BRITISH COLUMBIA LABOUR RELATIONS BOARD

NCR CANADA LTD.

(the "Employer")

-and-

LOCAL 213 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

(the "Union")

PANEL:	Elena Miller, Vice-Chair
APPEARANCES:	David G. Wong and Monique Orieux, for the Employer John MacTavish and Emily Luther, for the Union
CASE NO.:	66936
DATE OF DECISION:	August 22, 2014

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 The Employer applies under Section 99 of the *Labour Relations Code* (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"). In the Award, the Arbitrator found the Employer was estopped from requiring that 19 employees switch from a defined benefit ("DB") pension plan to a defined contribution ("DC") pension plan.

2 The Employer submits its Section 99 application should be held in abeyance as jurisdiction to review the Award lies with the Court of Appeal under Section 100 of the Code. Alternatively, it submits the Award should be set aside under Section 99.

3 The Union responds that the Board, not the Court of Appeal, has jurisdiction to review the Award, and the Employer's Section 99 application should therefore not be held in abeyance. It further submits the Section 99 application should be dismissed on its merits. The Employer filed a final reply submission disputing the Union's arguments. I am able to decide this matter on the basis of the parties' written submissions, which include a copy of the Award.

II. THE AWARD

4 The Award begins by noting that the Employer is a multinational company with a bargaining unit of approximately 60 employees in B.C. represented by 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 terminals, and airport self-service kiosks.

5 The Employer has a Canada-wide pension plan (the "Pension Plan") which applies to its 850-860 management staff, non-union and union employees. Until 2001, it was a DB plan. In 2001, the Employer announced it was introducing a DC plan that would become effective January 1, 2002, and would apply to all new employees. Existing employees were given a one-time choice in 2001 of remaining with the DB plan or switching to the DC plan. Nineteen members of the Union's bargaining unit chose to remain with the DB plan.

6 In 2012, the Employer decided to amend the Pension Plan effective December 31, 2012, such that all employees still participating in the DB plan component would have to switch to the DC plan as of January 1, 2013. On December 13, 2012, the Union filed a grievance on behalf of the 19 employees in its bargaining unit who had opted to remain with the DB plan (and would therefore be affected by this amendment). The Arbitrator stated:

> 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. (Award, p. 2)

7 The Union argued the Employer was estopped from requiring the 19 employees in its bargaining unit who had chosen to remain in the DB plan to switch to the DC plan, because it had made representations to its employees in 2001 which "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" (Award, p. 18).

8 The Employer "gave five separate reasons why the Union's estoppel argument should not succeed" (Award, p. 20), and the Arbitrator summarized the Employer's position in the Award. The Arbitrator further stated:

> 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 any 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. (Award, pp. 23-24)

9 After noting passages from two 2001 Employer documents (the Transition Guide and the Enrollment Form) that the Union relied on as constituting the unequivocal representations, the Arbitrator addressed Employer arguments that the passages from those two documents did not constitute unequivocal representations on which the 19 employees could reasonably have relied to their detriment. In particular, the Arbitrator addressed the Employer's argument that, in a footnote to the Transition Guide, it had expressly said that it reserved the right to amend the Pension Plan. The Arbitrator stated:

> 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 [in the Transition Guide] 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. (Award, pp. 28-29)

10 The Arbitrator concluded 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 that NCR had a general right to amend the Plan at any time" (Award, p. 29).

11 The Arbitrator then turned to whether the third element of estoppel, detrimental reliance, was established. In that regard, she found the evidence of the Union's two witnesses, bargaining unit members who had both chosen to remain with the DB plan in 2001, established that they had "conducted their financial planning for their retirements on the understanding that their participation in the DB pension plan would continue for the length of their careers with NCR" and that if the Employer were permitted to amend the Pension Plan such that they were required to switch to a DC plan, "the foundation upon which the retirement planning was based would be shaken" (Award, p. 30). On this basis, she found the detrimental reliance aspect of estoppel was established.

12 The Arbitrator further stated there was no evidence the Union was aware during prior bargaining sessions that the Employer planned to amend the Pension Plan to require all employees to join the DC plan. Accordingly, the Arbitrator found, the Union had no reason to seek to bargain a provision into the Collective Agreement precluding the Employer from making such an amendment. The Arbitrator further stated that the legal right upon which an estoppel is founded "need not be a right under the collective agreement"; it can be "a right under a pension plan as is the situation in the instant case" (Award, p. 31).

13 The Arbitrator rejected an argument by the Employer that an "entire agreement" clause in the Collective Agreement precluded reliance on the equitable doctrine of estoppel. She also rejected the argument that, if estoppel is found, it should only apply

to the two employees who testified, concluding that their testimony was representative of the circumstances of the 19 bargaining unit employees at issue.

14 In the result, the Arbitrator allowed the Union's grievance. She found the Union had met the requirements to establish an estoppel against the Employer amending the Pension Plan to require the 19 employees to switch from the DB plan to the DC plan effective January 1, 2013. The Arbitrator concluded:

> The result of the forced change in 2013 would be the loss of the 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. (Award, pp. 34-35)

III. POSITIONS OF THE PARTIES

A. Employer

Jurisdiction to Review

15 The Employer submits the British Columbia Court of Appeal has jurisdiction to review the Award because, it submits, the basis of the Award is a matter of general law not included in Section 99. Specifically, the Employer submits the real basis of the Award is "the application of estoppel in respect of an alleged representation to all Canadian employees of the Employer related to the Employer's Canadian Pension Plan (the 'Pension Plan') that applies to all Canadian employees of the Employer, within and outside of British Columbia, whether unionized or not". On that basis, the Employer says, it has filed a Notice of Appeal with the Court of Appeal.

