In a matter pursuant to the collective agreement

BETWEEN:

NOVA CHEMICALS (CANADA) LIMITED

("the employer")

and

UNIFOR LOCAL 914 – NOVA (CORUNNA UNIT)

("the union")

Re: Pension Freeze Grievance

Sole Arbitrator: **Matthew R. Wilson**

For the employer:

Henry Dinsdale
Martin Addario
Rob Thompson
Bruce Davies
Christina Fanelli
Victoria McCorkindale

For the union:

Micheil Russell
Tom Rinker
Todd Grunte
George Fortin

The hearing was held by video on April 12, August 23, December 8, 2021.

AWARD

1. The grievance before me challenges the employer's decision to freeze the Defined Benefit Pension Plan ("DB Plan" or "DB Pension") and require employees to participate in the Defined Contribution Pension Plan ("DC Plan" or "DC Pension"). As announced by the employer in a July 2, 2020 memo to all employees, the change is scheduled to take place on December 31, 2021.

2. As the parties completed the case on December 8, 2021, and there was some urgency to know the outcome, it was agreed that I could issue a bottom-line decision with reasons to follow. As it turns out, I was able to prepare the full decision with reasons prior to the announced deadline.

3. There are two issues that I must decide. First, I must determine whether the employer is permitted under the collective agreement to freeze employees' participation in the DB Plan and require those employees to participate in the DC Plan. This requires a contextual analysis of the language of the collective agreement. If the answer is yes, the second issue is whether the employer is estopped from implementing these changes until the expiry of the collective agreement.

4. For the reasons that follow, I accept the employer's interpretation of the collective agreement and conclude that it is permitted to make the change to the pension as announced in the July 2, 2020 memo. However, I also conclude that the doctrine of estoppel precludes the employer from making these changes to the pension until the expiry of the collective agreement.

Brief overview of the facts

5. The parties presented me with a Statement of Agreed Facts that was supplemented by the evidence of four witnesses and several books of documents.

6. The union is the bargaining agent for production, maintenance, and other employees at the company's plant in Corunna, Ontario ("the Corunna facility"). The union was certified as the bargaining agent on August 27, 1998, and negotiated a first collective agreement with a term from July 22, 1999 until May 31, 2001 ("the first agreement").

7. The first agreement contained Article 27.01, which has never been changed. It reads as follows:

> Article 27 – PENSION AND BENEFITS
>
> 27.01 The parties agree that bargaining employees' membership in the current pension, savings and benefits plans, as amended from time to time, shall be continued for the duration of the collective agreement.

8. It was agreed that the first agreement provided for continued participation in the same DB Plan that existed when the union was certified, which was also provided to all non-union employees of Ontario. That plan was titled, "The Retirement Plan for Eastern Canadian Salaried Employees of NOVA Chemicals Corporation" ("the Eastern Plan").

9. There was a similar DB Plan in Alberta referred to as "The Retirement Plan for Western Canadian Salaried Employees of NOVA Chemicals Corporation" ("the Western Plan").

10. Following the negotiation of the first agreement, the company announced that all new hires would be placed in a DC Plan and that existing unionized employees would have the option of transferring the commuted value of their DB Plan to the DC Plan. The company held information meetings for the employees to educate them about the option to move from the DB Plan to the DC Plan. I will have more to say about the evidence and significance of these meetings later in the decision.

11. While most employees in the bargaining unit opted to convert from the DB Plan to the DC Plan, some employees decided to remain in the DB Plan. Among those employees were George Fortin and Todd Grunte. While these two individuals were not part of the union executive at the time, they did go on to become members of the union executive and participate in multiple rounds of collective bargaining.

12. In December 2019, the company merged the Eastern Plan and the Western Plan, which was renamed "Retirement Plan for Canadian Employees of NOVA Chemicals Corporation" ("The Canadian Plan"). While there was no impact on the retirement benefits for members, the company was able to realize efficiencies with the merger.

13. On July 2, 2020, all Canadian employees of the company, including both unionized and non-unionized (with the exception of one unionized facility that has its own pension plan), were sent a notification announcing that the DB Plan would be frozen effective December 31, 2021, and that those affected employees would be enrolled in the DC Plan. Those employees were still eligible to receive their DB Plan benefits, however their service and contributions would be frozen effective December 31, 2021, and new contributions would be made to the DC Plan.

The positions of the parties

14. The union argues that Article 27.01 refers to the employees' current pension plan as it existed when the collective agreement was renewed and this includes the DB plan. Thus, the language is to be interpreted to protect the employees' entitlement, which includes the majority of employees in the DC plan and the smaller group of employees in the DB plan. In the alternative, the union argues that the employer is estopped from making changes to

the DB plan until the expiry of the collective agreement. It said that promises made to employees in 1999 were central to the decision to remain in the DB plan and also part of the union's rationale for not pursuing changes to Article 27.01 in collective bargaining. The union reasonably believed that there would be no changes to the pension plan because employees were told in 1999 that they would enjoy the DB plan until their retirement. On this basis, the union argued that the doctrine of estoppel precludes the employer from making the announced changes.

15. It refers me to the following: *St. Mary's Cement and USW Local 9235*, 194 L.A.C. 4th 72 (Hunter); *NCR Canada Ltd and IBEW Local 213 (Pension Amendment) Re*, 2014 CarswellBC 754 (Jackson); *Finning (Canada) and IAMAW, District Lodge 250 (Pension), Re*, 246 L.A.C. 4th 273 (Lanyon); *Ontario (Ministry of Labour) and O.P.S.E.U. (Sutherland) (Re)*, 179 L.A.C. 4th 387 (Dissanayake); *OPSEU v Ontario (Ministry of Community and Social Services)*, 1995 CarswellOnt 1068 (Div. Ct.); *Grey Bruce Regional Health and OPSEU Loc. 236*, 35 L.A.C. 4th 136 (McLaren); Great Lakes Power Ltd. and CUPE, Local 3033, [1996] O.L.A.A. No. 295 (Bernardi).

