IN THE MATTER OF: AN ARBITRATION

BETWEEN:

THE AGASSIZ TEACHERS' ASSOCIATION

OF THE MANITOBA TEACHERS' SOCIETY,

(hereinafter called the "Association"),

and

THE AGASSIZ SCHOOL DIVISION NO. 13,

(hereinafter called the "Division")

MEMBERS OF THE BOARD:

A. Blair Graham, Q.C. Chairperson
William Summerlus Nominee of the Association
Gerald Parkinson Nominee of the Division

APPEARANCES:

Division: Robert Simpson and Elizabeth Murray
Association: Valerie Mathews Lemieux

A W A R D

INTRODUCTION

This matter came on for hearing on June 13th, 1997.

At the outset, the parties agreed that the matter was arbitrable, and that the Board was properly constituted and had jurisdiction to deal with the grievances, being a grievance brought by the Association, and a series of ten individual grievances brought by members of the Association who are also employees or former employees of the Division.

The Association grievance, and the ten individual grievances put forward the same complaint. The grievances allege that:

> "...the Division has misinterpreted and/or misapplied, and/or violated the provisions of the Collective Agreement, and in particular, Article 307.
>
> As a result of this violation, the division has unreasonably, improperly and unfairly calculated these administrative allowances on the basis of the equivalent of full time teaching positions, rather than the number of actual teachers, under the supervision of the administrators. "

The contentious issue in all of the grievances is the interpretation and application of Section 3.07 of the Collective Agreement. Section 3.07 deals with the administrative allowances to be paid to principals,

vice principals and acting principals. Section 3.07 is relatively lengthy, but quoting from sub section (a) will properly set forth the words which give rise to the difference between the Association and the Division:

> "3.07 ADMINISTRATIVE ALLOWANCES
>
> (a) For the period January 1st, 1992 December 31st, 1992
>
> Principals shall receive an allowance of $470.00 per annum per teacher supervised to a first year maximum of $10,800.00..." (underlining added)

THE EVIDENCE

The evidence presented at the hearing consisted of 14 exhibits introduced by consent, and two witnesses called on behalf of the Association, namely, Al Tymko and Anne Longston. The Division called no witnesses.

Al Tymko is currently retired, but was an employee of the Division for approximately 35 years until his retirement in June, 1996. Mr. Tymko was a principal with the Division from 1972 until his retirement. He was active for many years in the Agassiz Teachers' Association, having been president for two terms, 1993 to 1994 and 1994 to 1995, treasurer of the Association for a period of time, and Chair of the Employee Benefits Committee for approximately ten years.

Anne Longston is also a long time employee of the Division. She was a vice principal in Lac Du Bonnet from 1984 to 1994. In 1994 she became a principal of two adult education centres, and a third in 1995. She continues to be employed by the Division as a principal.

The salient facts emerging from the evidence can be summarized as follows:

> (a) The wording of the current Collective Agreement relating to administrative allowances, with its provision for the payment of per annum allowances "per teacher supervised" is essentially the same as all of the Collective Agreements that have been entered into between the Division and the Association since 1972.
>
> (b) The Division, since 1972, has been paying administrative allowances on the basis of the equivalent number of full time teaching positions under the supervision of principals, vice principals and in some cases, acting principals.
>
> (c) This long standing practice on the part of the Division has resulted in the Division paying less to administrators in administrative allowances than would have been paid if the Division had been paying administrative allowances on the basis of the actual number of teachers being supervised. The discrepancy arises because some of the teachers being supervised are employed on a part-time basis, either because of the nature of their teaching appointments, or because of job sharing or other arrangements.
>
> (d) Exhibit 8 is a calculation illustrating the difference between the administrative allowances actually paid by the Division on the basis of the equivalent number of full time teaching positions being supervised, and what would have been payable by the Division had the allowances been paid on the basis of the actual number of teachers supervised, for the years 1995 to 1996, and 1996 to 1997. The total difference for those two years

is $18,453.00.

(e) For most of the period from 1972 to the present, principals, and vice principals employed by the Division would receive their salary payments, including their administrative allowances by way of direct deposits by the Division into personal bank accounts designated by the principals and vice principals for that purpose. Those individuals would also regularly receive statements from the Division, for most of the period from 1972 to the present, which would provide a breakdown distinguishing between the amount of regular pay being paid, and the amount of administrative allowances being paid for the relevant period.