16 The Employer further submits that the leading decision on the issue of jurisdiction to review arbitration awards under Sections 99 and 100 of the Code is *Vancouver Hospital & Health Sciences Centre v. British Columbia Nurses' Union*, 2005 BCCA 343 ("*BCNU*"), in which a five-member panel of the Court of Appeal stated:

> I would summarize what I understand to be the correct analytical approach to the application of ss. 99 and 100, based on a purposive interpretation of those sections, and the jurisprudence which has previously addressed the problem:
>
> 1. Identify the real basis of the award;

2. Determine whether the basis of the award is a matter of general law;

3. If the basis of the award is a matter of general law, determine whether it raises a question or questions concerning the principles of labour relations, whether expressed in the Labour Relations Code or another statute. (para. 49)

17 The Employer submits the real basis of the Award is "estoppel in relation to an alleged representation related to the Employer's Canada-wide Pension Plan that applies to all Canadian employees of the Employer, whether unionized or not". The Employer further submits that this is a matter of general law not included in Section 99, because the Board has recognized that estoppel is a matter of general law, and because in this case the estoppel is in relation to a right under the Employer's Canada-wide Pension Plan that applies to all of its Canadian employees, whether unionized or not. The Employer submits the Court has held it has jurisdiction under Section 100 where the basis of an award is a matter of general law that applies to or affects all employees, whether unionized or not: *BCNU* at paras. 52-53.

18 The Employer submits the Board relied on the approach set out in *BCNU* in *Haakon Industries (Canada) Ltd.*, BCLRB No. B36/2011 (Leave for Reconsideration of BCLRB No. B186/2010) ("*Haakon*"). In that case, the reconsideration panel found the Board did not have jurisdiction to review an award under Section 99 because the basis of the award was a provision of the *Employment Standards Act*, R.S.B.C. 1996, c. 113, which applies both to union and non-union employees. The panel found that, in those circumstances, it was "insufficient that the provisions apply to labour relations matters, along with the broader impact in other employment contexts": *Haakon* at para. 38.

19 The Employer submits that, similarly, in the present case, the basis of the Award is "an estoppel that would apply to all Canadian employees of the Employer equally, whether unionized or not". The Employer submits it is thus a matter of general law not included in Section 99, and accordingly the Award is not within the review jurisdiction of the Board under Section 99, but rather the Court of Appeal under Section 100.

Section 99 Application

20 Alternatively, if the Board concluded it has jurisdiction under Section 99, the Employer submits the Board should set aside the Award and dismiss the grievance.

21 The Employer submits the Collective Agreement requires it to provide a pension plan to bargaining unit employees but does not provide entitlement to a particular type of plan (DB or DC). Furthermore, the terms of the Pension Plan expressly provide the Employer the right to amend the plan, which it did first in 2001 and again in 2013.

22 In 2001, the amendment gave all existing employees a one-time opportunity to remain under the DB plan or switch to the new DC plan, effective January 1, 2002. In 2013, the Employer amended the Pension Plan again, such that those employees who

had chosen to remain under the DB plan would keep their DB entitlements accrued to January 1, 2013, but from that date onward, they would be switched to accrue benefits under the DC plan.

23 The Employer submits that, when the Union grieved the 2013 amendment to the Pension Plan, it originally alleged a breach of the Collective Agreement, but eventually amended the grievance to allege solely that the Employer was estopped from amending the Pension Plan to cease the accrual of DB benefits for those employees who still accrued such benefits. The Union relied for its estoppel argument on alleged representations by the Employer in 2001 regarding the choice to switch to the new DC plan or remain with the existing DB plan.

24 The Employer submits the Arbitrator erred in allowing the Union's estoppel argument, because in 2001 the Employer had not unequivocally represented it would not amend the Pension Plan in the future, or that employees who chose to remain with the DB plan would be able to continue to accrue DB benefits for the remainder of their employment with the Employer. The Employer argues that the passages the Union relied on, in the Transition Guide and the Enrollment Form, did not provide a basis for finding such unequivocal representation.

25 The Transition Guide expressly provided that it did not replace or modify the official Pension Plan documents that legally governed, and that the Employer reserved the right to amend, modify or terminate the plan in whole or in part at any time. The Employer submits these passages clearly rendered the passages relied on by the Union in the Transition Guide at best equivocal.

26 With respect to the Enrollment Form, the Employer submits that the passages relied on in that document communicate that employees were being given a one-time choice to remain in the existing DB plan or switch to the new DC plan. Whereas the Transition Guide stated: "With this option, you will continue to participate in the DB Pension Plan until you leave or retire from NCR", the Enrollment Form merely stated: "Your choice will remain in effect as long as you are actively employed by NCR". The Employer submits this does not constitute an unequivocal representation that the Pension Plan will not be amended.

