

**ARBITRATION AWARD**

BETWEEN:

FISH, FOOD AND ALLIED WORKERS UNION (FFAW/CAW)  
(hereinafter called the "Union")

AND:

MOLSON CANADA, ST. JOHN'S  
(hereinafter called the "Company" or the "Employer")

GRIEVANCE: Policy Grievance

COUNSEL: For the Union

Greg Pretty

For the Employer

Harold M. Smith, Q.C.

ARBITRATOR: James C. Oakley

The arbitration hearing was held at St. John's on October 8, 2010. The parties agreed as follows:

1. The Arbitrator was acceptable.
2. There were no preliminary objections going to jurisdiction to hear the grievance.
3. The grievance procedure was properly followed or any requirements waived.
4. The Arbitrator would remain seized of the matter for thirty (30) days, following publication of the Award, in the event there is a question of interpretation or compensation arising from the Award.

The following exhibits were entered at the hearing:

- Consent 1 - Collective Agreement between Molson Canada, St. John's and Fish, Food and Allied Workers Union (FFAW/CAW) dated 2006 to 2012
- Consent 2 - Grievance Form, Grievance No. 02183 dated January 15, 2010
- Consent 3 - Letter dated February 18, 2010 from John Buckley, Brewery Manager to Gerry Nurse, Chairperson for the Union denying the grievance
- SL - 1 Minutes of labour-management meeting held on June 18, 2008
- SL - 2 Minutes of labour-management meeting held on September 11, 2008
- SL - 3 Minutes of labour-management meeting held on October 23, 2008
- SL - 4 Minutes of labour-management meeting held on February 11, 2009
- SL - 5 Minutes of labour-management meeting held on April 23, 2009
- SL - 6 Collective Agreement between Molson Canada, St. John's and Fish, Food and Allied Workers Union (FFAW/CAW) dated 2002 to 2006
- SL - 7 Vacation Guidelines for St. John's Unionized Employees Effective May 1, 2009, amended May 14, 2009
- SL - 8 Minutes of labour-management meeting held on May 21, 2009

- SL - 9            Vacation Guidelines for St. John's Unionized Employees Effective May 1, 2009, dated December, 2008
- SL - 10          Vacation Guidelines for St. John's Unionized Employees Effective May 1, 2009, amended April 23, 2009

### **Nature of the Grievance**

The Employer introduced vacation guidelines effective May 1, 2009. The Union grieved that the guidelines violated Article 20.02 of the Collective Agreement. The Union submitted at the arbitration hearing that the Employer was estopped by its past practice from introducing the guidelines. The Employer submitted that scheduling vacation is a management right of the Employer, the guidelines did not violate the Collective Agreement, and estoppel did not apply.

### **Collective Agreement**

The relevant Articles of the Collective Agreement are as follows:

#### Article 20 - Vacations

20.01 Vacation Leave - As of May 1<sup>st</sup> in each year and based on seniority attained up to that day, employees will be entitled to paid vacations as follows:

- (a) Employee on the seniority list having less than 12 months seniority - 1 week.
- (b) Employees with 12 months seniority or more but less than 3 years - 2 weeks.
- (c) Employees with 3 years seniority but less than 8 years - 3 weeks.
- (d) Employees with 8 years seniority but less than 15 years - 4 weeks.
- (e) Employees with 15 years seniority but less than 20 years - 5 weeks.
- (f) Employees with 20 years seniority but less than 25 years - 6 weeks.
- (g) Employees with more than 25 years - 7 weeks.

- (h) If any of the holidays provided for in Article 19 above fall within an employees vacation, the employee shall receive one days pay for each of such holidays in addition to his regular vacation payment, unless by mutual agreement between the employee and the Company the employee is given another day off with pay in lieu of such holiday. Such lieu day shall be scheduled by mutual agreement between the employee and the Company.

20.02 Summer vacation schedules shall be posted by February 15<sup>th</sup> of each year. Employees shall be required to indicate their preference of vacation prior to March 1<sup>st</sup>. Employees will be notified by the Company of their approved vacation schedule by April 1<sup>st</sup>.

Any employee who fails to indicate his preference of summer vacation prior to March 1<sup>st</sup>, shall forfeit his right to displace employees with less seniority who have indicated their preference prior to March 1<sup>st</sup>. Subsequent to March 1<sup>st</sup>, the available vacation slots will be filled on the basis of seniority.

Summer vacations shall be limited to two (2) weeks for employees with less than eight (8) years seniority and three (3) weeks for employees with more than (8) years seniority and shall be scheduled between June 1<sup>st</sup> (effective January 1<sup>st</sup>, 2007) and the third week of September inclusive. Where practical, vacation may be taken outside this period if mutually satisfactory to an employee and the Company.

