**IN THE MATTER OF AN ARBITRATION**

**Between:**

NCR Canada Ltd.

(the "Employer")

**And:**

International Brotherhood of Electrical Workers, Local 213

(the "Union")

(Pension Amendment Grievance)

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**AWARD**

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| Arbitrator: | Marguerite Jackson, Q.C. |
| Counsel for the Employer: | David Wong |
| Counsel for the Union: | John MacTavish |
| Dates of Hearing: | October 1 & 2, 2013 |
| Place of Hearing: | Vancouver, BC |

# I

NCR Canada Ltd. (formerly known as National Cash Register) is a multinational company with a bargaining unit of approximately 60 employees in BC represented by IBEW, Local 213 ("the Union"). Those employees known as customer service representatives are technicians who install, service and maintain computerized equipment such as banking systems, retail and restaurant Point of Sale (POS) terminals and airport self-service kiosks.

NCR Canada Ltd. ("NCR" or "the Employer") has a pension plan for its employees that is Canada-wide and includes management staff as well as union and non-union employees. There are 850 to 860 employees who are subject to the plan. Prior to 2001 all employees were in a defined benefit pension plan. In 2001 NCR announced it was introducing a defined contribution plan option that would become effective January 1, 2002 and would apply to all new employees. Employees who had joined NCR prior to January 1, 2002 were given a one-time opportunity to choose between their current defined benefit plan and the new defined contribution plan. Nineteen members of the IBEW, Local 213 bargaining unit elected to stay in the defined benefit plan.

In 2012 NCR decided to amend the pension plan effective December 31, 2012 so that all members still participating in the defined benefit component of the plan would have to change to the defined contribution plan as of January 1, 2013. On December 13, 2012 the Union filed a grievance on behalf of the nineteen employees who had opted to remain in the defined benefit plan in 2002.

The issue is whether NCR is estopped from amending the plan and requiring the nineteen employees to participate in the defined contribution plan because of representations made to these employees in 2001.

## II

## Collective Agreement Provisions

Article 22 of the collective agreement addresses the issue of fringe benefits. The provisions most relevant to the pension plan are articles 22.02 and 22.04.

> **22.02** During the term of this Agreement, all bargaining unit employees who have completed their probationary period will have the following additional fringe benefits provided:
>
> (a) NCR Pension Plan;
> (b) Stock Purchase Plan;
> (c) Training Allowances;
> (d) Short-Term Disability;
> (e) Travel Accident Insurance; and
> (f) NCR Savings Plan.
>
> **22.04** All benefits provided by this Article 22 shall be governed by the text of the insurance contracts or benefit plan documents in all cases, with the Employer's obligation being limited to the payment of premiums to the extent specified in the NCR Single Benefit Plan or in this Agreement.
>
> The employer agrees, however, that claims applicable to these fringe benefits shall be subject to the Grievance and Arbitration provisions contained in this Agreement.

Article 25.06 was relied upon by the Employer as a clause that precludes the Union from access to the equitable doctrine of estoppel.

**25.06 Entire Agreement**

> 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 by this Agreement.

On this same point the Employer referred to article 9.04 which addresses the power of an arbitration board.

> **9.04** In reaching its decision, the Board of Arbitration shall be governed by the provisions of this Agreement. The Board of Arbitration shall not be vested with the power to change, modify, or alter this Agreement in any of its parts but may, however, interpret its provisions. The expenses of the impartial Chairman shall be borne equally by the Employer and the Union unless otherwise provided by law.

## III

## Factual Background

The Union called two witnesses. Tom Mooney and Wes Wilson are customer service representatives ("CSRs") with NCR. Mr. Mooney started with NCR in 1990 while Mr. Wilson was hired in 1982. In 2001 both men chose to stay in the defined benefit pension plan rather than join the new defined contribution plan effective January 1, 2002.

There were two witnesses for the Employer. Cliff Gayler joined the management of NCR in April, 1996 when NCR purchased his company. He has

been the Service General Manager since 2001, responsible for all service technicians or CSRs through their territory managers. He is the person designated to answer grievances at Step 2 of the grievance procedure and has been a member of the Employer's bargaining committee in the last four bargaining sessions.

The second Employer witness was Bo Sawyer who has been with NCR since June, 1991. The Treasurer Division has the financial responsibility for all NCR retirement plans and Mr. Sawyer has occupied the position of Assistant Treasurer in that Division since 2008. His role now and in 2001/2002 included the financial oversight of those plans.

The testimony of these witnesses disclosed the history of NCR's pension plan, the relevant negotiating evidence as well as the retirement planning of two of the nineteen employees who opted to stay with the defined benefit plan in late 2001.

## Pension Plan History

Bo Sawyer, NCR's Assistant Treasurer, relayed the following history.

In the 1970s and early 1980s there were two pension plans. One was a contributory plan while the other was a non-contributory plan. Those plans

were phased out and by 1998 there was a single structure which was a defined benefit plan.

In late 2001 NCR announced an upcoming amendment to the pension plan. NCR was introducing a new defined contribution ("DC") plan option to take effect January 1, 2002. All new employees would have to participate in the DC Plan but current employees were given a one-time opportunity to stay in the only plan that existed prior to the change which was the defined benefit ("DB") plan. The current employees could also choose to move to the new DC plan going forward but keep the DB pension benefits earned thus far.