27 The Employer further submits that, even if the Arbitrator did not err in finding an unequivocal representation, she erred in finding the third element required for an estoppel, detrimental reliance, was met. There was no evidence the employees who chose to remain with the DB plan would not have done so, and would instead have switched to the DC plan, but for the passages in the Transition Guide and the Enrollment Form that the Union relied on in asserting an estoppel. To the contrary, the Union's position was that those employees who chose to remain with the DB plan should be allowed to remain with that plan notwithstanding the 2013 amendment requiring them to switch to the DC plan.

28 Thus, the Employer submits, the employees did not change their position in reliance on the alleged representation. Their original position that they wanted to be

under the DB plan continues to be their position. Accordingly, there was no detrimental reliance on any statements made by the Employer in the Transition Guide and the Enrollment Form.

29 The Employer submits the Arbitrator further erred in rejecting its argument that, even if the elements of estoppel were present, a finding of estoppel was precluded by Article 25.06, the "entire agreement" clause in the Collective Agreement. The Employer submits the Arbitrator erred in finding that clause did not apply because it referred to "representations" but not "misrepresentations". The Employer submits a misrepresentation is a "representation" for purposes of this clause; to find otherwise would render the clause meaningless. The clause is intended to prevent the parties from relying on representations outside the Collective Agreement, including representation that might otherwise give rise to an estoppel.

30 Thus, the Employer submits, the Award is inconsistent with Code principles because the Employer "did not make the unequivocal representation that was necessary to ground the finding of estoppel made by the Arbitrator"; because "there was no detrimental reliance necessary to ground the finding of estoppel"; and because the Arbitrator's interpretation of Article 25.06, the "entire agreement" clause in the Collective Agreement, "was unreasonable and, in the alternative that the elements of estoppel were present, its operation was precluded by article 25.06 of the Collective Agreement".

B. Union

Jurisdiction to Review

31 The Union disagrees with the Employer as to jurisdiction to review the Award. The Union submits the real basis of the Award is not a matter of general law but rather the Arbitrator's factual determination that the Union's members are entitled to remain in the DB plan based on her application of established, agreed-upon principles of estoppel to the facts in the context of a collective bargaining relationship. Alternatively, if the basis of the Award is a matter of general law, estoppel as applied by arbitrators in the labour relations context is a matter of general law included in Section 99, and accordingly the Award is within the Board's jurisdiction to review.

32 The Union agrees the test for determining jurisdiction to review is that set out by the Court of Appeal in *BCNU*. However, it submits, with respect to the first question under that test, the real basis of the Award is not estoppel but rather the Arbitrator's factual determination that the employees in question are entitled to remain in the DB plan. In order to reach this conclusion, the Arbitrator considered and applied the principles of estoppel, finding the Employer made an unequivocal representation and the Union's members relied on that representation to their detriment. Accordingly, the Award did not involve an interpretation of the general law of estoppel but rather an application of the well-established legal test for estoppel, on which both parties agreed, to the facts before the Arbitrator.

33 The Union submits it is well-established that, once the correct test for estoppel is chosen, determinations as to whether the test is met (whether there has been an unequivocal representation and detrimental reliance) are questions of fact on which the arbitrator will be given deference: *B.C. Rail Ltd.*, IRC No. C152/92 and a number of other Board decisions cited by the Union. The Union submits the same approach was taken by the Court of Appeal in finding it did not have jurisdiction to review an award even though estoppel was an aspect of the award: *Martin-Brower of Canada, Ltd. v. General Truck Drivers and Helpers Union, Local No. 31* (1994), 112 D.L.R. (4th) 191 (B.C.C.A.) ("*Martin-Brower*").

34 The Union further submits the Court of Appeal has indicated that, where an arbitrator does not interpret a statute of general application but merely applies well-established legal principles and tests, review will not lie with the Court of Appeal under Section 100: *United Steelworkers of America, Local 7884 v. Fording Coal Ltd.*, 1999 BCCA 534 ("*Steelworkers*"); *Communications, Energy and Paperworkers' Union of Canada, Local 789 v. Domtar Inc.*, 2009 BCCA 52 ("*Domtar*"). Here, the Union submits, the parties agreed on the well-established test for estoppel, and the basis of the Award is the Arbitrator's application of that test to the facts, a circumstance which does not trigger the Court of Appeal's jurisdiction under Section 100.

35 The Union further submits that the Board has consistently taken jurisdiction to review arbitration awards involving the application of the principles of estoppel by arbitrators: *Corporation of the City of Penticton*, BCLRB No. 26/78, 18 L.A.C. (2d) 307 ("*Penticton*") and other Board decisions cited by the Union. In one such decision, *West Fraser Mills Ltd. (100 Mile Lumber Division)*, BCLRB No. B199/2006 (Leave for Reconsideration denied, BCLRB No. B311/2006) ("*West Fraser Mills*"), the Board stated:

> That the Board has jurisdiction under Section 99 to review an arbitration award in respect of the application of the doctrine of estoppel is well-established… . (para. 18)

36 The Union submits the Board has very clearly expressed the view that it has jurisdiction to review arbitrators' application of the doctrine of estoppel, and that this view is consistent with the Court of Appeal's narrow view of its own jurisdiction under Section 100. The Union submits it is also consistent with the view expressed by the Supreme Court of Canada in *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59 ("*Nor-Man*"), that arbitrators are entitled to deference in terms of how they apply the doctrine of estoppel in the specialized context of labour arbitration, and that they need not apply in the same way as would a court. The Union submits this supports the conclusion that, to the extent estoppel as applied by an arbitrator is a matter of general law, it is a matter of general law included in Section 99.