(f) Anne Longston testified that in June, 1995 she did a calculation of the administrative allowances that had been paid to her for that period, and noted a discrepancy between what had actually been paid to her, and what she thought should have been paid to her based on her interpretation of the Collective Agreement. She raised the issue with some of her colleagues at a windup dinner in June, 1995. She decided to pursue the matter more formally once the fall school term commenced.

(g) In September, 1995, Ms Longston undertook at least two initiatives with respect to the issue. Firstly, she raised the question with the Agassiz Teachers' Association and with the Agassiz Branch of the Manitoba Association of Principals (MAP). Secondly, she contacted the secretary treasurer of the Division, Mr. Hainsworth, and wrote to him by letter dated September 29th, 1995 (Exhibit 4). Ms Longston's letter pointedly stated that it was the belief of her and her colleagues that the Division had been misinterpreting the wording of the Collective Agreement.

(h) In the fall of 1995, Mr. Tymko was active in both the Agassiz Teachers' Association, and the Agassiz branch of MAP, and had been for several years. He testified that to his knowledge, neither association had ever considered this issue prior to it being brought to their attention by Ms Longston in September, 1995. Ms Longston, who had also been active in MAP since 1984, also indicated she was unaware of that organization considering the issue prior to September, 1995. Speaking for himself personally, Mr. Tymko indicated that he had not noted any discrepancy earlier, because he was the type of individual who would get his cheque or statement and just "put it in my drawer". He did not review his statements in detail, or at all.

(i) On cross-examination, Mr. Tymko acknowledged that by referring to his cheque, or other equivalent statement, and by referring to the Collective Agreement with reference to the amount of the allowance, and by referring to the number of teachers or full time equivalents he had supervised in the applicable period, there was "...probably a calculation I could do quite simply.." to determine the basis upon which the Division was paying administrative allowances.

(j) Mr. Tymko observed during his testimony that the practice of using part time teachers, and the practice of job sharing had only become common within the Division during the 1990's. He, therefore, noted that any discrepancy with respect to the payment of administrative allowances in the 1970's and 1980's caused by a difference between the number of actual teachers, and the equivalent number of full time teaching positions being supervised, would be small.

(k) Ms Longston explained that she only noted the discrepancy in 1995 because until 1994 most of the teachers she had supervised as a vice principal in Lac Du Bonnet had been full time teachers. It was only when she became a principal at various adult education centres within the Division that she started supervising staff, a significant portion of whom, depending on enrollment, were less than full time equivalents. In cross examination, she acknowledged that prior to 1994, she had never taken any steps to determine how the administrative allowances were calculated because she knew that they were "in the ball park". She also indicated she was "not a detail person" so she "didn't look at it".

(l) The evidence does establish that part time teachers had been employed by the Division for many years prior to September, 1995.

(m) The communications between Ms Longston, and Mr. Hainsworth in September, 1995 were the first notice the Division had received from any principal or vice principal, or from the Association that the Division's method of calculating and paying administrative allowances was being challenged.

(n) Mr. Hainsworth responded to Ms Longston's letter of September 29th, 1995 by letter dated November 30th, 1995 (Exhibit 7). The response was not considered satisfactory by Ms Longston, or the Association, resulting in the filing of the Association grievance and the ten individual grievances.

THE INTERPRETATION OF ARTICLE 3.07

The first issue to be determined in this arbitration is the proper interpretation of the phrase contained in Article 3.07 of the Collective Agreement directing that principals and vice principals are to receive an allowance of a specific amount of money per annum "per teacher supervised".

Specifically, the question is: Are administrative allowances to be paid on the basis of the number of actual teachers being supervised, as asserted by the Association, or on the basis of the equivalent number of full time teaching positions being supervised, as asserted by the Division?

A corollary issue is whether the wording of Article 3.07 of the Collective Agreement is ambiguous so as to permit the consideration of any extrinsic evidence such as the past practices of the parties, in order to resolve the ambiguity.

It is well settled that in interpreting a Collective Agreement, unless the parties have used a word or phrase in a specialized technical sense, words are to be given their usual and ordinary meaning. Inasmuch as Collective Agreements are usually written, and intended to be read, understood, and administered by the parties themselves, arbitrators should assume that the language used in a Collective Agreement is to be viewed in its ordinary sense, unless an absurdity, or an inconsistency with other terms of the Agreement would result.