Additional weeks of vacation for employees with three (3) or more years of service shall be taken outside the regular summer vacation period. Vacation requests shall be decided on a seniority basis and the Company will not refuse vacation requests for the purpose of preserving vacation weeks for the annual maintenance shutdown and Christmas shutdown. It is further understood that, subject to the provisions of the seniority clause, unused vacation weeks may be scheduled during the annual maintenance shutdown and Christmas shutdown.

...

#### Article 24 - Miscellaneous Clause

- (a) Amendments to this Agreement may be made only by mutual consent of both parties. Proposed amendments shall be submitted in writing by the party desiring a change, and negotiations thereon shall start within thirty (30) days of such notice. During negotiations, and thereafter if no agreement is reached, the provision of this Agreement shall remain in effect.

...

## **Legislation**

The *Labour Standards Act*, RSNL 1990 c. L-1 states in part as follows:

Annual vacation with pay

...

8 (2.1) The employer shall, unless the employer and employee agree upon shorter periods, permit the employee to take the annual vacation

(a) in one unbroken period of 2 weeks; or

(b) in 2 unbroken periods of one week, each

if the employee, not later than the date on which the employee becomes entitled to the annual vacation, gives the employer written notice of the intention to take the vacation by either of the methods specified in paragraphs (a) and (b).

...

(5) Where an employer cancels, or changes the dates of the employee's annual vacation after having given the notice to the employee required by subsection (4), the employer shall reimburse the employee for reasonable expenses incurred by the employee with respect to the cancelled or changed vacation that are not otherwise recoverable by the employee.

## **Evidence**

The witness called by the Union was Steve Lawlor, brewing department. The witness called by the Employer was John Buckley, brewery manager. The bargaining unit at the Molson brewery in St. John's has about 53 full time active employees with vacation rights. John Buckley testified that there are 17 employees who have more than 25 years seniority, and are entitled to 7 weeks vacation under Article 20.01. There is one employee with more than 20 years seniority, but less than 25 years seniority entitled to 6 weeks vacation. The remaining employees have less than 15 years seniority and are entitled to varying amounts of vacation between 1 week and 4 weeks. The bargaining unit includes employees who were employed at the former Carling O'Keefe brewery. Steve Lawlor is one of those employees. He has 30 years seniority. He testified that, in 1990, the bargaining units at Carling O'Keefe and Molson were combined. At that time there were about 80 bargaining unit employees.

Steve Lawlor testified about vacation scheduling practices prior to the introduction of the vacation guidelines on May 1, 2009. The Company posted a vacation schedule in mid February. Employees had 2 weeks to select vacation on the schedule for the summer period in accordance with Article 20.02 of the Collective Agreement. There was no similar vacation scheduling process at any other time of the year. Mr. Lawlor testified that he could take one day vacations at any time outside the summer period so long as his supervisor agreed. He could be allowed a one day vacation on a Friday on short notice, if there was no brewing operation that day. Mr. Lawlor said any employee could be approved for one day allotments of vacation without any maximum limit. He testified that, of his 7 week vacation entitlement, he usually takes 3 weeks vacation in the summer, 1 week in October, 1 week at Christmas and the rest in 1 day allotments. He said that all the supervisors since 1990 had followed the same practice of allowing vacation days. Approval of vacation was made by the supervisor and not by plant management. Some supervisors allowed employees to carry over unused vacation days from one vacation year to the next. Mr. Lawlor said that outside the posted summer vacation period, a senior employee could bump a junior employee out of a planned vacation day. He has observed a junior employee become upset if a senior employee bumped him out of his vacation.

John Buckley testified about the reasons the Company introduced the vacation guidelines. He said that the volume of production was increasing. In 2009, the brewery incurred significant overtime costs, some of which was related to vacation scheduling. Mr. Buckley testified that every year near the end of the vacation year, there were a lot of senior employees who had not used their vacation entitlement for that year. As a consequence, it was difficult to schedule vacations without incurring overtime costs. For reasons of health and safety, the Company wanted employees to use their vacation entitlement each year and not to have unused vacation to carry over to the next year. The Company also wanted to encourage use of vacation in one week blocks and to have vacation scheduled in advance. Mr. Buckley said there was no consistent application by team leads of vacation scheduling. The vacation guidelines were introduced so that the Collective Agreement could be administered consistently without conflict between employees. Mr. Buckley also testified that the practice of allowing senior employees to bump junior employees from scheduled vacation created hostilities. The Company wanted employees to do more advanced planning of vacation scheduling.