37 The Union also relies on recent decisions by the Court of Appeal in which it emphasized the narrow scope of its jurisdiction under Section 100 in finding no jurisdiction to review the awards in issue: *Teck Coal Ltd. v. United Steelworkers Local*

9346 (Elkview Operations), 2013 BCCA 485 ("*Teck Coal*"); *Okanagan College Faculty Assn. v. Okanagan College*, 2013 BCCA 561 ("*Okanagan College*"); *British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation*, 2014 BCCA 110.

38 The Union submits that the fact the estoppel in the present case arises in relation to a right found in the Pension Plan rather than the Collective Agreement itself makes no difference for purposes of determining jurisdiction to review the Award. It is the fact that principles of estoppel are being applied in a labour relations context that is relevant for jurisdictional purposes. The Union submits the Board has accepted jurisdiction to review an award where the estoppel did not relate to a collective agreement provision: *West Fraser Mills*.

39 With respect to the Employer's argument that the Court of Appeal has jurisdiction to review under Section 100 because the estoppel in question would apply to all of its employees, unionized or not, the Union submits that this is not the case. The estoppel found by the Arbitrator in the Award was in respect to a grievance filed by the Union on behalf of unionized employees, and it is binding only on the parties to the Collective Agreement. Accordingly, the Union submits, the Award has no effect on non-union employees of the Employer. In the circumstances, the Union submits, jurisdiction to review the Award lies with the Board under Section 99 of the Code.

Section 99 Application

40 On the merits of the Section 99 application, the Union submits the Employer bases its objections to the Award on the Arbitrator's findings of fact and her interpretation of the Collective Agreement, areas in which the Arbitrator is due considerable deference. The Union submits the Employer has failed to point to any palpable and overriding error with respect to the Arbitrator's findings of fact that there was an unequivocal representation and detrimental reliance, and has failed to show the Arbitrator did not make a genuine effort to interpret the Collective Agreement provision at issue. In these circumstances, the Union submits, the Award should not be disturbed.

IV. ANALYSIS AND DECISION

Jurisdiction to Review

41 The Board has long taken jurisdiction under Section 99 to review arbitrators' application of the doctrine of estoppel in their awards. As stated in *Harbour Cruises Ltd.*, BCLRB No. B181/2004 ("*Harbour Cruises*") (at paras. 31-32, emphasis added):

> The issue in this case is whether the Arbitrator properly applied the law of estoppel. The Board has long exercised its jurisdiction to review arbitration awards in respect to the doctrine of estoppel: *Corporation of the City of Penticton*, BCLRB No. 26/78, (1978) 18 LAC (2d) 307 ("*Penticton*"); *Corporation of the District of Surrey*, *supra*; *Fording Coal Limited*, BCLRB No. B317/95. The

> Board has found reviewable errors in respect to arbitration panels' estoppel determinations: *Penticton*; *District of Chilliwack*, BCLRB No. L362/82; *Board of School Trustees, School District No. 41 (Burnaby)*, BCLRB No. 365/83, upheld on reconsideration BCLRB No. 256/84.
>
> The Board has jurisdiction to ensure that arbitrators apply the principles of estoppel in a manner consistent with the arbitrator's statutory mandate. However, the Board will not review an arbitrator's conclusions regarding the merits of an estoppel claim, provided the arbitrator "proceeds on the right understanding of the law of estoppel": *Fording Coal Limited*, BCLRB No. B317/95, para 18; *Fording Coal Limited*, BCLRB No. B2/2003. As stated by the Board in *Corporation of the District of Surrey*, *supra*, "it would be a reviewable error if an arbitration panel departed from the 'modern law of estoppel' and its approach as explained in *B.C. Rail*" (para 23).

42 Similarly, the Board stated in *Fording Coal Limited*, BCLRB No. B2/2003 ("*Fording Coal*") (at paras. 20-22, emphasis added):

> In *Fording Coal Limited*, BCLRB No. B317/95 ("*Fording Coal*"), the Board affirmed its supervisory role to ensure that arbitrators apply the principles of estoppel in a manner consistent with the arbitrator's statutory mandate. The Board cautioned that an arbitrator's conclusions regarding the merits of an estoppel claim are beyond review provided the arbitrator "proceeds on the right understanding of the law of estoppel" (para. 18). In *Surrey, supra*, the Board addressed an application that was similar in some respects to the instant case and concluded "it would also be a reviewable error if an arbitration panel departed from the 'modern law of estoppel' and its approach as explained in *B.C. Rail*" (para. 23). Later, the panel described the Board's review of arbitral determinations regarding estoppel as, "whether it was reasonably possible for the arbitrator to reach the conclusion he or she did by applying Code principles, in the case of estoppel the principles in *B.C. Rail*" (para. 30). In *Doman, supra*, the Board cited the standard of review articulated in *Fording Coal, supra,* and summed up the standard of review regarding estoppel determinations as follows: "It is not the practice to intervene if there was evidence on which the arbitration board could properly make its finding" (para. 27).
>
> Running through all the cases is the recognition that subject to the above noted principles, determinations about whether a party makes an unequivocal representation, acts to its detriment or the manner in which an arbitrator assesses the equities, are factual and discretionary matters beyond the scope of review under Section 99: *Corporation of the District of Maple Ridge,* BCLRB No. B209/2001(Leave for Reconsideration of BCLRB No. B295/2000) ("*Maple Ridge*") at para. 25. This reasoning is consistent with the

deference to arbitral determinations regarding the doctrine of estoppel underscored in *Penticton:*