I recognize that in some cases what is clear to one person may be ambiguous to another. I also have carefully considered the arguments of counsel for the Division that:

i) the intention behind the payment of administrative allowances is to provide additional compensation to administrators based on the overall staffing component of a particular school or schools; and

ii) the Division has interpreted and applied Article 3.07 in the same way for 25 years, and the Association, therefore, bears the heavy onus of establishing that a change in the interpretation of the article is required.

Notwithstanding those considerations, I am of the view that the subject wording in Article 3.07 is clear and unambiguous.

The phrase "per teacher supervised" refers to the number of actual teachers supervised, not the number of full time equivalents.

Therefore, I find that the Division has incorrectly calculated administrative allowances by doing so on the basis of the equivalent number of full time teaching positions being supervised. The correct calculation would involve administrative allowances being paid instead on the basis of the actual number of teachers supervised.

In view of that finding, it is not necessary here to consider past practice, and whether the long standing practice of the Division in paying administrative allowances ought to be considered in resolving any ambiguity. In my view, there is no ambiguity, and therefore no reason to consider past practice in interpreting the plain and straightforward meaning of the phrase in Article 3.07. However, a finding that the meaning of Article 3.07 is clear and unambiguous does not necessarily resolve all of the matters at issue between the Association and the Division.

ESTOPPEL

The Division asserts that even if the Association's interpretation of Article 3.07 is accepted, the Association is estopped from challenging the Division's method of administering at provision of the Collective Agreement because that practice has been in existence for at least 25 years, and has never before been challenged by the Association. Estoppel, whether promissory estoppel or estoppel by conduct, is a concept that has been widely applied by the courts, and by labour arbitrators for many years. Nonetheless, there are features of this dispute that make it useful to reexamine the basic principles underlying the concept, before deciding whether the Association ought to be estopped from challenging the Division's method of applying Article 3.07 in this case.

The modern source of estoppel as an equitable doctrine incorporated into the common law, is the Judgment of Denning, J. in Central London Property Trust Ltd. vs High Trees House Ltd. [1947], IKB 130. Denning subsequently elaborated upon the concept of estoppel in a series of cases including Combe v Combe [1951] 1 ALL ER 767, where he wrote:

> The principle, as I understand it is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to select the legal relations between them, and to be acted on accordingly, then, once the other party has taken him at *his* word, and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word."

As noted by D.M. Beatty in his decision re CN/CP Telecommunications and Canadian Telecommunications Union (1981) 4 LAC 3rd, 205, at page 207208, Denning has also made the following extra judicial comments about estoppel, indicating that it is applicable in circumstances:

"i) where the parties have already entered into a definite and legal contractual or analogous relationship;

ii) that there must be some conduct or promise which induces the other party to believe that the strict legal rights under the contract will not be enforced or will be kept in suspense; and

iii) that having regard to the dealings which have taken place between the parties, it will be inequitable to allow that party to enforce their strict legal rights."

In circumstances where there has been no specific promise made, Denning has also written:

> "But where the party has made no promise express or implied, and all that can be said against him is that he by his conduct has induced the other to believe that the strict rights under the contract will not be enforced, or kept in suspense, then the position is different because there is no question of good faith no question of a man keeping his word. In those circumstances. it may be necessary for the other party to show not only that he acted, but also that he acted to his detriment in the belief that the strict lights would not be enforced"

Brown and Beatty In Canadian Labour Arbitration (3rd edition) at pare 2.2210 have summarized the elements of estoppel as follows:

> "Thus, the essentials of estoppel are: a finding that there was a representation by words or conduct, which may include silence, intended to be relied on by the party to which it was directed; some reliance in the form of some action or inaction; and detriment arising therefrom."
>
> Are the elements of estoppel present in this case?