Steve Lawlor testified that at the labour management meeting on June 18, 2008, Company representatives advised that the Company was reviewing the vacation guidelines. The Company

advised that it wanted to ensure that all employees used their vacation entitlement within the current vacation year. The Company advised that scheduling conflicts at the vacation year end were contributing to escalating costs. The Union response at that time was to “wait and see”. At the labour management meeting on September 11, 2008, the Union was advised that the Company was in the final stage of drafting the guidelines. The Union advised the Company that the Collective Agreement dealt with the issue of vacation scheduling. At the labour management meeting on October 23, 2008, the Company advised the Union that it would be sending vacation guidelines to the Union to review. The Union told the Company that it would not be supportive of the vacation guidelines. The guidelines were given to the Union executive on November 7, 2008. The same guidelines were sent to the bargaining unit employees with their pay stubs in November, 2008. Mr. Lawlor testified that Union members indicated at a meeting that they did not support the vacation guidelines. At the labour management meeting on February 8, 2009, the Union reiterated that it did not support the guidelines. At the labour management meeting on April 23, 2009, the Company presented amended vacation guidelines. The Union did not support the amended guidelines.

John Buckley testified that the Union executive advised him on February 11, 2009, that the Union wanted past practice and the Collective Agreement language to continue and did not support the guidelines. Mr. Buckley asked for informal feedback from department heads and team leads. Based on this feedback, some changes were made to the draft guidelines. For example, the draft guidelines allowed a maximum of 5 single days vacation in one year. Team leads requested that they have flexibility to grant more than 5 days where the circumstances justified it. The vacation guidelines that were implemented by the Company stated as follows:

## MOLSON

### Vacation Guidelines for St. John’s Unionized Employees Effective May 1, 2009

#### PURPOSE

To establish vacation guidelines to be consistently applied across all departments for bargaining unit employees eligible for vacation entitlement as per St. John’s Brewery Collective Agreement.

#### POLICY

The company requires employees to take their full annual vacation entitlement during the current vacation year. Molson’s philosophy is that people need time off as a matter of health and safety. Vacation is an earned entitlement for employees. We require employees to take that entitlement.

### VACATION YEAR

The vacation year runs annually from May 1 to April 30 as per Article 20.01 of the Collective Agreement.

### SERVICE DETERMINATION DATE

Vacation entitlement will be determined by the seniority attained up to May 1<sup>st</sup> each year.

### ENTITLEMENT TO VACATION

1. Regular, full-time seniority employees who are not absent from work as of May 1<sup>st</sup>, for 104 weeks or more, shall be entitled to vacation in accordance with their length of seniority as at May 1<sup>st</sup> of each year.
2. Temporary, part time, casual or seasonal employees shall be entitled to vacation pay in accordance with the *Labour Standards Act* as determined at May 1<sup>st</sup> each year.

### VACATION SCHEDULING

All vacation must be **scheduled and used** within the vacation year (May 1<sup>st</sup> to April 30<sup>th</sup>)

Employees are required to book vacation in one week blocks except as noted within these guidelines. Blocks of 1 week may be selected as follows:

- For employees normally scheduled Monday to Friday, the week shall run from Monday to Friday
- For Shift Engineers working a 12 hour schedule, the week shall run from 8 pm on Monday until 8 pm the following Monday.

### SUMMER VACATION PERIOD

All employees entitled to vacation with pay must indicate their preference for the summer vacation period on the posted vacation schedule between February 15<sup>th</sup> and March 1<sup>st</sup>. Any employee who fails to indicate their preference of summer vacation prior to March 1<sup>st</sup> shall forfeit their right to displace employees with less seniority who have indicated their preference of summer vacation prior to March 1<sup>st</sup>.

Where practical, employees entitled to either two or three weeks vacation, may schedule and take their applicable vacation entitlement outside the summer period if mutually satisfactory to an employee and the Company.

Summer vacations shall be limited to two weeks for employees with less than eight (8) years seniority and three (3) weeks for employees with more than eight (8) years seniority and shall be scheduled between June 1<sup>st</sup> and the third week of September inclusive. The company may allow an employee to take additional vacation time beyond these limits during the summer vacation period if unused vacation weeks are

available, the necessary operational skills needed during this time are met and no additional costs will be incurred by the company.

Where preferences expressed on the vacation roster between February 15<sup>th</sup> and March 1<sup>st</sup> conflict, selection will be made on the basis of seniority. Where a preference is not able to be accommodated due to seniority the company will meet with the employee to determine if there is an alternate period of vacation from available slots in the June to September period, and the employee will be scheduled accordingly.

#### VACATION FOR THE REMAINDER OF THE YEAR

A second vacation schedule will be posted on September 1. Employees with remaining vacation entitlement shall indicate their preference of vacation for the remainder of the vacation year prior to September 21<sup>st</sup>. Any employee who fails to indicate his preference of vacation for this period shall forfeit his right to displace employees with less seniority who have indicated their preference prior to September 21<sup>st</sup>. Where preferences expressed on the vacation roster between September 1<sup>st</sup> and September 21<sup>st</sup> conflict, selection will be made on the basis of seniority.