Mr. Sawyer testified that he had to sign off on the 2002 amendment indicating that from a financial perspective the amendment was in the best interests of NCR. In cross-examination he agreed that there was a savings element to the amendment but he added that there were other reasons as well including reduced risk and more certainty for the company.

Mr. Sawyer explained that information about the new DC pension plan was provided to all employees through the Human Resources department including a Transition Guide booklet and DC plan Enrollment Forms. In addition, information meetings were held for employees to assist them in making their decisions.

The Transition Guide set out the following overview of both the DB and DC plans as well as the advantages of each plan.

## Overview – Your CURRENT DB Pension Plan

The DB Pension Plan is a promise by NCR to pay you a specific level of income when you retire based on your age, years of service and salary. The Company contributes money to the DB Pension Plan during your working years to fund the promised benefit. Professional investment managers invest the funds.

### Advantages of your CURRENT Pension Plan

Your current Pension Plan offers a number of advantages, such as:

- **Your retirement income is predictable**

  A defined benefit plan is essentially a promise to pay a specific benefit at retirement, based on a formula. You will know in advance what your future benefit will be.

- **Investment results do not affect your pension income**

  Investment results do not affect your benefit – they affect how much the Company must contribute to fund the benefit. Pension laws require NCR to contribute enough money to the Plan to ensure it can fund all promised pensions.

- **It could provide a greater benefit to some employees**

  A defined benefit plan typically provides more advantages to employees who are closer to retirement and have many years of service with the Company because more of the total value of the plan is earned nearer to retirement. If you plan to retire early from the Company and have many years of service, the benefit may be higher under the current Pension Plan because of the Plan's early retirement features.

## Overview – The NEW DC Pension Plan Option

The NEW DC **Pension Plan** represents a commitment from NCR to contribute a specific amount (2% of your gross salary) to a retirement "account" on your behalf each year. "Gross salary" is defined below.

Through the DC Pension Plan **you are in charge** of investment decisions for all money contributed by the Company. You choose the investment strategies where NCR's contributions will be invested. At retirement, you will use the balance in your DC Pension Plan account to generate retirement income. The amount in your account will depend on several factors, including the total amount contributed to the Plan during your career and any investment income earned as a result of your investment decisions.

**Advantages of the NEW DC Pension Plan**

When compared to the current DB Pension Plan, the new DC Pension Plan provides advantages such as:

- **More control over your investments**

  You will choose how to invest the Company's contributions to your account under the DC Pension Plan. You will have four investment strategies to choose from. See the DC Pension and Savings Plan Guide for more details.

- **More ongoing RRSP contribution room**

  The new retirement program will give most employees more RRSP contribution room.

- **No pension formula to learn**

  Many employees will find it easier to understand how the new DC Pension Plan works.

The Guide also stated the following with respect to the two options available to current employees:

**It's Your Choice! (and it's an important decision)**

You have a **one-time opportunity** to stay in your current DB Pension Plan or change to the new DC Pension Plan option. The choice is entirely up to you.

***Option #1 – Stay with the CURRENT DB Pension Plan***

With this option, you will continue to participate in the DB Pension Plan until you leave or retire from NCR.

***Option #2 – Join the NEW DC Pension Plan Option as of January 1, 2002***

With this option, you will keep the pension you have earned so far under the DB Pension Plan, but join the new DC Pension Plan for the future. At retirement, you'll have the option of converting your DB pension benefit to a lump sum and combining it with your DC Pension Plan account balance.

All employees hired after January 1, 2001, will join the new DC Pension Plan option that becomes effective January 1, 2002.

**It's a ONE-TIME Choice**

You must make your choice by November 30, 2001. If you choose the new DC option, you cannot switch back to the DB plan you now have.

> The choice you make will go into effect on January 1, 2002. Your choice will remain in effect as long as you are actively employed by NCR. **If you do not submit an enrollment form, you will automatically stay in the current DB Pension Plan.**

The Transition Guide had the following footnote or boxed statement on the Table of Contents page:

> This booklet provides an overview of the current and new Pension Plan options. It does not replace or modify the official plan documents that legally govern the operation of the respective options. In the event of questions, the official plan documents will apply. The information in this booklet is intended to provide highlights and points of comparison – not to advise employees on which pension option should be chosen. NCR Canada reserves the right to amend, modify or terminate the Pension Plan, in whole or in part, at any time.

Mr. Sawyer testified that it was company policy to include that boxed statement in the annual pension statements sent to employees.

Section A of the Enrollment Form addressed the choice the current employees had to make.

> **Section A: Choose Your Pension Plan Option (mark only one)**
>
> The choice you make below will go into effect January 1, 2002. Your choice will remain in effect as long as you are actively employed by NCR. If you do not **return this form by November 30, 2001,** you will automatically remain in your current DB Pension Plan.
>
> ☐ **Option 1 – Stay with the current DB Pension Plan**
>
> Under this option you would continue participating in your current DB Pension Plan.
>
> **Important!** If you select Option 1, you must also complete the Beneficiary Designation (Section C) below.
>
> ☐ **Option 2 – Join the new DC Pension Plan option**
>
> Under Option 2 you keep the DB pension benefit you've earned so far, but join the new DC Pension Plan effective January 1, 2002. At retirement, your pension income will come from both plans.
>
> **Important!** Under Option 2 you keep the DB pension benefit you've earned so far, but join the new DC Pension Plan effective January 1, 2002. At retirement, your pension income will come from both plans.

