BRITISH COLUMBIA LABOUR RELATIONS BOARD

NCR CANADA LTD.

(the "Employer")

-and-

LOCAL 213 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

(the "Union")

PANEL:	Brent Mullin, Chair Bruce R. Wilkins, Associate Chair, Adjudication Jacquie de Aguayo, Vice-Chair
APPEARANCE:	David G. Wong, for the Employer
CASE NO.:	67658
DATE OF DECISION:	October 23, 2014

DECISION OF THE BOARD

1 The Employer applies under Section 141 of the *Labour Relations Code* (the "Code") for leave and reconsideration of BCLRB No. B152/2014 (the "Original Decision"). The Original Decision dismissed the Employer's application under Section 99 of the Code for review of an arbitration award issued by Arbitrator Marguerite Jackson, Q.C. (the "Arbitrator") on February 28, 2014 (Ministry No. A-023/14) (the "Award"). The Award found that the Employer was estopped from requiring that 19 employees within the Union's bargaining unit switch from a defined benefit pension plan to a defined contribution pension plan.

2 The Employer raises two bases upon which it says the Original Decision should be overturned. First, the Employer says that review of the Award properly falls under Section 100 of the Code and thus the matter should be before the Court of Appeal, not the Board. In that regard, the Employer submits:

> … [the] reasoning in the Original Decision fails to take into account the key distinguishing factor in these circumstances, namely that the claimed estoppel and "representation" upon which the estoppel is based did not arise in and were not made in the labour relations context. Additionally, if the Original Decision were to be upheld, it could result in conflicting decisions where the only basis for the conflict would be the forum making the decision. Such a result would be arbitrary and untenable.
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> For these reasons and those set out in our submissions to the Board prior to the Original Decision, it is NCR's position that the Original Decision should be overturned and that review of the Award falls under section 100 of the Code.

3 The Employer secondly says that the Original Decision erred and should be overturned on the basis of its treatment of Article 25.06 in the parties' collective agreement. Article 25.06 is what is commonly referred to as an entire agreement clause. It states:

> This Agreement constitutes the entire agreement between the Parties with respect to the transactions contemplated in this Agreement and supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written, of the Parties. There are no representations, warranties, covenants, conditions or other agreements, express or implied, collateral, statutory or otherwise, between the Parties in connection with the subject matter of this Agreement, except as specifically set forth herein and the Parties have not relied and are not relying on any other information, discussion or understanding in entering into and completing the transactions contemplated in this Agreement.

4 The Employer submits that the Original Decision breached the requirements of procedural fairness in its consideration of Article 25.06 and rendered an interpretation of Article 25.06 which is inconsistent with the principles expressed or implied in the Code. In respect to procedural fairness, the Employer says that the Original Decision failed to address the reasons relating to Article 25.06 in the Award and the Employer's argument in relation to those reasons. Further, the Original Decision is submitted to have developed its own interpretation of Article 25.06 without giving the parties an opportunity to make submissions on that interpretation. With respect to the interpretation itself, the Employer says that it "distorts and does not account for the language agreed to by the parties" and, as a result, is unsustainable and inconsistent with the principles expressed or implied in the Code.

5 An application under Section 141 must meet the Board's established test before leave for reconsideration will be granted. An applicant must establish a good, arguable case of sufficient merit that may succeed on one of the established grounds for reconsideration: *Brinco Coal Mining Corporation*, BCLRB No. B74/93 (Leave for Reconsideration of BCLRB No. B6/93), 20 C.L.R.B.R. (2d) 44 ("*Brinco*").

6 The Board's approach to leave is set forth in *RG Properties Ltd.*, BCLRB No. B378/2003 (Leave for Reconsideration of BCLRB No. B252/2003) ("*RG Properties*").

7 We have reviewed and considered the Award, the Original Decision, and the leave and reconsideration application. Having done so, we find that the first basis upon which the Employer seeks leave and reconsideration does not establish a good, arguable case that the Original Decision is in error and thus leave is denied in respect to it: *RG Properties*.

8 In respect to the second basis upon which the Employer seeks leave and reconsideration of the Original Decision, we find as follows. While we do not rely on the "misrepresentation" approach to the interpretation of Article 25.06 in paragraph 92 of the Award, or the reasoning in paragraph 65 of the Original Decision based on the definition of "collective agreement" in the Code, we find it was open to the Arbitrator to apply the doctrine of estoppel in the circumstances of the case.

9 As noted above, Article 25.06 is what is referred to as an entire agreement clause. Such clauses are most often found in contracts and thus have long been considered by the Courts in terms of contract law. In that regard, it is well established that such clauses do not constitute an absolute bar to the application of the principles of estoppel. As stated in one such decision, "In each case, the court must consider the provisions of the particular agreement in the entire context of the facts in order to determine whether it would be unjust or unconscionable to permit a party to enforce its strict legal rights": *Vision West Development Ltd. v. McIver Properties Ltd.*, 2012 BCSC 302, para. 79.

10 For the reasons explained by Chair Weiler in respect to the principles in the Code in *Corporation of the City of Penticton*, BCLRB No. 26/78, 18 L.A.C. (2d) 307 ("*City of Penticton*"), as relied upon in paragraphs 65-72 of the Original Decision, such an

approach is even more warranted and required in the labour relations context: see also the labour relations policy considerations enumerated by arbitrator Burkett, relied upon by the Arbitrator at paras. 89-90 of the Award. As well, the approach in *City of Penticton* is both long and well established: see Original Decision, paras. 41-43. In applying that approach to review of the Award under Section 99 of the Code, we find Article 25.06 was not a bar to the Arbitrator's application of the doctrine of estoppel. We also find it would be unjust not to find an estoppel in the circumstances of this case. We further find there is no basis under Section 99 of the Code to interfere with the conclusions of the Arbitrator in respect to the facts in the case.

11 In respect to the Employer's procedural fairness argument regarding the consideration of Article 25.06 in the Original Decision, in light of the above we find that if there is a procedural fairness concern or breach as submitted, it has been cured by the present leave and reconsideration process and decision: *Commonwealth Construction Company Ltd., et al.,* BCLRB No. B168/2013 (Leave for Reconsideration of BCLRB No. B48/2013), para. 30, and cases cited therein.

12 As a result, we find the leave and reconsideration application has not presented a good, arguable case for reconsideration in respect to the second basis upon which the Employer seeks reconsideration and leave is denied in respect to it: *Brinco*.

13 In conclusion, leave is denied and the application for reconsideration is dismissed.

LABOUR RELATIONS BOARD

"BRENT MULLIN"

BRENT MULLIN
CHAIR

"BRUCE R. WILKINS"

BRUCE R. WILKINS
ASSOCIATE CHAIR, ADJUDICATION

"JACQUIE DE AGUAYO"

JACQUIE DE AGUAYO
VICE-CHAIR