The Association says no because in order to make a promise or assurance (or a representation as it has been referred to in many cases) there must be knowledge of all of the relevant facts. The Association argues that it was not until 1995 that they were aware that the Division was paying administrative allowances on the basis of full time equivalents, and not on the actual number of teachers supervised, and therefore, they did not have the requisite knowledge to make a meaningful promise or assurance. The Association also contends that in the absence of knowledge of the practice which they now seek to challenge, their acquiescence in the Division's practice cannot have been "intended to alter the legal relations between the parties"

In contrast, the Division says that the elements of estoppel are present. They argue that their practice with respect to administrative allowances has been essentially unchanged for 25 years, and that their practice has been administered consistently and openly throughout that lengthy period. They also point out that the many principals and vice principals who received administrative allowances over this period, regularly received statements or other information from the Division, that would have enabled them to readily determine the basis for the payment of the administrative allowances. The Division, therefore, asserts that the Association must be taken to have known of the Division's practice, and that their silence from 1972 to 1995 constitutes a representation that they were satisfied with the Division's method of paying administrative allowances.

I have reviewed various authorities that have been referred to me as to whether silence or acquiesce can constitute a promise, or representation sufficient to provide the basis for an estoppel in a labour relations context.

Some of the cases which find that one party or the other is estopped from relying on the wording of a collective agreement are not directly applicable here, because the facts in those cases establish that the party who maintained the silence was specifically aware of the practice which ultimately resulted in a challenge.

In this case, the evidence is that neither the Association, nor the Agassiz branch of MAP were aware of the method of the Division's calculation of administrative allowances until the initiatives undertaken by Ms Longston in the fall of 1995.

I have been referred to a decision of P.S. Teskey in City of Portage La Prairie and The Canadian Union of Public Employees Local 1002 (1993). That case involved an argument relating to whether a union ought to be estopped in circumstances where it was unaware of a long standing management practice with respect to the payment of statutory holiday pay to temporary employees. As a result of that lack of knowledge, the union had never raised the issue with the city, nor included it in any collective bargaining negotiations with the city. Upon becoming aware of the city's practice, the union promptly filed a grievance.

In his decision, arbitrator Teskey reviewed various authorities with respect to whether inaction can constitute conduct resulting in estoppel. He also referred to the words of Denning, L.J. in the Combe v Combe decision referred to above. Arbitrator Teskey summarized his review of the authorities as follows:

> "In each, there is an indication of some action taken, or right foregone, or verbal representation or agreement made by the union which can be taken as evidence that it knows of the practice, and is either not objecting to it, or has in fact agreed to it. In each, the union is at least knowingly, and in some case hopefully, allowing the company to crawl out on the Arthurian limb to retrieve the shield that blunts the saw.
>
> In the present case there is no evidence of any clear knowledge of the company practice. Far less is there evidence of any acquiescence in, or collaboration with the practice which may be said to be evidence of the union's intent to accept the practice which changes the clear meaning of the agreement. The evidence of the company, as has been noted, is that there were no representations from the union, nor negotiations by them on the matter. The issue did not appear to arise in any form."

Arbitrator Teskey also quoted with approval, the following comments of arbitrator Weatherill in Re U.A.W. Local 1524 and General Spring Products Ltd. (1971), 23 L.A.C. 73 at page 77:

> "The doctrine when applied to prevent a party from advancing an argument based on the plain meaning of the words of a Collective Agreement, must surely be applied with the greatest of care. Its affect, in the result, is a determination that the parties really agreed to something different from that set out in the Collective Agreement..."

Accordingly, in the Portage La Prairie case, arbitrator Teskey concluded that there was no evidentiary basis upon which to find that an estoppel existed, and therefore, no estoppel was found.

However, there is at least one important difference between the Portage La Prairie case, and the instant case. Although there is a statement in the reasons in the Portage La Prairie case that the City was not attempting to hide the situation, there is no indication in the reasons that the Union had the means of

readily determining the city's practice. Arbitrator Tesher does not comment on whether his decision would have been different if he had concluded that the union had had the means of determining the employers' practice, particularly over an extended time.

In the current case, it has been established that the Division was not attempting to conceal its practice with respect to administrative allowances. It has also been established that for an extended period information had regularly been provided by the Division to the principals and vice principals affected containing a breakdown between their regular pay, and their administrative allowances. That information, coupled with the amount of the allowance per teacher specified in the applicable Collective Agreement, and their own knowledge of the number of teachers they were actually supervising (or the full time equivalents they were actually supervising) would have enabled them to determine the basis of the Division's calculation of their allowances.

I accept without question the evidence of both Mr. Tymko and Ms Longston that they did not personally turn their minds to the issue prior to 1995, for reasons that are perfectly understandable. However, their personal circumstances and habits cannot be determinative of the issue as between the Division and the Association, if it is reasonable to conclude that the Association knew or ought to have known of the practice being followed by the Division.