This Form did not contain the words found in the footnote of the Transition Guide.

The Pension Plan in effect on January 1, 2002 was identified by Mr. Sawyer. Section 17 is headed "Future of the Plan." Sections 17.01 and 17.02 address amendments to or termination of the Plan.

> **17.01 Termination of the Plan**
>
> The Company intends and expects to maintain this Plan in force indefinitely, but necessarily reserves the sole right to terminate the Plan either in whole or in part at any time or times should further conditions, in the opinion of the Company, warrant such action, subject always to the Pension Benefits Act, the Income Tax Act and the approval of the appropriate regulatory authorities.
>
> **17.02 Amendment to the Plan**
>
> Further to Section 17.01 above, the Company reserves the sole right to amend the Plan. However, in no event shall any amendment to the Plan operate to reduce the benefits which have accrued to any Participant or other person entitled to benefits under the Plan prior to the date of such amendment; nor shall the Company have the power to make any amendment which would cause or permit any portion of the contributions made prior to that date to be used for purposes other than as prescribed by the provisions of the Plan, the requirements of the Pension Benefits Act, the Income Tax Act and the appropriate regulatory authorities.

Mr. Sawyer testified that to the best of his knowledge sections 17.01 and 17.02 had always been part of the Plan.

In 2012 the management of NCR notified its employees of a further amendment to the Plan to be effective January 1, 2013. The consequence of the amendment was that all employees still participating in the DB component of the pension plan (except those in Manitoba because of its particular legislation) would cease to accrue credited service in that plan on December 31, 2012 and would commence participation under the DC component of the plan for all service with NCR on and after January 1, 2013. As Mr. Sawyer

described it, the accrued DB benefits would be preserved just as had happened in 2002 for the employees who had chosen to join what was then the new DC option.

## Negotiating History

Cliff Gayler, the Service General Manager, has been a member of the Employer's bargaining committee in the last four rounds of bargaining with the Union. The essence of his testimony was that although the numbering is different, there have been no changes over those years to what is now article 22.02, the fringe benefits provision that refers to the pension plan. He also testified that when the pension plan was amended in 2002, no grievances were filed by the Union nor were any issues raised by the Union with respect to that amendment in the negotiations subsequent to the amendment.

The collective agreement with a term from June 7, 2009 to June 6, 2012 contained the following new article 24.6 (which is now 25.06):

> **Entire Agreement**
>
> 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 by this Agreement.

The current agreement was concluded on October 25, 2012 with a term from June 7, 2012 to June 6, 2015.

## Defined Benefit Participants

Tom Mooney is one of NCR's employees who chose to remain on the DB pension plan in 2002.

He explained that in late 2001 he received and read all the information the Employer sent to employees to assist them in deciding whether to stay in the DB plan or move to the new DC plan. A diskette came with one of the documents. Mr. Mooney had a keen interest in retirement planning and used the calculator on the diskette to determine which plan would be best for him. Based on his findings he initially elected to go with the DC plan and chose that option on the Enrollment Form. Sometime after he had submitted his Form he was advised by the Human Resources office in Toronto that there had been an error in the first calculator. When he reran the numbers he decided the DB plan was better for him. He rescinded his choice on the first Enrollment Form and filled out a second Form opting to stay with the current DB plan. He explained that for the DC plan to be a better plan for an employee, the employee would have to be 20 years old while Mr. Mooney was in his early 40s.

Mr. Mooney continued with his retirement planning after he made his choice. He explained that he has an adult handicapped daughter who relies on him financially so he makes sure there is a "cushion" in his plans. He said he is continuously forecasting what he will need in retirement and the age at which

he can retire. He modifies his spending so that he will have a stable financial outlook later in life.

In his retirement forecasting Mr. Mooney factors in a number of components – his pension plan from NCR, his CPP and his OAS. He does his own research but has also talked to several financial planners. The DB pension plan issues a statement at the end of each year with a fixed number, excerpts from which were identified at this hearing. His wife also has a DB plan so her projected pension income is stable as well. At the end of each year he looks at the number on his DB statement which shows the monthly pension he has earned thus far. He then determines how much more he will accrue in that pension if he works, for example, another 10 years. Once he calculates that number as a monthly income, he then considers how much more than the number he wants or needs and how he can make up the difference. One option is to save more money; another is to work longer. Mr. Mooney testified that he keeps extending his retirement date for this reason.

Mr. Mooney explained that the forced change in 2013 to the DC plan will result in him receiving a lesser amount in his retirement pension than if he had continued on the DB plan. He will have to retire later or save more to achieve his retirement objectives.

In cross-examination Mr. Mooney agreed he had seen and read the footnote in the Transition Guide that includes the statements that the Guide does not replace or modify the official plan documents and that NCR has the

right to amend, modify or terminate the plan at any time. Mr. Mooney also agreed that the personalized annual pension statement that he receives includes the advice that the official plan documents govern.

Mr. Mooney was cross-examined about the choice he made in 2001. He agreed he took the decision seriously, did his homework and ran some calculations. His original decision to join the new DC plan was based on the outcomes from the calculator he had used. When he found out the calculator was inaccurate he changed his mind.