Employees who fail to indicate their preference for all or any of their vacation entitlement by September 21<sup>st</sup> will have their remaining entitlement approved by the company, generally upon a “first come first served basis”, subject to the operational needs of the Brewery.

The Company will not refuse vacation requests for the purpose of preserving vacation weeks for the annual maintenance shutdown and Christmas shutdown. It is understood that subject to the provisions of the seniority clause, unused vacation weeks may be scheduled during the annual maintenance shutdown and Christmas shutdown.

#### ADVANCE SCHEDULING OF VACATION

All vacation shall be scheduled in advance. No period of absence shall be treated as vacation retrospectively.

#### COMPANY DIRECTED VACATION

Vacation entitlement that has not been scheduled off by employees prior to the second Friday in January will be scheduled off for the employees by the Company in accordance with company requirements.

#### SINGLE DAYS OF VACATION

Employees can assess up to five (5) single days of vacation entitlement at any point throughout the year, provided the guidelines below are followed:

1. Any vacation period of less than one (1) week must be discussed and approved by the employee's Team Leader prior to the Thursday posting of the weekly work schedule under Article 16.16 of the Collective Agreement.
2. No request, "phoned in," or requested on the day, or including the days sought, will be granted.
3. Should an employee fail to request vacation entitlement of any duration prior to the Thursday work schedule being posted under Article 16.16 of the Collective Agreement vacation entitlement requested will ordinarily not be granted unless:
  - (a) Two (24) hour days notice is provided prior to the proposed start of the vacation entitlement; **and**;
  - (b) Coverage of the employee's position is available without incurring overtime or other premium pay.
4. Exceptions to points 1-3 above may be made at the discretion of the team leader and/or department manager to accommodate extenuating circumstances.

Any proposed vacation period extending beyond three (3) weeks must have the written approval of **both** the Team Leader and the Department Manager before it will be considered.

Employees who are on weekly indemnity near the end of the vacation year and remain eligible for vacation will be scheduled for vacation in accordance with 20.07 of the Collective Agreement.

#### ADVANCING OF VACATION DAYS

Advancing of vacation days is not permitted. Vacation days must be earned before leave is granted.

#### CARRY-FORWARD OF VACATION DAYS

There is no carry forward of vacation days. Vacation must be taken during the period of May 1<sup>st</sup> to April 30<sup>th</sup> of each vacation year.

#### CASH OUT OF VACATION DAYS

Where, by reason of the operational requirements of the Brewery, an employee is unable to use their additional vacation before April 30<sup>th</sup>, upon approval of the Brewery Manager, such vacation will be converted to cash and paid out in a lump sum payment. Approval by the Brewery Manager will require a full and satisfactory explanation from the Employee's Team Leader/Supervisor as to how, or, why the employee was prevented from using their scheduled vacation before April 30<sup>th</sup>.

#### TERMINATION OF EMPLOYMENT

As per Article 20.03 employees who retire, quit, or are discharged, shall be entitled to equivalent vacation pay upon termination.

#### ADMINISTRATION TRACKING

Team Leaders and Supervisors are responsible for managing this policy and for ensuring that appropriate administrative records are kept and are accurate. Team Leaders are also responsible for recording vacation on each employee's electronic time sheet.

Employees are responsible for reviewing their pay stubs on a bi-weekly basis to ensure that their pay and vacation bank is correct. Any discrepancies must be reported to a Team Leader or Supervisor within two (2) weeks.

#### EXCEPTIONS

There will be no exceptions to this policy permitted unless they are approved by the Department Manager and Brewery Manager.

Mr. Buckley testified that the Company was not amending the Collective Agreement, but simply creating structure around how to administer the Collective Agreement. He testified that seniority was accommodated under the guidelines outside the summer period by providing a sign-up sheet in September to allow selection of vacation by seniority. If no one signed up during this window of opportunity, then vacation would be scheduled on a first come, first served basis, subject to the needs of the brewery. The fall vacation sign-up sheets were in the same form as the summer sign-up sheets. A junior employee who had signed up could not be bumped out of vacation by a senior employee. Mr. Buckley said the revised guidelines allowed for exceptions to the maximum of 5 single days in one year. He said he did not ask the Union to renegotiate the vacation article in the Collective Agreement, because he did not believe it was necessary.

Mr. Lawlor testified that some sections of the vacation guidelines were consistent with the Collective Agreement, such as the vacation year, service determination date and termination of employment. However, he believed that most sections of the guidelines violated the Collective Agreement and violated past practice. The practice under both the prior and current Collective Agreements was that employees could access a single vacation day at any time.