In that regard, it is noteworthy and relevant that:

a) The Division's practice with respect to administrative allowances had been in place for 25 years; and

b) Based on Exhibit 8 there were 13 principals and vice principals who would have had their administrative allowances calculated and paid according to the Division's interpretation of the Collective Agreement, and who would have received monthly statements as to those payments. Moreover, Exhibit 8 relates to only 2 of the 25 years the practice had been in place. It is, therefore, reasonable to conclude that over the 25 year period significant number of administrators would have received hundreds of statements enabling them to determine the basis upon which the Division was calculating administrative allowances.

c) Although the utilization of part time teachers likely increased in the 1990's, part time teachers had previously been a component of the staffing arrangements within the Division.

Bearing the foregoing factors in mind, I find the comments of arbitrator of M.G. Picher in the case Re Board of Commissioners of Police for the City of Owen Sound (1984) 14 LAC (3rd) page 46, at page 56 to be apt:

> "Most significantly, Collective Agreements are made and renewed under a collective bargaining system which contemplates a sustained relationship between the parties. They are not, like many commercial contracts, entered into on a one time basis, or concluded by the discharge of a single arbitration. Consequently, the Collective Agreement is not unlike a constitutional document which, through its ongoing application and successive re-negotiation, shapes the mutual expectations of the parties. Those expectations are, therefore, reflected in large measure in the past practice of the parties. Critical to the process are the ongoing responses of each of them to any changes in an established practice of the other. It is, therefore, not surprising that the acquiescence of the parties in a long standing practice, or in a change in practice can be a significant component

> in the application of their Collective Agreement.
>
> With the foregoing principles in mind, I turn to consider the facts of the instant case as they apply to the issue of estoppel. In my view it is significant that the formula by which the Board of Commissioners calculated sick leave credits was at all times readily accessible to the members of the Association. This is not a circumstance where a complex calculation was left entirely in the hands of management's and implemented through the workings of a computer... There is no reason why a diligent employee or representative of the Association could not, by the application of a reasonable degree of care have scrutinized and fully understood the interpretation of Article 14 which was at all time reflected in the records of the Board of Commissioners... Consequently, the Association and its members had all of the tools necessary to monitor, and where appropriate, to object to the application of Article 14 by the Board of Commissioners."
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> **In the same case, arbitrator Picher wrote:**
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> "While there is no evidence before me either way on whether the Association knew of the Board of Commissioner's practice with respect to computing sick leave credits over many years, I am satisfied given the figures which were at all times available to the Association, that it reasonably should have known how Article 14 was being applied. To put it differently, for many years the Association had constructive notice of the employer's calculation of sick leave credits. It would be inequitable to let it now assert the rights of an ignorant party which has just discovered a violation of its rights. The Board of Commissioners has relied on the acquiescence of the Association, and has accordingly geared its financial planning and expectations for the life of the current Collective Agreement."

In a similar vein, I am also in agreement with the following statement of the arbitrator in Re Toronto Transit Commission and Amalgamated Transit Union. Local 113 (1992) 26 LAC (4th) 196 at 203:

> "In this case, we must impute knowledge of the practice to the union. Fiftyeight people over a period of nine years were treated the same way as Mr. Entmaa. Four of those people were union executives."

In both the City of Owen Sound case and the Toronto Transit Commission case, an estoppel was found to operate in circumstances where the party estopped may not have had actual knowledge of the long standing practice of the other side, but where the party estopped had the means of becoming aware of the practice, or could have become aware of the practice upon reasonable inquiry.

Pragmatism and fairness must be considered in these circumstances. The Division has followed its practice with respect to administrative allowances openly and consistently for 25 years. The Division is entitled to conclude that the Association knew of the practice, and had accepted it.

It would be both unfair and impractical if the Association were able to insist that the basis of the payment of administrative allowances be immediately changed, or changed retroactively.

I have concluded that the Association by its silence has conducted itself for an extended period in a way that entitled the Division to conclude that the Association has knowingly accepted that administrative allowances will be paid on the basis of full time equivalents. Therefore, the first two elements of estoppel, namely a promise or assurance through words or conduct, which has the effect of altering the legal relations between the parties, are present in this case.