Mr. Mooney agreed that with the DB plan the annual pension at retirement is a fixed number while with the DC plan the retirement amount is based on how the funds perform over time. Mr. Mooney had determined that to receive a higher pension amount from the DC plan he would need a 25 to 30% annual rate of return. Mr. Mooney said that the DB plan provided greater value for a person closer to retirement. When he did the calculations in 2001 with the revised diskette he discovered that based on his situation he would only receive better value from the DC plan if he started with that plan when he was in his late teens or early twenties. Mr. Mooney explained that the DB plan had stability as it gave him the benefit of knowing the exact pension he would receive as opposed to the DC plan where there was a range. He felt having some stability in one part of his retirement pie stabilized some of the other components as well.

Mr. Mooney was asked if at the end of the day his decision to remain on the DB plan was based on the numbers produced by the revised diskette. Mr. Mooney agreed that was part of his reasoning but said he had also read the information documents and made inquiries. In the end he felt the stability of the DB plan outweighed any potential for greater gains with the DC plan.

It was suggested to Mr. Mooney in cross-examination that if he had not received all the printed information but simply received the diskette he would still have made the same choice. Mr. Mooney replied that if he had just received the diskette he probably would have done nothing. He went on to say that the sense of urgency in the written communications, especially that it was a one-time opportunity and that his choice was for life, encouraged him to do all the homework. Mr. Mooney explained that in 2001 he had been with NCR for 10 years but had formed no foundation for his retirement. This choice was the foundation he would build his retirement on.

Mr. Mooney said that as a result of the 2013 change to the pension plan he felt he would have to make some changes to his retirement planning. As Mr. Mooney saw it, he would either have to extend his retirement date or save a considerable amount of additional money to make up for the loss of the DB pension at retirement. He added that, although he could not say for sure, if he had known that his DB pension was not as permanent as he believed it to be he might have elected to put aside a little extra money over the past 10 years. If he does that now the amount of money he will have to put aside will be more.

While Mr. Mooney agreed that under the DC plan he would have the freedom to invest the funds however he wished, he pointed out that it is common practice for people to take less risk with their funds the closer they are to retirement which is his situation.

Wes Wilson is another of NCR's employees who chose to remain in the DB pension plan in 2002 after receiving and reviewing all the information on the topic from the Employer. Mr. Wilson testified that he is fairly detailed in his finances and for the last 15 years has calculated his net worth every quarter.

He remembered reading the documentary information, receiving the diskettes as well as talking to a couple of financial planners. Then he put all the information together and made a decision. He explained that he decided what income he wanted to receive on retirement and then worked backwards, determining what he had to do to arrive at that place. He looked at his current income, at costs that might increase as well as adding in a fairly large safety factor since one never knows what might happen. He reanalyzes and makes adjustments once a year on average and also has spreadsheets where he tracks expenses and his net worth.

He explained that when he made his decision to stay with the DB plan in 2002 he talked to a financial planner. He discussed the possibility of purchasing insurance products if he moved to the DC plan but the planner advised him to stay with the DB plan since it was stable and does not change. The DB plan fit into his retirement plan as a diversification from mutual funds.

The DB plan was stable and the annual statements said exactly how much he would receive at age 65. Other investments have to be adjusted as the financial market changes and he did not want to have all his eggs in one basket.

In cross-examination Mr. Wilson agreed that he understood the pension plan was governed by the plan documents. However, he went on to say that when he filled out and signed the Enrollment Form and choose Option #1 – to stay with the DB plan – it never crossed his mind that he would end his career and not have the DB. It was suggested to Mr. Wilson in cross-examination that the Enrollment Form did not state that he would continue to accrue DB benefits until the end of his career. Mr. Wilson disagreed: "To me that's exactly what it says."

Mr. Wilson said that he saw the DB plan as a really good component to base retirement on because it is predictable. He explained that if he hadn't had the DB he might have developed a different type of investment for a guaranteed monthly income. Stability and diversification are the factors he weighs in his planning.

## Other Evidence

Mr. Gayler, NCR's Service General Manager, was asked if any representations had been made to the Union or the employees to the effect that the Employer would not make amendments to the pension plan. Mr. Gayler

replied: "Not to my knowledge." However Mr. Gayler agreed in cross-examination that whether or not the statements upon which the Union relies in this case are promises or representations is a matter for the arbitrator to determine.

## IV

The positions of the parties can be summarized as follows.

### Union Position

The Union based its submission on these cases: *Nor-Man Regional Health v. MAHCP* [2011] 3 SCR 616 (SCC); *ICBC and OPEIU, Local 378* [2002] BCCAAA No. 109 (Hall); *Hertz Canada Ltd. and COPE, Local 378* [2012] BCCAAA No. 143 (Hall); *BC Rail Ltd. and UTU et al* [1992] BCLRBD No. 153 (Hall); *Litwin Construction* (1973*) v. Pan et al* [1988] BCJ No. 1145 (BCCA); *CPU, Local 298 and Eurocan Pulp and Paper Co.* [1990] BCCAAA No. 23 (Hickling); *Westmin Resources Ltd. and IUOE, Local 115 and Tunnel and Rock Workers Union, Local 168* [1992] BCCAAA No. 105 (Blasina); *HEABC and HSA* (2004) 123 LAC ($4^{th}$) 390 (Ready); *Re Versatile Pacific Shipyards Inc. and IBEW, Local 213* [1986] BCCAAA No. 135 (Kelleher); *Terasen Gas Inc. and IBEW, Local 213* Unreported, December 10, 2004 (Korbin); *Pacific Press Ltd. and Vancouver-New Westminster Newspaper Guild, Local 115* [1987] BCCAAA No. 230 (Munroe); and *Waste Management of Canada and Teamsters, Local 419* [2009] OLAA No. 669 (Burkett).