### **Union Submission**

The Union referred to the vacation benefits provided in Article 20 of the Collective Agreement. Article 20 did not require that employees commit to a vacation schedule in the fall, or at any time outside the summer period. There had been a consistent practice for at least 20 years that employees could take vacation at any time and draw vacation in one day allotments. The Employer could not change the practice. The vacation guidelines infringed the rights of all employees including senior employees. The principle of seniority was important. The Employer could not alter the benefits of seniority by introducing the vacation guidelines. The reference in Article 20 to “weeks” of vacation needed to be interpreted in the context of the practice of the parties and the expectations of the workers. The Employer’s concern about overtime usage was not a vacation scheduling issue. The proper procedure for the Employer was to propose changes to the Collective Agreement. It was a 6 year Collective Agreement, but the parties had inserted Article 24 to allow for negotiation of changes during the term of the Agreement. The Union relied on the principle of estoppel as applied in *Tembec Inc. and CEP, Local 32* (2002) 111 L.A.C. (4<sup>th</sup>) 313 (Luborsky) and *Carling O’Keefe Breweries of Canada Ltd. and United Brewery Workers, Local 325* (1982) 5 L.A.C. (3d) 302 (Little). The Union relied to its detriment on the practice followed by the Employer, because the Union did not attempt to make any changes to the vacation scheduling article in the last round of bargaining. Estoppel protects employees from the harm caused by the vacation guidelines. The *Labour Standards Act* did not apply in this case. The vacation guidelines could not be enforced. The Union requested that the grievance be allowed.

### **Employer Submission**

The Employer submitted that the vacation guidelines did not violate Article 20 of the Collective Agreement. The implementation of the guidelines was a reasonable exercise of management’s discretion. The guidelines included direct quotes from the Collective Agreement, such as the summer vacation scheduling procedure. The guidelines did not take away any right from senior employees to select vacation. The Employer wanted to avoid the situation of a junior employee, who had scheduled vacation in advance, being bumped from the vacation by a senior employee. The Employer wanted consistency in the practice of granting vacation. Limiting the number of single vacation days addressed the issue of consistency. Employees were allowed 5 single days and additional single days when there were extenuating circumstances. Employees would know the guidelines with respect to single days in advance. The Employer could amend the guidelines if the

limit of 5 single days violated the Collective Agreement. The Employer has the right to schedule vacations. The Employer's right to schedule vacation was also supported by *Molson 2005 v. Fish Food and Allied Workers Union (FFAW/CAW)*, 2010 NLTD 14, (2010) N.J. No. 27 and *St. James-Assiniboia School Division No. 2 and CUPE, Loc. 744* (1999) 78 L.A.C. (4<sup>th</sup>) 336 (Graham). Employees do not have a right to select single days of vacation. The practice of taking one day of vacation at a time was contrary to Article 20.02 which referred to employees taking "additional weeks of vacation" and not "days of vacation", and the discretion of the Company to schedule unused vacation weeks during maintenance and Christmas shutdowns. The Employer also referred to Subsections 8 (2.1) and 8 (5) of the *Labour Standards Act*, with respect to the selection of "weeks" of vacation. Estoppel did not apply. The grievance form did not refer to estoppel. The Union had stated the principle of estoppel too broadly. The Employer referred to the Newfoundland and Labrador Court decision in *U.F.C.W., Local 1252 v. Lewisporte Wholesalers Limited* (1989) 79 Nfld. & P.E.I.R. 237 (Nfld. S.C.T.D.). Estoppel did not apply where the Employer had acted in the exercise of its discretion. There was no representation by the Employer giving rise to detrimental reliance by the Union, an essential ingredient of estoppel. The Employer had attempted to discuss the vacation guidelines with the Union, but the Union had refused. It was therefore unlikely that the Union would have agreed to negotiate under Article 24. The Employer requested that the grievance be denied.

### **Considerations**

The issue before the Arbitrator concerns the vacation guidelines introduced by the Employer effective May 1, 2009. The Union submits that the Employer is estopped from implementing the vacation guidelines because the guidelines violate the Employer's past practice in the administration of Article 20.02 of the Collective Agreement. The Arbitrator will consider the evidence of past practice and the interpretation of Article 20.02.

Article 20 states that employees are entitled to vacation based on seniority obtained as of May 1 in each year. Accordingly, the vacation year starts on May 1 and ends on April 30. The length of vacation entitlement varies from 1 week to 7 weeks per year, according to seniority. Employees having more than 25 years seniority are entitled to 7 weeks vacation. Prior to the introduction of the vacation guidelines, the practice was that a summer vacation schedule was posted by mid February each year and employees were required to select summer vacation prior to March 1 each year. Employees with less than 8 years seniority were limited to 2 weeks vacation in the summer, and

employees with more than 8 years seniority were limited to 3 weeks vacation in the summer. The summer vacation period was between June 1 and the third week of September. The summer vacation scheduling practice was consistent with Article 20.02 of the Collective Agreement.