> Let me be clear about the nature of this Board ruling. It is not a ground for review under the Labour Code that an arbitrator has reached one conclusion rather than another about the merits of an estoppel claim. Rather, the reviewable flaw in this arbitration award consisted in its assumption that a labour arbitrator is strictly bound to the narrow, judicial conception of estoppel. In so far as this award was based on that legal premise, it did contravene the principles of the Labour Code, and it is for that reason that this award must be set aside. (at p. 322)

Hence, I am not persuaded that it is appropriate to subject the arbitrator's analysis of *Eurocan* to an exacting analysis to determine if the propositions represent a correct reading of arbitral jurisprudence. All that is necessary to decide is whether the Arbitrator's analysis is underpinned by a correct understanding of the modern view of estoppel. Within the broad confines of that doctrine different strands of arbitral opinion may develop in response to the individual circumstances of each case. Under the provisions of Section 99 it is not the Board's role to resolve such debates or interfere with the outcome of a particular determination provided that the reasoning is consistent with the arbitrator's broad statutory mandate.

43 Thus, there is no doubt the Board considers it has jurisdiction to review arbitrators' application of the principles of estoppel under Section 99 of the Code. Not only has it done so on numerous occasions, but also it has developed an established policy approach to such review, as summarized in *Harbour Cruises* and *Fording Coal* and the Board decisions cited in those two decisions.

44 I find the Court of Appeal's decisions under Section 100 support the view that the Board, not the Court, has jurisdiction to review the application of principles of estoppel by labour arbitrators. In *Martin-Brower*, the employer sought to appeal an award under Section 100 in which the arbitrator had applied principles of estoppel, arguing that "the law concerning promissory estoppel is part of 'the general law' and that therefore the Court of Appeal has jurisdiction" to review the award (para. 7). In the course of rejecting this argument, Finch J.A. (as he then was) stated for the Court of Appeal (at paras. 32 and 35-37):

> There will be many circumstances in which labour arbitrators are called upon to hear and to weigh legal arguments, and to reach conclusions as to what common-law principles, or statutory provisions, apply to the facts giving rise to the arbitration procedure. It is clear from the legislative scheme for review of arbitration awards that not every "…issue of general law…" falls

> outside the ambit of review by the Industrial Relations Council [now the Board] under s. 108 [now Section 99]. …
>
> * * *
>
> It was not the intention of the legislature that every time an arbitrator applies principles or concepts derived from law of general application that an appeal should lie to this Court. Such an interpretation overlooks entirely the closing words of s-s. 109(1) [now Section 100] as well as s. 108 of the Act [now Section 99 of the Code], and the important supervisory role conferred by the legislature upon the Industrial Relations Council [now the Board].
>
> With these considerations in mind, it cannot be said that the arbitrator's reference to estoppel, as a matter of the general law, constitutes "the basis of the … award …" as those words are used in s-s. 109(1) of the Act [now Section 100 of the Code]. Nor can it be said that the basis of the award is a matter of the general law "…not included in section 108(1) [now Section 99]."
>
> It would seem to me to be much more consonant with the general scheme of review contemplated by ss. 108 and 109 [now Sections 99 and 100], and the principles expressed in the Act [now the Code], to conclude that the basis of this award is a matter for review by the Industrial Relations Council [now the Board].

45 The approach to Section 100 jurisdiction taken in *Martin-Brower* (and other Court of Appeal Section 100 decisions cited therein) has been followed in subsequent Court of Appeal Section 100 decisions. For example, in a much more recent decision, *Teck Coal*, the Court of Appeal stated (at para. 19):

> Thus, even if the matter is an issue of general law, that does not end the analysis. It must also be an issue of general law not included in s. 99(1) in order for this Court to have jurisdiction. As Esson J.A. said, at para. 27 (citing para. 35 of the reasons of Mr. Justice Finch (as he then was) in *Martin-Brower*:
>
> > …It was not the intention of the legislature that every time an arbitrator applies principles or concepts deriving from law of general application that an appeal should lie to this Court. Such an interpretation overlooks entirely the closing words of s. 109(1) [now Section 100] as well as s. 108 [now Section 99] of the Act, and the important supervisory role conferred by the legislature upon the Industrial Relations Council.