The Union argued that the Employer is estopped from exercising whatever right it had to require employees to switch from the DB plan to the DC plan effective January 1, 2013 because of a representation made by the Employer eleven years earlier upon which nineteen employees relied in planning their retirement. The representation was made in 2001 when the DC plan was introduced and employees had to choose between their current DB plan or the new DC plan. The representation amounted to a promise that those employees who opted to remain with the DB plan would remain on that plan and continue to accrue benefits until they left NCR or retired.

The Union argued that the elements required to establish an estoppel are present in this case: an unequivocal representation by the first party that it will not rely on its legal rights; reliance on that representation by the second party; and harm or detriment to the second party (in this case the nineteen employees) if the Employer is allowed to change its position: see *ICBC and OPEIU, Local 378,* supra at para. 40.

The Union submitted that it does not matter that the right in issue here is not a right under the collective agreement. It is evident from the authorities that the representation can concern any variety of legal rights: see *BC Rail Ltd.,* supra and *Litwin Construction,* supra. Furthermore, it does not matter that the representation was to individual employees rather than to the Union: see *HEABC and HSA*, supra; *Terasen Gas and IBEW, Local 213*, supra; and *Pacific Press Ltd.,* supra.

The Union concluded its submission by urging me to find that the Employer is estopped from any right it has to amend the pension plan that will affect the nineteen employees who chose in 2001 to stay on the DB plan and have planned their retirements on their understanding that they can continue on the DB plan until by retirement or otherwise they leave NCR. The Union asked for an Order restoring the DB plan retroactive to January 1, 2013 for all affected employees. Finally the Union argued that there is no reasonable amount of notice in the particular circumstances of this case that would be sufficient to terminate the estoppel since the employees have made their retirement plans over the course of the past 11 years and it is not possible to "unring that bell."

## Employer Position

In its argument the Employer referred to the following decisions: *Re Ontario Public Service Employees Union and Ontario Public Service Staff Union (*1987) 28 LAC (3d) (Saltman); *Re University College of Cape Breton and Nova Scotia Government Employees Union* (1997) 60 LAC (4th) 394 (Wright); *Dawn Foods Canada and UFCW, Local 342 P-2* (2002) 108 LAC (4th) 51 (Hood); *Corporation of the District of Maple Ridge v. CUPE, Local 622 and RG Arenas (Maple Ridge) Ltd. and RG Properties Ltd.* [2001] BCLRBD No. B209/2001 (Watters); *British Columbia (Public Service Employee Relations Commission) and BCGEU* (2000) 92 LAC (4th) 216 (Burke).

The Employer described this case as an attempt by the Union to attain rights through the grievance procedure over terms of the pension plan, a plan

that applies to all of NCR's employees across Canada. Those rights could have been bargained by the Union but were not. Instead the Union had agreed to exclude the plan from the collective agreement and to be governed by the plan documents which have always included the right in the Employer to amend or end the plan. The Employer characterized this grievance as a backdoor attempt by the Union to gain rights not in the agreement through an estoppel argument. This attempt must fail.

The Employer gave five separate reasons why the Union's estoppel argument should not succeed.

First, it would be unfair to apply the doctrine of estoppel since the pension plan is beyond the scope of the collective agreement. The bargain struck by the parties with respect to the plan was that employees would have the benefit of the plan but the text of the plan would govern those benefits: see articles 22.02 and 22.04. Furthermore, NCR always had the right to amend or even terminate the plan: see section 17 of the plan. In addition, any communications concerning the plan between the Employer and its employees routinely contain a statement to the effect that the plan documents govern. In such a circumstance it is the text of the pension plan that applies: see *Re Dawn Foods Canada,* supra. The Employer conceded that, unlike the situation in *Re Dawn Foods*, by virtue of article 22.04 the grievance is within my jurisdiction. However, the Employer stressed that it is significant that the Union's estoppel claim is not with respect to any bargained right and instead relates to a plan expressly agreed to be outside the scope of the collective

agreement: see, on a similar point, *Re University College of Cape Breton*, supra.

Second, the Employer submitted that in the overall context, the alleged representation was not unequivocal and did not amount to a promise that it was reasonable to rely upon. The Employer stressed that there was no commitment in the statements referred to by the Union to the effect that the DB benefits would not be amended in the future. The statements made to the nineteen employees who chose in 2001 to stay in the DB plan were simply that they would "continue to participate" in that plan. The change in 2012 was not inconsistent with those statements since those nineteen employees would continue to participate in the DB plan as amended.

When considered in the overall context, the statements cannot be considered a promise that those nineteen employees would continue to accrue DB benefits for all time. The emphasis was not on benefits but was on the fact it was a one-time opportunity. Furthermore, the footnote in the Transition Guide and in other documents to the effect that the plan documents govern and that the plan could be amended at any time renders the phrases referred to by the Union and the nineteen employees equivocal and makes it unreasonable for anyone to have relied upon them: see *District of Maple Ridge,* supra at paras. 40 and 78.