Outside the summer vacation period, there were longstanding practices that preceded both the current 2006 to 2012 Collective Agreement, and the prior 2002 to 2006 Collective Agreement. These practices are established by the evidence, in particular, by the testimony of Steve Lawlor. It was a practice that employees could take vacation days in one day allotments, or in other periods of less than one week. There was no limit on the number of vacation days that could be selected in one day allotments. The granting of single vacation days was subject to the approval of the supervisor. Approval was not refused on the grounds that the requested vacation entitlement was for one day or any other period less than one week. It was also a practice, outside the summer vacation period, that employees could select vacation at any time, and there was no posted vacation schedule. A further practice was that a senior employee could bump a junior employee from a scheduled vacation, on the basis of seniority. There was evidence with respect to the practice of allowing carry over of unused vacation days from one year to the next. The practice was not consistently followed. Some supervisors allowed the carry over of vacation days, while other supervisors did not. Therefore a practice of allowing the carry over of vacation from one year to the next is not established by the evidence.

I will consider the interpretation of Article 20.02 of the Collective Agreement having regard to the principles of interpretation applied by arbitrators, in particular, that the language is to be interpreted within the context of the Collective Agreement as a whole. The first three paragraphs of Article 20.02 refer to the posting of the summer vacation schedule and the process to select vacation in the summer between June 1 and the third week of September. The availability of vacation in the summer is limited to 2 weeks or 3 weeks depending on length of seniority. Article 20.02 states that summer vacation entitlement may be taken outside the summer period if mutually satisfactory to the employee and the Company. The fourth paragraph of Article 20.02 refers to the scheduling of “additional weeks of vacation”. The “additional weeks” in the context of Article 20, refers to the number of weeks, up to a maximum of 7 weeks, to which an employee is entitled, in addition to the summer vacation entitlement. There is no provision in Article 20.02 for the posting of a vacation schedule for any period outside the summer period. Article 20.02 states “vacation requests shall be decided on a seniority basis” indicating that a senior employee has preference over a junior employee for the selection of vacation. However, the procedure for selection of vacation is not specified

outside the summer vacation period. The paragraph refers to “weeks” of vacation and does not make any reference to selection of vacation for single days or any other period. The Employer submits that the reference in Article 20.02 to “weeks” and not single days of vacation, means that vacation may only be taken in one week blocks, that a posted schedule is consistent with the language of Article 20.02, and that any deviation from that is a matter of Employer discretion. For example, the vacation guidelines, that are the subject of this dispute, allow an employee up to 5 single days in a vacation year, plus additional single days in extenuating circumstances. The Employer’s position is that it is not required to grant single days of vacation under Article 20.02, and that single days may be allowed in the Employer’s discretion as an exception to the scheduling of “weeks” of vacation in Article 20.02. The Employer also maintains that the provisions of the vacation guidelines with respect to scheduling of vacation outside the summer period, are a reasonable exercise of the Employer’s management rights.

Although the Union does not concede that the Employer’s interpretation of Article 20.02 is correct, the Union has argued that the doctrine of estoppel applies. The Union submits that, assuming that the Employer’s interpretation of the Collective Agreement is correct, the Employer is estopped by past practice from relying upon that interpretation.

Article 20.02 of the Collective Agreement has been the subject of a prior arbitration award between the parties, and a judicial review of the award by the Supreme Court of Newfoundland and Labrador, Trial Division. In *Molson 2005 v. Fish Food and Allied Workers Union (FFAW/CAW)* (2010) N.J. No. 27, 2010 NLTD 14 (“*Molson 2005*”), the Court considered the authority of the Employer to schedule vacation for an employee absent from work and receiving Workers’ Compensation benefits. The employee did not want to schedule the vacation and wanted to carry over the vacation days to the next vacation year. The effect of scheduling the vacation was to deny the carry over of vacation from one vacation year to the next. The Court ruled that it was unreasonable for the arbitrator to interpret Article 20 to require mutual agreement of the Employer and employee to schedule a vacation, when there was no language to that effect in the Agreement. The Court said that it was a reasonable exercise of management’s rights to schedule vacation unless otherwise restricted by the Collective Agreement. The Court stated as follows in paragraphs 24 and 25:

24 First of all, it must be noted that it is generally accepted in labour arbitration cases that management has the right to schedule vacation time unless otherwise provided in a collective agreement. However, scheduling vacation is subject to the

employer acting fairly and reasonably. (See Brown & Beatty, *Canadian Labour Arbitration*, 4<sup>th</sup> ed. (Aurora, Ont.: Canada Law Book, 2006) at pages 8-68 and 8-69. The only restrictions on management in scheduling vacation time in the Agreement are those set out in Article 20. Based upon my full reading of his reasons, it is clear that the arbitrator interpreted the Agreement as requiring mutual agreement of the parties in order to schedule vacation outside the summer period, referring there to unused vacation entitlements. The only time where mutual agreement with regard to scheduling vacation is where an employee did not take his/her prescribed earned vacation during the defined summer period. This is clearly the case based upon what follows at paragraph 4 of Article 20.02, which refers to vacation entitlements remaining after that taken during the summer period. That paragraph starts out by referring to “Additional weeks of vacation being taken outside the regular vacation period.” There is no reference in paragraph 4 to a requirement for mutual agreement of the employer and the employee to schedule such vacation time outside the defined summer period.

25 While I agree that there is no expressed limitation in the Agreement to scheduling these additional weeks within that vacation year, that is not the question to be answered in this case. Collective agreements are negotiated to establish the labour relations regime of the parties. Article 3 gives management the right to manage, including the right to schedule vacation time, but such is and has to be subject to the terms of the Agreement generally. In finding that an employee in receipt of WHSC benefits was not included in the one clause in the Agreement that referred to carryover of unused vacation, Article 20.07, a decision which I find reasonable, the arbitrator went on to say at page 17, “The Agreement clearly speaks of vacation entitlements commencing each year on May 1<sup>st</sup>, and vacation entitlement unused after the summer leave period being scheduled ‘outside the regular vacation period’ providing there is mutual agreement . . .”. This not only is an unreasonable interpretation of what Article 20 says, it also is incorrect. The arbitrator’s unreasonable interpretation of the Agreement that mutual agreement was required for scheduling unused vacation entitlement after the summer period clearly factored heavily in his award in this case. His position in this regard is in some sense counterintuitive as I suspect that the employees subject to this Agreement generally would want to have access to their full vacation entitlement each year without the need to get the consent of the employer to schedule any unused vacation entitlement in that year.

The *Molson 2005* decision interpreted Article 20.02, the same article that is currently before the Arbitrator. The decision states that scheduling vacation, without mutual agreement with the employee, is within management rights, where it is not limited by the collective agreement. The

*Molson 2005* decision addressed a different issue related to vacation scheduling than arises in this case. Also, the *Molson 2005* decision did not address whether a practice may give rise to an estoppel.

I will consider whether the doctrine of estoppel applies in this case. Estoppel may be applied where it would be unfair or inequitable for a party to rely on grounds that would otherwise support its claim (*Newfoundland and Labrador Association of Public and Private Employees v. Her Majesty the Queen in Right of Newfoundland and Labrador, as represented Newfoundland and Labrador Health Boards Association*, 2010 NLTD 107 (CanLII)). Arbitrators have the authority to apply equitable principles, such as estoppel (Mitchnick and Etherington, *Labour Arbitration in Canada*, 2006, page 290). The elements of estoppel, as set out in the arbitral authorities, include (1) a representation, either by words or conduct, including silence or acquiescence, (2) intention that the representation be acted on by the other party, which may be inferred from the circumstances and (3) reliance on the representation to the detriment or prejudice of the other party (Brown & Beatty, *Canadian Labour Arbitration* 4<sup>th</sup> edition, paragraph 2:2211).

Arbitrators have addressed the question as to whether a longstanding work practice may amount to a representation giving rise to an estoppel. Although some arbitrators have enforced a longstanding practice, whether or not addressed by the collective agreement, the prevailing view is that a longstanding practice does not create an estoppel, unless there is a connection to a collective agreement provision (Brown & Beatty, paragraph 2:2221). The connection of a practice to a collective agreement provision was made in a case of vacation scheduling in *Tembec Inc. and CEP, Local 32* (2002) 111 L.A.C. (4<sup>th</sup>) 313 (Luborsky). In that case it was found that the employer had, by its practice, expanded the application of the vacation scheduling clause. The collective agreement specifically addressed vacation allotment for employees in certain departments, however, by its practice the employer had applied the vacation scheduling provision to other departments. The practice amounted to estoppel by conduct. The arbitrator stated, commencing at paragraph 16 as follows:

[16] Thus as is apparent from the above-quoted excerpt, even a general reference in the collective agreement to the topic in issue may be enough to support an estoppel argument, where in its application and administration, the employer has consistently “gone further” than required by the relevant language for a sufficient period of time. Applying that reasoning in the instant case, while the collective agreement is silent

with respect to the specific allotment for members of the Digester, Bleach and Machine Room departments; nevertheless, the references in article 23.07 of the collective agreement to a vacation allotment for employees in certain departments or crews, and the Employer's longstanding practice of going further than the collective agreement requirements by including members of the Digester, Bleach and Machine Room departments among those employees entitled to a specific vacation allotment of 25%, is in my view sufficient to found the basis for an estoppel, if the other requirements necessary to establish an estoppel, namely evidence of a representation intended to affect legal relations, and detrimental reliance, are also met. In short, the existence of vacation allotment language in article 23.07 of the collective agreement is enough to provide what Union counsel referred to as the "hook" upon which an estoppel affecting departments not expressly mentioned in that article can be based.