46 Thus, I find decisions of the Court of Appeal under Section 100 are consistent with the Board's longstanding view that arbitrators' application of estoppel is reviewable by the Board under Section 99, not by the Court of Appeal under Section 100. I find the

same conclusion would be reached by applying the three-part jurisdictional test set out by the Court of Appeal in *BCNU*. Assuming the real basis of an award is the arbitrator's application of estoppel, and that estoppel is a matter of general law, both the Board and the Court of Appeal have concluded that arbitrators' application of estoppel is a matter of general law falling within the scope of Board review under Section 99.

47 I further agree with the Union that, in any event, the real basis of the Award is not the interpretation of the doctrine or principles of estoppel, but the application of the well-established test for estoppel to the facts before the Arbitrator. There was and is no dispute between the parties as to the legal test for estoppel that the Arbitrator had to apply; the dispute was whether the test was met in the particular circumstances of the case. As noted in the Court of Appeal's decision in *Okanagan College* and decisions cited therein, where the basis of an award is the arbitrator's application of a well-established legal test to the particular facts before the arbitrator, review jurisdiction lies with the Board under Section 99, not the Court of Appeal under Section 100 (see also *Steelworkers* and *Domtar*).

48 I find the fact that the doctrine of estoppel was applied by the Arbitrator with respect to the Employer's legal right to amend the Pension Plan rather than with respect to a legal right under an express provision of the Collective Agreement makes no difference from a jurisdictional perspective. There is no suggestion the Arbitrator lacked jurisdiction to decide the grievance. As the matter was arbitrable (presumably because the Pension Plan was incorporated by reference into the Collective Agreement), the Arbitrator had jurisdiction to consider the doctrine of estoppel in relation to the Employer's legal right to amend the plan. In these circumstances, her application of the doctrine in the context of a grievance arising under the Collective Agreement is reviewable by the Board under Section 99.

49 While the Pension Plan itself, and any amendment to it, would affect all employees of the Employer covered by it, union and non-union, the Award did not turn on the interpretation of the Pension Plan. It was not disputed that, under the Pension Plan, the Employer had a legal right to amend it; the issue was whether the Employer was estopped from exercising that right with respect to the 19 members of the Union whose grievance was before the Arbitrator. It is possible that other, non-union employees covered by the Pension Plan may make a similar estoppel argument to a court or other tribunal with jurisdiction to decide that claim. However, that tribunal would not be bound by the Award, and the Supreme Court of Canada in *Nor-Man* held arbitrators are not required to apply the doctrine of estoppel identically to how it would be applied by a court. Accordingly, I find this case is not similar to cases where the Court of Appeal has found jurisdiction under Section 100 because an arbitrator was applying a statutory provision which must be applied identically to all employees, union and non-union.

50 For these reasons, I conclude jurisdiction to review the Award lies with the Board under Section 99 of the Code.

Section 99 Application

51 As noted earlier, the Board has a long-established policy approach to reviewing arbitrators' application of estoppel principles. In essence, as long as the arbitrator applies the correct legal test, and there is some evidentiary basis for the arbitrator's findings on the required elements of the test, the Board does not second-guess the arbitrator's assessment of whether the various elements of the test are met on the facts before the arbitrator: *Harbour Cruises*; *Fording Coal*; and Board decisions cited therein.

52 Here, the Employer does not allege the Arbitrator failed to apply the established test for estoppel, which the Arbitrator summarized correctly in the Award at page 23 ("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"). Rather, the Employer takes issue with the Arbitrator's application of the test to the circumstances before her. It alleges she erred in concluding the Employer had made an unequivocal representation in 2001 that employees who chose to remain with the DB plan would be able to remain on that plan and continue to accrue benefits under it until they left their employment with the Employer or retired, and in concluding that the 19 employees at issue who chose to remain with the DB plan relied to their detriment on the Employer's 2001 representations.

53 Thus, the Employer does not agree with the Arbitrator's finding that statements it made in the Transition Guide and the Enrollment Form constitute an unequivocal representation, and that evidence established the 19 employees in question relied on that representation to their detriment. These are precisely the types of assessments which the Board has consistently said it will not review under Section 99. As stated in *Fording Coal* (at paras. 21-22, emphasis added):

> …determinations about whether a party makes an unequivocal representation, acts to its detriment or the manner in which an arbitrator assesses the equities, are factual and discretionary matters beyond the scope of review under Section 99: *Corporation of the District of Maple Ridge,* BCLRB No. B209/2001(Leave for Reconsideration of BCLRB No. B295/2000) ("*Maple Ridge*") at para. 25. This reasoning is consistent with the deference to arbitral determinations regarding the doctrine of estoppel underscored in *Penticton:*
>
> > Let me be clear about the nature of this Board ruling. It is not a ground for review under the Labour Code that an arbitrator has reached one conclusion rather than another about the merits of an estoppel claim. Rather, the reviewable flaw in this arbitration award consisted in its assumption that a labour arbitrator is strictly bound to the narrow, judicial conception of estoppel. In so far as this award was based on that legal premise, it did contravene the principles of the Labour Code, and it

> is for that reason that this award must be set aside. (at p. 322)
>
> Hence, I am not persuaded that it is appropriate to subject the arbitrator's analysis of *Eurocan* to an exacting analysis to determine if the propositions represent a correct reading of arbitral jurisprudence. All that is necessary to decide is whether the Arbitrator's analysis is underpinned by a correct understanding of the modern view of estoppel. Within the broad confines of that doctrine different strands of arbitral opinion may develop in response to the individual circumstances of each case. Under the provisions of Section 99 it is not the Board's role to resolve such debates or interfere with the outcome of a particular determination provided that the reasoning is consistent with the arbitrator's broad statutory mandate.