Third, there was no reliance let alone detrimental reliance by the Union or the employees. There have been four rounds of collective bargaining since

the alleged representations were made but the Union did not attempt to bargain any language related to pension benefits. Instead the Union continued with the limited language concerning the pension plan. In addition, the Union agreed to the Entire Agreement article (originally numbered article 24.6 and now article 25.06) in the negotiations that resulted in the 2009-2012 collective agreement. The effect of this new article was an agreement to preclude "representations" from consideration by an arbitration board. In light of this bargaining history it would be unfair to allow the grievance to succeed on the basis of estoppel.

Furthermore, and in any event, there was no evidence that established that if there had been no "representations" that either Mr. Mooney or Mr. Wilson would have chosen the DC benefit plan instead of the DB plan. It is only reasonable to conclude that they would have still made the same choice. Any change in the two employees' conduct is based on the amendment in 2013, not the amendment announced in 2001. It follows that there was no reliance, let alone detrimental reliance, on the alleged representation made in 2001. Any effect on the employees from the 2013 amendment is speculative and too remote: see *BC* (PSERC) and *BCGEU,* supra.

Fourth, and as argued more fully under the second point, the Employer has done nothing that is inconsistent with the communications that were issued.

Fifth, article 25.06 precludes the estoppel argument advanced by the Union on behalf of its members. Article 9.04 sets the scope of an arbitrator's

powers which are to interpret the provisions of the agreement and be governed by them. Article 25.06 is one of those provisions. It states that the collective agreement "constitutes the entire agreement between the Parties" and further specifies that "(t)here are no representations .... or other agreements .... between the Parties ...." In light of this article the Union does not have access to the equitable doctrine of estoppel.

Finally, and in the alternative, the Employer submitted that any estoppel finding could only apply to Messrs. Mooney and Wilson and not the seventeen other affected employees who did not testify.

## V

## Analysis and Decision

The issue in this case is whether the Union has established an estoppel such that the Employer should not be permitted to require the nineteen employees to change to the DC plan as of January 1, 2013.

Both counsel agree that the three elements required to establish an estoppel are an existing legal relationship, an unequivocal representation by the first party, reliance on that representation by the second party and detriment to the second party if the first party is allowed to change its position: see *ICBC* and *OPEIU, Local 378*, supra.

The first element is established by the existence of a collective bargaining relationship and a collective agreement between the parties: see, inter alia, *Westmin Resources Ltd.*, supra at para. 40; *HEABC*, supra at p. 398.

I turn to the second element. Was there an unequivocal representation by NCR in 2001 that employees who chose to remain on the DB plan at that time would remain on that plan until they retired or otherwise left NCR despite the existence of a right under the plan to amend it? The answer to this question lies in the documentary evidence.

I have reviewed all the documents from 2001 containing information relevant to the new DC plan. There are two main documents that contain what the Union has characterized as the representations.

The Transition Guide is the first document. In the section entitled "Choosing Your Pension Plan Option," two options are specified with a deadline of November 30, 2001. The importance of the choice is emphasized and the fact it is a one-time opportunity is stressed. Several passages are worthy of note and are set out below.

> You have a **one-time opportunity** to stay in your current DB Pension Plan or change to the new DC Pension Plan option. The choice is entirely up to you.
>
> ***Option #1 – Stay with the CURRENT DB Pension Plan***
>
> *With this option, you will continue to participate in the DB Pension Plan until you leave or retire from NCR.*

> ***Option #2 – Join the NEW DC Pension Plan Option as of January 1, 2002***
>
> With this option, you will keep the pension you have earned so far under the DB Pension Plan, but join the new DC Pension Plan for the future. At retirement, you'll have the option of converting your DB pension benefit to a lump sum and combining it with your DC Pension Plan account balance.
>
> .....
>
> **It's a ONE-TIME Choice**
>
> You must make your choice by November 30, 2001. If you choose the new DC option, you cannot switch back to the DB plan you now have.
>
> *The choice you make will go into effect on January 1, 2002. Your choice will remain in effect as long as you are actively employed by NCR.* ***If you do not submit an enrollment form, you will automatically stay in the current DB Pension Plan.***
>
> (italics added)

I am satisfied from a reading of this excerpt from the Guide that the employees were told by NCR that whatever choice they made by November 30, 2001, that choice would remain in effect as long as they worked for NCR. This is not a situation where the words used were vague or uncertain. The statements were clear. An employee who chose to stay with the DB plan would "continue to participate in the DB Pension Plan until you leave or retire from NCR." The choice, whether for Option #1 or #2, "will remain in effect as long as you are actively employed by NCR." There is nothing equivocal about the language that was chosen by the Employer's representatives to help employees make an informed choice about a significant benefit.

The second document of particular significance is the Enrollment Form. In that Form employees were told to choose one of two options: Option #1 to stay with the DB plan or Option #2 to join the new DC plan. Employees were given the deadline of November 30, 2001 for submission of the Form. Of most

importance, employees were told that whatever choice they made, it would "remain in effect as long as you are actively employed by NCR." The footnote found in the Transition Guide that refers to the official plan documents and the right to amend or modify the pension plan is notable by its absence from the Enrollment Form.

