COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *NCR Canada Ltd. v. International Brotherhood of Electrical Workers, Local 213,* 2015 BCCA 44

Date: 20150205
Docket: CA041653

IN THE MATTER OF SECTION 100 OF THE *LABOUR RELATIONS CODE OF BRITISH COLUMBIA*, RSBC 1996, c. 244

Between:

NCR Canada Ltd.

Appellant

And

International Brotherhood of Electrical Workers, Local 213

Respondent

Before: The Honourable Chief Justice Bauman
The Honourable Madam Justice Levine
The Honourable Mr. Justice Goepel

On appeal from: An award of the Labour Relations Board, dated February 28, 2014 (*NCR Canada Ltd. v. International Brotherhood of Electrical Workers, Local 213* (Pension Amendment Grievance), Vancouver, British Columbia).

Counsel for the Appellant:	D.G. Wong and M.G. Orieux
Counsel for the Respondent:	J.A. MacTavish and E.J.M. Luther
Place and Date of Hearing:	Vancouver, British Columbia December 8, 2014
Place and Date of Judgment:	Vancouver, British Columbia February 5, 2015

Written Reasons by:
The Honourable Mr. Justice Goepel

Concurred in by:
The Honourable Chief Justice Bauman
The Honourable Madam Justice Levine

Summary:

Appeal from the award of a labour arbitrator. In January 2002, the appellant offered its employees a one-time opportunity to switch from their current defined benefit pension plan to a defined contribution plan. Nineteen members of the respondent union elected to stay with the defined benefit plan. In December 2012, the appellant amended the pension plan, requiring employees to switch to the defined contribution plan. The respondent filed a grievance on the ground that the appellant employer was estopped from such an amendment based on representations that it had made. The arbitrator made an award in favour of the respondent. Held: appeal dismissed. This Court does not have the jurisdiction to hear the appeal because the question it raises, even if it was a matter of general law, pertains to the principles of labour relations. Thus, the appeal falls within the jurisdiction of the Labour Relations Board.

Reasons for Judgment of the Honourable Mr. Justice Goepel:

[1] The appellant, NCR Canada Ltd. ("NCR"), appeals from the award of a labour arbitrator. At the outset of the hearing, the respondent**,** International Brotherhood of Electrical Workers, Local 213 (the "Union"), applied to quash the appeal on the grounds that this Court does not have jurisdiction. This is because, in its submission, the review authority over the arbitrator's award is the Labour Relations Board (the "LRB"), pursuant to s. 99(1) of the *Labour Relations Code*, R.S.B.C. 1996, c. 244 (the "*Code*").

[2] After hearing submissions on the jurisdiction issue, the division quashed the appeal with reasons to follow. These are the reasons.

BACKGROUND

[3] NCR is a multinational company with a bargaining unit of approximately 60 employees in British Columbia represented by the Union. NCR 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.

[4] 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 Union bargaining unit elected to stay in the defined benefit plan.

[5] In 2012, NCR decided to amend the pension plan effective January 1, 2013. Pursuant to that amendment, 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. NCR notified all Canadian employees of the pension plan amendment on November 13, 2012.

[6] On December 13, 2012, the Union, pursuant to the provisions of the collective agreement, filed a grievance on behalf of the 19 employees who had opted to remain in the defined benefit plan in 2002. The issue on the arbitration was whether NCR was estopped from amending the plan and requiring the 19 employees to participate in the defined contribution plan because of the representations made to these employees in 2001.

[7] The collective agreement addressed the issue of non-salary remuneration, which it termed fringe benefits. Fringe benefits included the NCR pension plan. Pursuant to the provisions of the collective agreement, any claims applicable to fringe benefits were subject to the grievance and arbitration provisions contained in the collective agreement.

[8] At the arbitration NCR submitted that article 24.06 of the collective agreement, which through subsequent but unrelated amendments became article 25.06, precluded the Union from relying on the equitable doctrine of estoppel. That clause read:

> **24.06 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.

[9] NCR also relied on article 9.04 of the collective agreement, which addressed the power of an arbitration board in a grievance or arbitration proceeding:

> **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. …

[10] The arbitrator found in favour of the Union. She held that NCR was estopped from requiring the 19 employees to change to the defined contribution plan.

POSITION OF THE PARTIES

[11] In this appeal, NCR submits that it was inappropriate, in the circumstances, for the arbitrator to apply the doctrine of estoppel. It submits that the elements necessary to give rise to an estoppel were not present. In the alternative, NCR submits that even if those necessary elements giving rise to an estoppel were present, the parties had agreed to express language in the collective agreement precluding either party from relying upon any representation outside the collective agreement. NCR submits that this language precluded the operation of estoppel in the circumstances.