I have specifically considered the argument of counsel for the Association that at least one essential element of estoppel is not present in this case because the Association cannot have given a promise that was intended to alter the legal relations between the parties since it did not have knowledge of the Division's practice with respect to Article 3.07. I do not accept that argument. As indicated above, I have concluded on the basis of the authorities referred to that it would be unfair to allow the Association to immediately assert its rights under Article 3.07, given the 25 year practice of the Division. The Association could have known, and arguably should have known of the Division's practice. In essence, I am ruling that the Association had constructive notice of the Division's practice, and their acquiescence in the practice has had the effect of altering the legal relations between the parties with respect to Article 3.07. In my view, this sufficiently fulfills the intention requirement.

Recognizing that this is not a case where an express promise or undertaking has been made by the Association permitting the Division to change the basis for paying administrative allowances under Article 3.07, the Division must also establish that it has relied upon the Association's conduct to its detriment. As Denning, L.J. stated in one of the quotations earlier referenced, in the absence of an express promise:

> "...it may be necessary for the other party to show not only that he acted, but also that he acted to his detriment, in the belief that the strict rights would not be enforced."

Several cases, including Re Kemptville District Hospital and Ontario Nurses Association, (1988) 1 L.A.C. (4th) 360, and Re Lake Ontario Cement Ltd. and United Cement Lime and Gypsum Workers International Union. Local 387 (1984) 13 L.A.C. (3rd) 1, have ruled that a lost opportunity to re-negotiate an alternative position constitutes the necessary detrimental reliance.

The Division in this case has foregone several opportunities to negotiate alternate wording of the administrative allowance provision, including the opportunity to re-negotiate the wording of Article 3.07 prior to entering into the 19921994 Collective Agreement. The Division had no way of knowing such a re-negotiation was necessary in order to maintain its method of calculating and paying administrative allowances. The Division, therefore, has relied to its detriment on the Association's apparent acceptance of the Division's calculation, and payment of those allowances.

All of the elements of estoppel are present in this case, and I accordingly find that the Association is estopped from insisting the Division pay additional administrative allowances retroactively, on the basis of the number of teachers supervised by the individual grievors.

DURATION OF THE ESTOPPEL

Having determined that an estoppel operates in this case, it must still be determined at what point the estoppel ends. As has been noted by other arbitrators, estoppel suspends but does not extinguish a party's contractual rights.

Counsel for both parties have referred to various cases which consider the issue of when an estoppel ought to end. I have reviewed those cases and several others referenced therein to determine if any clear principles have been enunciated that could usefully be applied to this case.

When an estoppel operates, one party has failed or neglected to enforce its strict rights under an agreement. The cases establish that when that party decides to enforce its rights, it can only do so "reasonable notice" to the other party.

However, what constitutes reasonable notice can vary greatly. Many of the cases are decided on their own particular facts, and are not particularly helpful in setting forth principles which provide guidance in other cases.

Counsel for the Association has indicated that the Association is not seeking a retroactive adjustment for any period prior to when the grievance was filed. It is her submission that if a finding of estoppel is made, it should cease as at the date the grievances were filed, or at the very latest, approximately six months after the grievances were filed.

She points out that this matter was brought to the Division's attention at the start of the 1995 1996 school term, and it is now almost two years later. She argues that it would be unfair for the Division to have the financial benefit of its own incorrect interpretation of the Collective Agreement for a full two years after Ms Longston and the Association brought this issue to the Division's attention.

The Association is acting fairly and reasonably in not seeking a retroactive adjustment prior to the date of the grievances being filed. Moreover, their argument that the Division ought not to be permitted to enjoy the benefits of their own faulty interpretation of Article 3.07 for an extended period after the filing of the grievances, would be persuasive if the test for determining what constitutes a reasonable notice of an intention to adhere to the wording of the Collective Agreement is purely a temporal one.

If the test is a temporal one, there are at least three possible dates upon which the estoppel might end. There are reported decisions supporting each of those possible dates:

1. The date the grievance was filed, on the basis that the filing of a grievance puts the party receiving the grievance on clear notice of the grievor's altered position; (Re Rahey's Supermarket of North Sidney and Retail Wholesale and Department Store Union Local 596 (1987) 30 LAC (3rd) 65.
2. A date between the filing of the grievance, and the arbitration Award, on the basis that the party receiving the grievance has an opportunity to consider its position, to obtain advice, if necessary, and to take whatever other steps are available to it to organize its affairs so that it can deal with the consequences of a reversion to the strict wording of the Collective Agreement (Re Triangle Mechanical Ltd. and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry. Local 488 (1984) 15 LAC (3rd) at 400.
3. The date of the arbitration Award or some date referable to the Award, on the basis that until the Award is made known, neither party is aware of the correct interpretation of the Collective Agreement (Re Pacific Western Airlines and International Association of Machinists and Aerospace Workers (1985) 22 LAC (3rd) at page 111.