Let me address two arguments advanced by the Employer about these key statements that the Union considers are unequivocal representations.

One argument was that the statements simply meant employees would continue to participate in whichever plan they chose. It was suggested by the Employer that the nineteen employees would, in fact, continue to participate in the DB plan after the 2012 amendment, even though they were required to switch to the DC plan, since the retirement pension earned up to December 31, 2012 would be maintained. So the nineteen employees would continue to participate in the DB plan but it would be the DB plan as amended. In other words, the continued participation would be with respect to the benefits earned to December 31, 2012 and frozen at that point to be paid on retirement. So the argument goes.

I cannot accept that argument. In 2001 the phrase "continue to participate in the DB Pension Plan" was used to explain what would happen to the employee who chose to stay with the current DB plan (Option #1) rather than change to a different plan. There was no language used with respect to Option #2 that suggested employees joining the new DC plan would somehow

*continue to participate* in their former plan as well. While those employees who chose the DC Plan were told they would keep the DB pension benefit earned to date, their "participation" would now be in the new plan they had joined.

It is significant, in my view, that the words "one-time opportunity" and "one-time choice" were used in the Guide. The message conveyed was that this was the only time the employees would be allowed to choose between the DB and the DC plans. Once that choice was made, that was the plan in which the employee would remain. Just as an employee who chose the new DC option was told he could not switch back to the DB plan, the employee who chose to remain with the DB plan was told he would not have the option of switching to the DC plan at a later date as it was a "one-time choice." In my opinion, this was the plain and ordinary meaning of the language chosen by NCR in the Guide and, to a lesser extent, in other information documents.

The second argument advanced by the Employer about the key statements was this. The documents relied upon by the Union did not contain a commitment that the DB plan would not be amended in the future. Further, the footnote in the Transition Guide specified that the official plan documents governed and that NCR had "the right to amend, modify or terminate the Pension Plan, in whole or in part, at any time." In light of this the statements relied on by the Union must be viewed as equivocal and any reliance upon them unreasonable.

The answer to this argument is two-fold.

First, when employees were told in no uncertain terms that the pension plan they chose "will remain in effect as long as you are actively employed by NCR" it was reasonable for those employees to regard that as a commitment and rely upon it. The footnote in the Guide did specify that NCR reserved the right to amend the pension plan. But in my opinion if the Employer wanted to place a caveat on its clear statement that the choice would last for the employees' employment life, that caveat should have been expressed in the body of the information documents. Alternatively, the Employer could have omitted the reference to the choice remaining in effect throughout the individual's employment at NCR. It was always the case that NCR had the right to amend the pension plan and section 17.02 of the Plan specifically provided for this. But NCR had also explicitly advised its employees that what it stressed was an "important decision" would be one that would last as long as the individuals remained employed by NCR. As I see it, NCR was letting its employees know that, despite the fact the Plan could be amended, the choice made in 2001 was a choice that the employees and NCR would have to live with for the duration of their employment relationship.

The very essence of an estoppel argument is the existence of a legal right held by one party that it has represented it will not rely upon. NCR's legal right in this case is the right to amend its pension plan. But when NCR explicitly advised its employees in 2001 that the pension choice made at that time would be in effect for the rest of their employment life, NCR was

representing to those employees that any legal right it had to amend the Plan to change that situation would not be exercised.

Second, and in any event, the Enrollment Form in which each employee's choice was actually made, did not contain the footnote referenced earlier but did include the statement that the choice made would remain in effect throughout the individual's employment with NCR. If the Footnote was so important, then its absence from the Form must be equally significant.

It is my conclusion that there was a representation by the Employer in the words used in the 2001 documents already discussed that employees who elected to stay in the DB plan would remain in the DB plan until they left NCR and that employees could rely upon this representation despite the fact NCR had a general right to amend the Plan at any time.

I turn next to the third element required to establish an estoppel. If the Employer is allowed to change its commitment upon which the nineteen employees relied, will that change harm those employees?

In *Litwin Construction*, supra, the Court referred to the following quotation from another case that explains the form of detriment existing here and the purpose of the doctrine of estoppel:

> That purpose is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it.
>
> *Grundt v. The Great Proprietary Gold Mines Limited* (1938) 59 CLR 641 at p. 674

The evidence is convincing that Messrs. Mooney and Wilson relied on the commitments made in 2001. In fact, Mr. Mooney described the DB plan as the foundation upon which he built his retirement. Both men conducted their financial planning for their retirements on the understanding that their participation in the DB pension would continue for the length of their careers with NCR. Their NCR pension benefit would be a stable and predictable number around which other retirement planning would occur. That other planning included determinations about how much additional money was needed for regular savings, what modifications needed to be made in spending, what would be the best retirement date, what more speculative investments could safely be made and what diversification was necessary. It is significant to note that this planning took place over a period of eleven years.

If the Employer is permitted to resile from its commitment or turn its representation into a misrepresentation, the foundation upon which the retirement planning was based would be shaken. I am satisfied that "detriment or harm… would flow from the change of position".

It is my conclusion that the Union has established an estoppel on these facts.

Let me address the Employer's remaining arguments.