[12] In regards to the jurisdiction issue, NCR submits that this Court has the jurisdiction to hear the appeal because the arbitration award affects both union and non-union employees. In those circumstances, NCR submits that the award raises a question of general law. This is because, in its submission, a question of estoppel that affects both the rights of union and non-union employees arises outside of the labour relations context because, among other things, the real basis of the award is not the interpretation of a collective agreement or an issue of estoppel in relation to rights that arise under a collective agreement. On that basis, it contends that the

policy objectives of the labour relations regime are not engaged. As a result, it submits that the question of whether the doctrine of estoppel ought to apply is a question of general application that is within the jurisdiction of this Court to consider on appeal.

[13] The Union takes a contrary position. It submits that the labour arbitrator's determinations regarding estoppel, both factual and legal, are reviewable exclusively by the LRB and that this Court has no jurisdiction to entertain this appeal. It submits that the real basis of the award is a factual determination that the 19 employees in question were entitled to remain under the defined benefit plan. It submits that this is not a question of general law and that the arbitrator's decision is not necessarily a binding determination of the rights of non-union employees. In the alternative, the Union submits that if the basis of the award gives rise to a question of general law, it concerns a question of labour relations as expressed in the *Code* so as to bring it within s. 99 of the *Code*.

LEGISLATIVE SCHEME

[14] Sections 99 and 100 of the *Code* provide alternative methods of reviewing arbitration awards:

> **Appeal jurisdiction of Labour Relations Board**
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> **99** (1) On application by a party affected by the decision or award of an arbitration board, the board may set aside the award, remit the matters referred to it back to the arbitration board, stay the proceedings before the arbitration board or substitute the decision or award of the board for the decision or award of the arbitration board, on the ground that
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> > (a) a party to the arbitration has been or is likely to be denied a fair hearing, or
> >
> > (b) the decision or award of the arbitration board is inconsistent with the principles expressed or implied in this Code or another Act dealing with labour relations.
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> (2) An application to the board under subsection (1) must be made in accordance with the regulations.
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> **Appeal jurisdiction of Court of Appeal**
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> **100** On application by a party affected by a decision or award of an arbitration board, the Court of Appeal may review the decision or award if the

> basis of the decision or award is a matter or issue of the general law not included in section 99 (1).

LEGAL PRINCIPLES

[15] The question of this Court's jurisdiction to review decisions of labour arbitrators has been frequently before this Court. The jurisdiction is narrow. In *United Steelworkers Local 9346 (Elkview Operations) v. Teck Coal Limited*, 2013 BCCA 485 [*United Steelworkers*], Bennett J.A. reviewed the applicable legal principles:

> [13] The LRB and this Court do not have concurrent reconsideration powers. (*Kinsmen Retirement Centre Association v. Hospital Employees' Union, Local 180* (1985), 63 B.C.L.R. 292 at 297 (C.A.)). In *Kinsmen*, Mr. Justice Lambert, for the Court, drew the following conclusions when assessing jurisdiction (at 298):
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> > 1. That if the real substance and determinative constituent of an award is inconsistent with the principles expressed or implied in the Labour Code, or another Act dealing with labour relations, then, even if the real substance is or involves a matter or issue of the general law, and even if there are subsidiary aspects of the award which could not, in themselves, found jurisdiction in the board, the Labour Relations Board and only the Labour Relations Board has jurisdiction, and it can grant all or any of the remedies set out in s. 108(1) [now s. 99];
> >
> > 2. If the real substance and main constituent of an award is a matter or issue of the general law, and if the Labour Relations Board does not have jurisdiction, then this court has jurisdiction and can grant any appropriate remedy, notwithstanding that other subsidiary aspects of the award would not, in themselves, be a ground for giving this court jurisdiction;
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> > 3. If the real substance of an award is not such as to give jurisdiction to either the Labour Relations Board or this court, then the award is final and conclusive.
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> [14] In *Martin-Brower of Canada Ltd. v. General Truck Drivers & Helpers, Local 31* (1994), 87 B.C.L.R. (2d) 292 at para. 25 (C.A.), this Court considered the existing jurisprudence, and set out an analytical framework for jurisdictional issues:
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> > … [I]s the main or determining ingredient of the award a matter or issue of the general law? If not, the Court of Appeal has no jurisdiction. If so, is that matter or issue of the general law "included in section 108(1) [now s. 99]"? If it is, then again the Court of Appeal has no jurisdiction. Only if the basis of the award is a matter or issue not included in s. 108(1) does this Court have a power to review the award under s. 109(1) [now s. 100].