54 In the present case, I am satisfied that the Arbitrator's analysis is underpinned by a correct understanding of the modern view of estoppel. That view, as explained by then-Chair Weiler in *Penticton*, requires the arbitrator not be "strictly bound to the narrow, judicial conception of estoppel" (p. 322). In the present case, I find it is evident from the Award that the Arbitrator was not so bound in coming to the conclusion that the circumstances before her gave rise to an estoppel against the Employer. I find this conclusion was open to the Arbitrator (there is an evidentiary basis for it apparent on the face of the Award), and her reasoning in reaching this outcome is consistent with arbitrators' broad mandate under the Code. Accordingly, the Award meets the Board's review requirements for an arbitrator's application of the doctrine of estoppel under Section 99 of the Code.

55 Even if I am wrong as to the limited extent of review required under Section 99, and were to review the Arbitrator's assessments that the Employer's representations were unequivocal and that the 19 unionized employees relied on them to their detriment in light of the Employer's arguments that those assessments were erroneous, I am not persuaded by the Employer's arguments for the reasons which follow.

56 With respect to the Arbitrator's assessment that the Employer's representations were unequivocal, the Employer submits it had the legal right to amend the Pension Plan, and this legal right was expressly noted in the Transition Guide. Accordingly, it submits, any representation in the Transition Guide implying the Pension Plan would not be amended could not be relied on as unequivocal. As for the Enrollment Form, it stated: "Your choice will remain in effect as long as you are actively employed by NCR", and the Employer submits this does not constitute an unequivocal representation that the Pension Plan would not be amended.

57 The Arbitrator addressed these arguments in the Award by stating:

> 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 [in the Transition Guide] 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 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 that NCR had a general right to amend the Plan at any time (Award, pp. 28-29)

58 I am not persuaded this analysis is in error or inconsistent with Code principles. It recognizes that the Employer referenced its legal right to amend the Pension Plan in the Transition Guide, but also that the Employer made other statements in the Transition Guide and Enrollment Form which, even when read in light of the reference to the Employer's legal right, would lead a reasonable employee to conclude that the Employer was waiving its legal right to amend in this particular instance. As the Arbitrator put 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" (p. 28). I find no error in this reasoning. In my view, it fully supports the Arbitrator's finding of an unequivocal representation by the Employer that employees who chose in 2001 to remain on a DB plan could and would remain on that plan until their employment relationship with the Employer ended.

59 With respect to the Arbitrator's finding of detrimental reliance, the Employer submits there was no evidence the employees who chose to remain in the DB plan would not have done so, and would instead have switched to the DC plan, but for the representations in the Transition Guide and Enrollment Form. Therefore, the Employer submits, there is no evidence the employees relied on those representations to their detriment.

60 However, the detriment alleged by the Union and found by the Arbitrator was not the missed opportunity to switch to the DC plan. Rather, it was the detriment that flowed from having relied on the 2001 representation that they would be able to remain on the DB pension plan until the employment relationship ended. The evidence was that the employees had organized their financial affairs and retirement plans on the basis of the representation that they would remain on the DB plan until retirement. The Arbitrator found that 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" (Award, p. 34). I find no error or inconsistency with Code principles in the Arbitrator's finding that this constituted detrimental reliance, particularly in light of the broad, labour relations-focused approach to estoppel mandated in *Penticton*.

61 The Employer further submits the Arbitrator erred in rejecting its argument that a finding of estoppel was precluded by Article 25.06, the "entire agreement" clause in the Collective Agreement. The Employer submits the purpose of this clause was to prevent parties from relying on representations outside the Collective Agreement, including representations that might otherwise give rise to an estoppel. It submits the Arbitrator erred in finding this clause did not apply in the circumstances because it referred to "representations" but not "misrepresentations".

62 I find the Arbitrator did not err in concluding Article 25.06 allowed a finding of estoppel, although my reasons for reaching this conclusion differ somewhat from the reasoning the Arbitrator expressed in the Award on this point.

63 The Arbitrator set out Article 25.06 as well as another Collective Agreement provision the Employer relied on, Article 9.04 (at p. 3 of the Award):

> 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 in this Agreement.
>
> * * *
>
> 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. …

64 In the Award, the Arbitrator noted with approval (at p. 32) arbitral authority for the proposition that arbitrators should be cautious with respect to a collective agreement provision that is being relied on as allegedly denying access to the equitable doctrine of estoppel. Because 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", collective agreement language which is said to preclude estoppel "must evidence a clear intention to this effect" (*ibid*). The Employer does not argue that this interpretative approach is erroneous or inconsistent with Code principles, and I find it is a correct approach.

65 Applying that approach, I find Article 25.06 does not preclude the application of the doctrine of estoppel by arbitrators deciding grievances under the Collective Agreement. Article 25.06 sets out that the written agreement in which it appears is the "entire" Collective Agreement. This is consistent with the definition of "collective agreement" in the Code, which states that it means "a written agreement". The statutory requirement that collective agreements be in writing ensures that the focus of collective agreement grievance arbitration is on interpreting relevant provisions of the written agreement. However, this focus does not preclude reliance on negotiating history and other extrinsic evidence, oral and written, for purposes of interpreting the written agreement, and it also allows for the application of the doctrine of estoppel: see the extensive explanation for these policies based on Code principles in *Penticton*.