However, counsel for the Division argues that the test to determine what constitutes reasonable notice should not be based on purely temporal considerations, but rather on an analysis as to when the party who has been relying on the other party's inaction is able to "adjust their affairs" as a consequence of the change in the other party's position, or is able to "exert economic consequences" on the other party if they are unable to resolve their differences consensually.

If that test is accepted, at least two other additional dates emerge as possible dates for the termination of the estoppel:

1. The date of the expiry of the applicable Collective Agreement, on the basis

that the parties are only able to effectively "adjust their affairs" once the results of their negotiations towards a new Collective Agreement are known or substantially known;

2. Potentially a later date in the case of a statutory freeze period, or until the end of the period during which a statute has extended the Collective Agreement, on the basis that it is only then that the parties are free to use economic weapons such as a strike or lockout.

An informative discussion of that approach to determining the point at which an estoppel ends, and the various possible dates that might be chosen based on that approach is found in Re Sanamish Terminals Ltd. and International Longshoremen's and Warehousemen's Union. Local 514 (1992) 25 LAC (4th) 116. Brown and Beatty in Canadian Labour Arbitration (3rd ed) at paragraph 2:2210 also refer to two cases which I have reviewed dealing with periods during which a statute has extended the Collective Agreement, namely, Government of the Province of Manitoba (1993), 34 L.A.C. (4th) 116 (Teskey), and Metropolitan Toronto Zoo (1995), 47 L.A.C. (4th) 336 (Hunter).

In this case, a statutory freeze can be said to prevail. Alternatively, this case falls into the category described by Brown and Beatty as involving a period during which a statute has extended the Collective Agreement.

The statutory context in which this case must be decided is different than that considered in any of the cases that I have reviewed.

Section 112(b) of *The Public Schools Act RSM* provides as follows:

112 "EFFECT OF NOTICE GIVEN UNDER SECTION 110
Where a party to Collective Agreement has given notice under Section 110, the other party to the Agreement ...

b) If a renewal or revision of the Agreement, or a new Collective Agreement has not been concluded before expiry of the term, or termination of the Agreement, the School Board shall not, without consent by or on behalf of the teachers affected decrease rates of pay, or alter any other term or condition of employment in effect immediately prior to the expiry or termination provided for in the Agreement until

i) a renewal or revision of the Agreement, or a new Collective Agreement has been concluded, or

ii) A Board of Arbitration appointed to consider the matter under dispute has made an Award, and seven days have elapsed after copies have been mailed to the School Board and the bargaining agent;"

Teachers in Manitoba have foregone their right to strike in exchange for the arbitration provisions in Section 112(b)(ii). In situations where a new Collective Agreement has not been concluded before the expiry of the old, a School Board is unable to decrease rates of pay, or alter any other term or condition of employment, until a new Agreement has been completed between the parties, or until the decision of a Board of Arbitration is made known.

The result can be a lengthy statutory "freeze" during which a Collective Agreement remains in force long after its normal expiry date, and during which the teachers do not have any right to strike, and the

Division is unable to lockout, decrease rates of pay, or otherwise alter terms or conditions of employment.

The last Collective Agreement concluded between the Division and the Association was to remain in force until December 31st, 1994.

Counsel for the Division argues strenuously on the basis of the principles enunciated in Squamish Terminals that the estoppel in this case should end once the statutory freeze period ends, which will be upon the parties concluding a new Collective Agreement or upon the award of an arbitration panel under Section 112(b)(ii). However, the parties have been unable to conclude a new Collective Agreement, and no arbitration award under Section 112(b)(ii) has been made.

The Division argues that the estoppel should end when the statutory freeze period expires, because until then, the Division is not in a position to exert any meaningful economic consequences if the negotiations with the Association fail to produce an agreement.

