineau put the matter as follows in *Sterling Place and U.F.C.W., Locs. 175/633 (Bailey) (Re), supra*, at pp. 304-305:

> In the present case, as in *Maple Lodge Farms*, the provision of meal benefits on a daily basis is a form of compensation. Compensation is normally not subject to unilateral alteration during the course of a collective agreement. Considering the existence of a six-year practice of paying meal benefits, the absence of any mention at the bargaining table that these benefits would be discontinued made it reasonable for the union to assume that the practice could continue. Considering that the practice continued for a period of eleven months after the collective agreement came into force, to be discontinued only by the successor employer, it is also reasonable to assume that the benefits were intended to continue, at least for the life of the collective agreement.

[59] This same consideration is reflected in the analysis of Arbitrator Brown in *Maple Lodge Farms, supra*. There, he contrasted the outcome in *Canadian National Railway* (where the issue was sick pay) and *Re Rothmans of Pall Mall Canada Ltd. and Bakery, Confectionary and Tobacco Workers' International Union, Local 319T* (1983), 12 L.A.C. (3d) 329 (Picher) (where the issue was management practice in relation to replacing absent workers). Arbitrator Brown wrote as follows at pp. 216-217:

> In my opinion, the opposite outcomes in *CN/CP* and *Rothmans* are explained by the differing nature of the subject-matter of the past practice in the two cases. The past practice in *CN/CP* concerned the payment of sick pay. Sick pay is one form of compensation. Compensation, whether in the form of wages or benefits, normally is not subject to unilateral alteration during the life of a collective agreement. This is part of the climate of collective bargaining, … In this climate, it was reasonable for the union in *CN/CP* to assume that the employer would continue to pay sick employees in conformity with past practice until the agreement expired.…

[60] Finally, although the fact is obviously by no means determinative of the reasonableness of the Board's decision, I note as well that a number of arbitrators have chosen to adopt an approach which is consistent with the one taken by the Board in this case. By way of example, in *Maple Lodge Farms Ltd., supra*, a delivery driver had been paid for collecting accounts from customers even though the collective agreement did not provide for such

payment. The employer indicated that it would no longer compensate the driver for collections and his union grieved, claiming that the employer could not unilaterally alter the long-standing compensation practice. Arbitrator Brown agreed that the employer was estopped and wrote as follows at p. 220:

> In the case at hand, the union relies exclusively upon the employer's practice of compensating drivers for receiving payment, and not upon anything else that the employer said or did. On the evidence before me, I conclude that the employer's conduct induced union representatives to believe this practice would not be terminated during the life of the collective agreement and that this belief was reasonable.
>
> Counsel for the employer contended that the union had failed to prove detrimental reliance. I disagree. The detrimental reliance in this case is precisely the same as in *CN/CP, supra*, and many of the other cases cited above. The union relied to its detriment when it signed the collective agreement and gave up the opportunity of negotiating a change to the contract which would have codified the employer's practice.

See also: *Sterling Place and U.F.C.W., Locs. 175/633 (Bailey) (Re), supra*; *Re Domglas Inc. and United Glass and Ceramic Workers, Local 203, supra*.

[61] Thus, while I do not necessarily accept all of the details of the Board's analysis, I conclude that its decision is reasonable in the sense that, as per *Nor-Man*, it adapted and applied the doctrine of promissory estoppel in a manner reasonably consistent with the objectives and purposes of *The Trade Union Act*, R.S.S. 1978, c. T-17, the principles of labour relations and the nature of the collective bargaining process.

[62] That said, let me add a word of caution or qualification. I certainly do not mean to be taken as having determined that the existence of a long-standing practice with respect to compensation automatically locks an employer into continuing that practice for the currency of a collective agreement. Rather, the better approach is one which recognizes that each grievance is necessarily fact specific. I am in agreement with the general view

of Arbitrator Sims as expressed in *Telus Communications Inc. v. T.W.U., supra*. In dealing with the idea that all compensation practices should remain as the status quo throughout the life of a collective agreement, he said this:

> 108 … I do not accept however a broad statement either of law, or of "the usual bargaining climate", that all compensation matters are assumed to remain in accordance with the status quo. It is a reasonable starting point, but is subject to exceptions. As described above, there are times in bargaining when both parties, either in fact, or from the words they have used in their agreement, tactically accept that some matters, that might have been dealt with between them, will in fact not form part of their collective agreement, but will be dealt with externally.

[63] Before closing, I should also add that I am not persuaded by Viterra's argument to the effect that, because Mr. Chomyn did not know personally about the practice of compensating employees for vacation on overtime at vacation entitlement rates, he could not have represented to the Union that Viterra would continue with that practice. This argument misses the mark on two counts. First, the Board found, and the Union accepts, that this issue was not discussed at the bargaining table. The Union's argument—accepted by the Board—is that Viterra's conduct in compensating employees at vacation entitlement rates, combined with its silence at the bargaining table, amounted to the necessary representation. As I understand it, the Union does not hang its hat directly or exclusively on what Mr. Chomyn himself said or did. Second, and more importantly, it would be inappropriate to allow an employer (or a union) in circumstances of the sort in issue here to escape its otherwise lawful obligations through the expedient of sending an under-informed representative to the bargaining table. In the present situation, the question is what Viterra (the employer) knew and did, not what Mr. Chomyn personally knew and did.

VI. CONCLUSION

[64] I conclude that Viterra's appeal must be dismissed. There are some problems with the Chambers judge's analysis but she made no bottom line error in deciding not to overturn the Board's decision. The Union is entitled to costs in the usual way.

DATED at the City of Regina, in the Province of Saskatchewan, this 10th day of September, A.D. 2013.

"Richards C.J.S."

Richards C.J.S.

I concur "Ottenbreit J.A."

Ottenbreit J.A.

I concur "Caldwell J.A."

Caldwell J.A.