...

[18] . . . At the very least, the failure to advise the Union of the Employer's intention to change its allotment practice for the employees in those departments, detrimentally impacted the Union's opportunity to negotiate on the issue, thus establishing the final element necessary to found an estoppel: see *Re Kemptville District Hospital and O.N.A.*, *supra*, at p. 367.

[19] Accordingly, I must conclude that the doctrine of promissory estoppel is available, and the elements of an estoppel have been established in connection with the change of the Employer's vacation allotment practice affecting the employees of the Digester, Bleach and Machine Room departments. In the circumstances of this case, the arbitral use of the doctrine of promissory estoppel is necessary to avoid the inequitable application or administration of the collective agreement that would otherwise result. I therefore allow the grievance and grant the Union's request for a declaration that the Employer is estopped from altering its longstanding practice respecting the allotment of vacation for the employees of the Digester, Bleach and Machine Room departments until the expiry of the current collective agreement. As requested by the parties, I shall remain seised in the event there is any difficulty with the implementation of this award.

I have reviewed decisions of the Supreme Court of Newfoundland and Labrador, both Trial Division and Court of Appeal, on the application by arbitrators of the doctrine of estoppel in *U.F.C.W., Local 1252 v. Lewisporte Wholesalers Limited* (1989) 79 Nfld. & P.E.I.R. 237 (Nfld. S.C.T.D.), *Newfoundland and Labrador Association of Public and Private Employees v. Her Majesty the Queen in Right of Newfoundland and Labrador*, as represented *Newfoundland and Labrador Health Boards Association*, 2010 NLTD 107 (CanLII), and *Her Majesty the Queen in Right of Newfoundland and Labrador v. Newfoundland and Labrador Association of Public and Private*

*Employees* 2010 NLCA 37 (CanLII). I find that an estoppel may be applied to enforce a past practice in circumstances where an employer represents by conduct how it will administer the collective agreement.

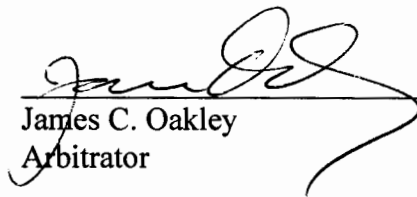
The doctrine of estoppel applies to the longstanding practices established by the evidence. The longstanding practices amount to representation by conduct. Having regard to all the circumstances, it may be inferred that the representations were intended to be relied upon and that the Union, in reliance on the representations, did not seek to negotiate amendments to Article 20.02. There was a representation by conduct, as demonstrated by the longstanding practices, that employees were allowed to select vacation in one day allotments, or other periods less than one week, subject to approval by the supervisor. Therefore the Employer is estopped from relying on an interpretation of Article 20.02 that employees may only select “weeks” of vacation. There was also a representation by conduct that employees are not required to select vacation in advance on a posted vacation schedule outside the summer vacation period and may select vacation based on seniority. Therefore the Employer is estopped from relying on management rights or an interpretation of Article 20.02 that has the effect of denying the selection of vacation based on seniority in accordance with this practice. To the extent that the Employer’s vacation guidelines are inconsistent with these longstanding practices, the Employer is estopped from implementing the guidelines. The evidence did not establish a representation by the Employer with respect to carry over of vacation from one year to the next. Therefore, the Employer is not estopped from implementing those parts of the vacation guidelines that require employees to take vacation during the vacation year.

The Employer raised the issue of the *Labour Standards Act*, RSNL 1990, c. L-1 (the “Act”). Subsection 8 (2.1) allows an employee to take vacation in one week periods. However, an employer and employee may agree on shorter periods. In this case, by operation of the Collective Agreement and the longstanding practice of the parties, there is agreement on shorter periods. Therefore the *Act* does not operate to limit selection of vacation in this case.

**Decision**

The grievance is allowed, in part. The Employer's vacation guidelines may not be implemented to the extent that they are inconsistent with the longstanding practices described in the Award, in particular, that employees are allowed to select vacation in one day allotments, and that employees are not required to select vacation on a posted schedule outside the summer period and may select vacation based on seniority.

**DATED** this 6<sup>th</sup> day of December, 2010.



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James C. Oakley  
Arbitrator