However, given the unique statutory freeze provisions in *The Public Schools Act,* the reality is that both parties are either prohibited from, or effectively constrained from ever exerting the most influential economic consequences normally applied in a labour relations context, such as a unilateral reduction in wages, a lockout or a spike. In other words, the scheme created by Section 112(b)(ii) of *The Public Schools Act* means that neither party may ever be in a position to exert the type of economic consequences contemplated by Squamish Terminals. Therefore, although the reasoning in Squamish Terminals may be compelling on its own facts, and could be usefully applied to many of the other cases dealing with estoppel, I find the principle of limited utility in the context of this case.

Another anomaly created by the unique statutory provisions in *The Public Schools* Act is that if a new Collective Agreement is put in place by an arbitration under Section 112(b)(ii), then the effective date of the new Collective Agreement would be January, 1995. The same result might occur if the parties ultimately agreed to a renewal or revision of the 1992 to 1994 Collective Agreement, or a new Collective Agreement. January 1st, 1995 is almost a year prior to the filing of the grievances in this case. Caution, therefore, must be exercised to prevent a ruling in this arbitration that would result in Article 3.07 being interpreted and applied as this Award requires, effective January 1st, 1995.

I am also not convinced that the Division is correct when it asserts that during the statutory freeze, it is effectively without any ability to "adjust its affairs" at least to the extent necessary to adequately respond to the requirement that it properly administer Article 3.07. I acknowledge for the reasons referred to above, that it is unable to exert economic consequences such as reducing wages or locking out its teaching staff. However, it may be open to the Division within the provisions of the Collective Agreement of 1992 1994 which has been statutorily extended, to reduce the incidence of job sharing or to otherwise adjust its staffing pattern to minimize the impact of having to correctly administer Article 3.07. Such staffing adjustments may be anathema to the Association, and unpalatable to the Division. I am not suggesting that the Division should undertake such steps. They may be unnecessary and unfair. Nonetheless they may represent available options, sufficient in the circumstances to enable the Division to adjust its affairs.

Furthermore, there may be other types of financial adjustments that the division is able to make that do not involve any staffing changes, or any other changes that involve the operation or the application of the collective agreement.

Principles of both fairness and pragmatism must also influence the determination of when the estoppel ends.

I think it is both fair and practical that the estoppel end within a period of time from the date of this Award.

The Division has now had ample notice of the Association's desire to interpret Article 3.07 on the basis of the number of actual teachers supervised. The Association must recognize that its years of silence on this issue, when it had the information available to it to both determine and challenge the Division's application of Article 3.07, has led the Division to reasonably conclude that the Association has accepted its interpretation of Article 3.07.

The granting of this Award constitutes notice to the Division that its previous interpretation of the article was wrong. The Division has now had sufficient time to consider what, if anything, it can do to lessen the negative consequences of having to administer Article 3.07 pursuant to the interpretation set forth in this award.

It would also be unfair to the Association and its members to allow the effect of the Division's incorrect interpretation of a provision which has been found to be clear and unambiguous to persist until a new Collective Agreement has been agreed to, or until a new Collective Agreement has been set by arbitration, without any other time limit being imposed. As at the date of this Award it is impossible to determine when either of those events may occur.

In practical terms, the Division is now able to make an informed assessment as to whether any adjustment in its affairs is necessary in order to deal with the impact of this ruling, and if so, to take whatever steps are available to it within the unique statutory context that prevails. It should be given a relatively brief period of time to do so.

Accordingly, I have decided that the estoppel will end upon the commencement of a new collective agreement, or January 1, 1998 whichever date is earlier. In other words, if a new collective agreement is not in place by January 1, 1998, the Division will be required to pay administrative allowances on the basis of the actual number of teachers supervised from and after January 1, 1998.

DECISION

In summary, I am ruling that:

1. The Division has incorrectly calculated administrative allowances by doing so on the basis of the equivalent number of full time teaching positions being supervised by various administrators. The correct calculation should involve administrative allowances being paid instead on the basis of the actual number of teachers supervised;
2. For the reasons indicated herein, the Association is estopped from insisting that the Division pay additional administrative allowances retroactively;
3. The estoppel will end as of the commencement date of a new collective agreement, or January 1, 1998, whichever date is earlier.

The outcome in this case is brought about by the unique statutory framework created by the Public Schools Act. This result may therefore not be applicable in a broad range of cases.

DATED the 17th day of September 1997.

A. BLAIR GRAHAM, CHAIR