66 In *Penticton*, Chair Weiler stated in part:

> Labour arbitrators in this Province most definitely are *not* confined to the traditional boundaries of such legal concepts as promissory estoppel. Even the Courts are now coming to a belated recognition that a collective agreement is not an ordinary commercial contract, and that established principles of contract law have to be re-fashioned to accommodate the special needs of the world of collective bargaining… .
>
> * * *
>
> Perhaps nowhere is that distinctive set of mind more important than in disputes such as this one: in which the arbitrator is invited to go beyond the four corners of the written document in order to explore the actual dealings of the parties in their collective bargaining relationship. … (pp. 314-316, emphasis in original)

67 Chair Weiler then quoted from an earlier decision of his regarding the use of extrinsic evidence in collective agreement interpretation, in which he stated that arbitration awards would look "foolishly legalistic" if they failed to consider such evidence, adding:

> Suppose the Code permits that party to come to the hearing, to invoke a technical, legal doctrine which prevents the other side from giving its account of what has been going on in the workplace, and then to talk the arbitrator into an artificial, linguistic construction of the contract provision, one which deprives the other party of the benefit of the bargain which previously it had enjoyed. It is hard to imagine a better recipe for eroding the atmosphere of trust and co-operation which is required for good labour management relations, ultimately breeding industrial unrest in the relationship – all contrary to the objectives of the Labour Code. It is for these reasons that this Board has consistently interpreted Part VI of the Code as empowering the arbitrator to do what this Board did: inquire into all of the background material which, as a matter of practical, common sense, is helpful to the interpretation of the collective agreement in order to discover the actual intent of the parties who wrote it. (p. 317, quoting from *The Corporation of the District of Burnaby*, BCLRB No. 19/78, [1978] 2 Canadian LRBR 99 at p. 103)

68 Chair Weiler then stated that, for the same reasons, labour arbitrators could and should have recourse to the equitable doctrine of estoppel in resolving grievances. Furthermore, he found that arbitrators should not feel constrained when applying the doctrine, stating in part:

> …the reviewable flaw in this arbitration award consisted in its assumption that a labour arbitrator is strictly bound to the narrow, judicial conception of estoppel. …In so far as this award was based on that legal premise, it did contravene the principles of the Labour Code, and it is for that reason that this award must be set aside. (p. 322)

69 Article 25.06 does not expressly preclude arbitrators from applying the doctrine of estoppel, and I find it would be inconsistent with the Code principles discussed in *Penticton* to interpret it as having that effect.

70 With respect to Article 9.04, which precludes arbitrators from modifying or amending the Collective Agreement, I note the doctrine of estoppel does not modify or amend the Collective Agreement. It merely precludes one party from relying on its strict legal rights under that agreement in circumstances where the test for estoppel is met. Accordingly, I find no inconsistency with this provision in the Arbitrator applying the doctrine of estoppel.

71 Thus, I find Articles 25.06 and 9.04 do not lead to the conclusion that the parties have agreed that the doctrine of estoppel shall not apply. Article 9.04 reflects the Code and labour relations principle that arbitrators may interpret the Collective Agreement but may not change, modify or alter it. Article 25.06 reflects the Code and labour relations principle that the entire Collective Agreement is the written agreement signed by the parties. However, neither of these principles precludes arbitrators from applying the doctrine of estoppel where appropriate.

72 Estoppel does not change, modify or alter the Collective Agreement, and the Board has found it to be within the jurisdiction of arbitrators to apply the doctrine when interpreting the (written) provisions of collective agreements. It is within arbitrators' jurisdiction for purposes of carrying out their mandate under Section 82(2) of the Code, pursuant to which they "must have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties to it under the terms of the collective agreement, and must apply principles consistent with the industrial relations policy of this Code, and is not bound by a strict legal interpretation of the issue in dispute" (emphasis added).

73 Accordingly, I find the Arbitrator was correct when she concluded that Article 25.06 does not preclude the parties from raising or relying on the doctrine of estoppel in the context of grievance arbitration. Here, the Union relied on the doctrine to argue the Employer should be estopped from changing the Pension Plan to force the 19 unionized employees who had chosen to remain in the DB plan to switch to the DC plan. The Arbitrator found the Employer had made an unequivocal representation that those employees could remain on the DB plan until their employment relationship with the Employer ended. The employees had relied on that representation for years of subsequent financial and retirement planning. That reliance would be to their detriment if the Employer was now able to rely on its strict legal right to amend the Pension Plan to force them to switch to a DC plan. Accordingly, in the circumstances, the Arbitrator found the Employer should be estopped from relying on its strict legal right to amend the Pension Plan in this way. I find no reviewable error or inconsistency with Code principles in this outcome.

V. CONCLUSION

74 For the reasons given, the Employer's Section 99 application is dismissed.

LABOUR RELATIONS BOARD

"ELENA MILLER"

ELENA MILLER
VICE-CHAIR