First, I have considered the Employer's submission about the Union's failure to bargain any language related to pension benefits even though there

have been four rounds of bargaining since 2001. In my view this has no relevance to the case before me since the issue did not arise until November, 2012 when NCR announced that employees in the DB plan would cease accumulating benefits in that plan and would move to the DC plan effective January 1, 2013. The parties concluded their most recent agreement on October 25, 2012, prior to the announcement. There is no evidence that the Union was aware before or during bargaining that the Employer planned to require all employees to join the DC plan. It follows that the Union had no reason to seek to bargain about this matter.

Second, the Employer submitted that it would be unfair to apply the doctrine of estoppel to an alleged representation that was not with respect to a right under the collective agreement. I agree with the Union that the legal right upon which the Employer has represented it will not rely need not be a right under the collective agreement. It can be a right under a Constitution for a Council of Unions as in *BC Rail*, supra, a right under a statute as in *Litwin Construction*, supra or a right under a pension plan as is the situation in the instant case.

Third, the Employer pointed to article 25.06 which it submitted expressly precludes the estoppel argument that the Union advanced.

In addressing article 25.06 the Union stressed that the provision refers to the "parties" who are the Employer and the Union. It does not refer to "persons" as does, for example, article 13.03. The Union said the article is intended to

govern the relationship between the Union and the Employer and submitted that a cautious interpretation of article 25.06 would not extend its application to employees. There is nothing in article 25.06 that says the Employer can renege on promises made to employees and that, argued the Union, is what this case is about.

In the *Waste Management* case cited by the Union, arbitrator Burkett commented that "a clause that is relied upon, within a collective bargaining relationship, to deny access to the equitable doctrine of estoppel .... must be construed cautiously" (para. 6). Arbitrator Burkett went on to give the following three labour relations policy reasons for taking a cautious approach:

> 7. This is so, firstly, because the application of the estoppel doctrine contributes to harmonious labour relations by preventing a party to a collective agreement from resiling from a representation made to the other side that it is content not to rely upon its strict legal rights where the effect of resiling would be to detrimentally affect the other party.
>
> 8. This is so, secondly, because, given the disruptive implication, i.e. the possible discontinuance of all practices that are not strictly in conformance with the language of the collective agreement, the language must evidence a clear intention to this effect.
>
> 9. Finally, this is so because the effect of not adopting a cautious approach might be to complicate the collective bargaining process -- a process that should not be made more complicated than it already is except where a more complicated process is required in order to address an issue that has been clearly and unequivocally raised.

I agree with and adopt the approach taken by arbitrator Burkett and the policy reasons upon which that approach is based.

Earlier in this award I discussed the *representations* made by the Employer in 2001 to the effect that employees who chose to remain on the DB

plan would stay on that plan until they retired or otherwise left the employ of NCR. Those representations turned out to be *misrepresentations* when, effective January 1, 2013, the Employer ceased to allow the accumulation of further benefits in the DB plan.

I have carefully examined the language used in article 25.06. When I construe the article cautiously, I am not satisfied that it was the intention of the parties to exclude consideration of evidence of broken promises or misrepresentations for the purpose of establishing an estoppel. While the article does state that there are "no representations", it is silent on "promises" and "misrepresentations" which in my view the term "representations" does not encompass. Express and unequivocal language would be required to exclude evidence of misrepresentations that could establish an estoppel.

It is my conclusion that article 25.06 does not deny access to the equitable doctrine of estoppel in these circumstances. My jurisdiction flows from article 22.04 and I am satisfied it includes the jurisdiction to apply the doctrine of estoppel in an appropriate case.

The Employer's final argument was that even if an estoppel is found to exist it should only apply to the two employees who testified. I cannot agree. The evidence was that all employees, including the nineteen who are the subject of this grievance, received the documents that contained what I have concluded was a representation. Two witnesses testified about how they relied on that representation in planning their retirements and the detriment that would flow if

the Employer is allowed to change its position. It is reasonable to conclude that the other affected employees made their own retirement planning based on what they understood and expected as a result of the Employer's representation. The Union is not required to call all nineteen employees. Other arbitrators have not imposed such a requirement but have been satisfied with the testimony of a few representatives of the group: see, inter alia, *Westmin Resources Ltd.*, supra; *HEABC,* supra and *Terasen Gas Inc.*, supra.

## VI

In summary, the Union's estoppel argument succeeds. In the documents provided by the Employer to the employees in 2001 to assist the employees in making this important decision about their pensions the Employer clearly represented that employees who chose the DB plan would stay with that plan for their employment life at NCR. The nineteen employees relied on that representation to their detriment since, as Messrs. Mooney and Wilson explained, they based their retirement planning over the next 11 years on their understanding that their pension benefit was stable and predictable. The result of the forced change in 2013 would be the loss of that stability and predictability which had been the cornerstone of their retirement planning for 11 years. In the particular circumstances of this case and when the nature of the detrimental reliance is considered, I am satisfied that there is no period of notice to terminate the estoppel that would constitute reasonable notice.

In the result the grievance is allowed. The Employer is estopped from requiring the nineteen employees to change to the DC plan. I retain jurisdiction to resolve any issues concerning the implementation of this award and to issue any Orders that may be necessary.

Dated at the City of Vancouver in the Province of British Columbia this 28th day of February, 2014.

Marguerite Jackson, Q.C.