[15] The Court in *Martin-Brower* also discussed the limited nature of the Court of Appeal's jurisdiction to review an arbitrator's decision. At para. 32, the Court said:

> 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 the general law . . ." falls outside the ambit of review by the Industrial Relations Council under s. 108 [now s. 99]. Nor will every error of law by an arbitrator found an appeal to this Court, even if the error in law is the basis of the award. To found jurisdiction in this Court, to paraphrase s. 109(1) [now s. 100], it must be shown that the basis of the award is an issue of the general law, and that that issue is one beyond the scope of review by the Industrial Relations Council, having due regard for its broad mandate under s. 108(1)(*b*) [now s. 99] to provide remedies where ". . . the decision or award of the arbitration board is inconsistent with the principles expressed or implied in this Act . . ." [Emphasis added.]

[16] The narrow scope of this Court's jurisdiction was confirmed in *Chilliwack School District No. 33 v. Chilliwack Teachers' Association*, 2005 BCCA 411 at para. 13 (*sub nom*. *British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation*), where Mr. Justice Esson said:

> [13] The legislative history of sections 99 and 100 of the *Code* – the original provisions of which were proclaimed effective on January 14, 1974, when the *Code* was known as the *Labour Code of British Columbia*, S.B.C. 1973 (2d Sess.), c. 122 – and the general history of labour relations in this Province in the preceding 75 years support the view that the legislative intent in enacting sections 99 and 100 was to confer a narrowly restricted jurisdiction upon the court. [Emphasis added.]

[17] What follows in Esson J.A.'s reasons for judgment is a useful review of the history of the legislation and the decisions of this Court from Madam Justice Southin's reasons for judgment in *Health Employers' Assn. of British Columbia v. British Columbia Nurses' Union*, 2003 BCCA 608 [*Castlegar & District Hospital*].

[18] In support of the limited jurisdiction of this Court, Esson J.A. also refers to s. 82(2), where it states that the arbitrator "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" (*Chilliwack School District*, at para. 23).

[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 s. 100] as well as s. 108 [now s. 99] of the Act, and the important supervisory role conferred by the legislature upon the Industrial Relations Council.

[20] Mr. Justice Esson concluded that "few principles of general law are not included in section 99" (at para. 34). In addition, at para. 50, Esson J.A. reiterated the steps this Court needs to consider when assessing whether it has jurisdiction (citing Chief Justice Finch's reasons in *Health Employers Assn. of B.C. v. B.C. Nurses' Union*, 2005 BCCA 343 at para. 49):

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.

[21] If the answer to the third question is yes, then the matter falls within the jurisdiction of the LRB. If no, then this Court has jurisdiction to entertain the review.

[16] In summary, s. 100 of the *Code* limits the reviewing jurisdiction of this Court to those arbitration awards the real basis of which is a matter of general law falling outside of s. 99(1) of the *Code*. Even if the real basis of the arbitration award is a *prima facie* matter of general law, such as the operation of the doctrine of estoppel, this Court is without jurisdiction if the substance of the matter concerns principles of labour relations, which turns the *prima facie* question of general law into one of specific application that is within the expertise of the LRB: *United Steelworkers* at para. 19.

DISCUSSION

[17] I agree with the Union that the real basis of the arbitration award is the determination of whether the 19 employees in question were entitled to remain under the defined benefit plan. In order to make that determination, the arbitrator considered and applied the principles of estoppel. In particular, the labour arbitrator considered the correct approach to the doctrine of estoppel in the context of a

collective bargaining relationship. This is a question of the specific application of the doctrine of estoppel to the collective bargaining context, which on review is a matter falling within the expertise and jurisdiction of the LRB.

[18] NCR takes the position that the question on appeal is of general application because the arbitration award may impact non-union employees. I disagree. The contingent fact of whether or not non-union employees are affected by a particular arbitration decision is not determinative of whether the issues in a given case are invariably tied to the industrial relations context and whether, as a result, those issues give rise to questions pertaining to the principles of labour relations.

[19] In discussing NCR's submission that article 24.06 prevented the application of the doctrine of estoppel, the arbitrator said at page 32:

> 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:
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> > 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.
>
> [Emphasis added.]

[20] The labour arbitrator took into account the provisions of the collective agreement between NCR and the Union. She considered and applied principles consistent with and internal to the industrial relation policies of the *Code*. To the

extent it can be said that the basis of the arbitration award appears to have been a *prima facie* matter of general law, it raised questions concerning the principles of labour relations. This includes considering whether the application of the doctrine of estoppel in the circumstances would affect the prospect of open, fair and reasonable negotiations between the parties when negotiating further collective agreements, This type of enquiry engages the core expertise of the labour arbitrator and, on appeal, the expertise of the LRB as it pertains to the principles and policies of labour relations. As a result, the questions raised in this appeal are not questions of general application but rather questions of specific application in labour relations.

[21] For the reasons set out above, this Court quashed the appeal.

"The Honourable Mr. Justice Goepel"

I agree:

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Madam Justice Levine "