16. The employer argues that a plain and ordinary interpretation of Article 27.01 leads to the conclusion that employees were entitled to participate in a pension plan and that commitment was being fulfilled through the provision of the DC plan. It argues that there was no guarantee of a DB plan. Moreover, the provision specifically permitted amendments to the plan. Thus, its announcement to move employees from the DB plan to the DC plan fulfilled the obligation of Article 27.01 because employees remained in the same plan. The employer also argues that it is appropriate to consider the factual matrix of Article 27.01 as the provision has never changed and the company has consistently taken the position that the pension plan is a company-wide plan and subject to unilateral changes. The employer further argues that there have been no representations to the employees or the union that the pension would not be changed, but rather there has been explicit statements from the employer that it reserves the right to make changes at any time. Thus, it argues that the elements of estoppel have not been satisfied.

17. It refers me to the following: *St. Mary's Cement Inc. v U.S.W., Local 9235*, 2010 CarswellOnt 7630; *Royal Ontario Museum v S.E.I.U., Local 2*, 2011 CarswellOnt 6027; *Canadian Northern Shield Insurance co. and COPE, Local 378 (Retirement Plan), Re*, 2015 CarswellBC 3842; *Brown and Beatty* § 3:79. *Past Practice; Brown and Beatty § 3:78. Negotiating History; Daymond Aluminum and C.A.W. – Canada Loc. 127 (Re)*, 133 L.A.C. (4th) 341; *Sattva Capital Corp v. Creston Moly Corp,* 2014 SCC 53; *Elementary Teachers' Federation of Ontario v. Elementary Teachers' Federation of Ontario Staff Association*, 2021 CanLII 3125 (ON LA); *Ontario Secondary School Teachers' Federation v. TDSB*, 2020 CanLII 30086 (ONLA); *Waterloo Region Record v. Unifor Local 87-M*, 2014 CanLII 59675 (ON LA); *Halton Recycling Ltd. d.b.a. Emterra Environmental v. Labourers' International Union of North America, Local 183*, 2019 CanLII 11765 (ON LA); *Sault Ste. Marie (City) and ATU, Local 1767, Re*, 2014 CarswellOnt 17774; *Brown and Beatty 2:2211; Coca-Cola Bottling Co. v. U.F.C.W., Local 393W*, (2003) 117 L.A.C. (4th) 238 (Marcotte); *Greater Sudbury Hydro Plus Inc. v. C.U.P.E.,*

Local 4705, (2003) 115 L.A.C. (4th) 385 (Marcotte); *Toromont Industries v. I.A.M. & A.W., Thunder Bay Lodge 1120*, 2010 CarswellOnt 5788; *Ryan v. Moore*, 2005 SCC 38; *Versa Services Ltd v. Milk and Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647* (1992), 30 L.A.C. (4th) 104; *Coca-Cola Bottling Co. v. U.F.C.W., Local 175*, 2003 CarswellOnt 5848; *Agropur Division Natrel and Milk and Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647, Re*, 2013 CarswellOnt 12612; *Waste Management of Canada v. Teamsters, Local 419 (Driver)*, 2009 CarswellOnt 8488; *Unifor, Local 672 and SGS Canada Inc., Re*, 2017 CarswellOnt 14460; *Manitoba v M.G.E.U.,* 2010 CarswellMan 522.

Analysis

18. This case requires me to interpret Article 27.01, a provision that has remained unchanged since it was negotiated in the first collective agreement in 1999.

19. There was no dispute that I am required to apply a plain and ordinary meaning to Article 27.01. It is universally accepted that a collective agreement should be read as a whole and that my interpretation of Article 27.01 must be harmonious with a reading of the collective agreement in its entirety. Both parties argued that the application of these principles favoured their preferred interpretation.

20. The phrase “current pension, savings and benefits plans” could be interpreted to mean the DB plan that those employees opted for in 2000. This is the interpretation put forward by the union. It also points out that the phrase “shall be continued for the duration of the collective agreement” means that the pension that existed when the collective agreement was negotiated, that is the DB plan, must continue for the duration of the collective agreement.

21. However, that argument ignores the uncontroverted evidence that there is a single pension plan with different components. The employer called Martin Addario, a retired partner from Hicks Morley, to give evidence about the history of collective bargaining as well as the pension plan. I also heard evidence from Rob Thompson, Vice President of Manufacturing for manufacturing east. He started working for the company in May 2000 as a human resources consultant and went on to spend 11 years in human resources. As an employee, he is a member of the DC plan, the only option available to him when he was hired, and he also sits on the pension committee.

22. The evidence of Mr. Addario and Mr. Thompson was that the company wide pension plan has a DC component and a DB component. These components were part of the same plan. The plan - Retirement Plan for Canadian Employees of NOVA Chemicals Corporation – was the result of a merger of the Eastern Plan and the Western Plan in 2019. That plan is the current plan with different components, and it continues as provided for in the collective agreement.

23. Thus, on its face, the current plan is being maintained as required by the collective agreement. The only evidence before me is that there remains a single pension plan. Thus, the phrase "…bargaining employees' membership in the current pension… plans, as amended from time to time, shall be continued…" has not been offended.

24. I further accept that the company's announcement is an amendment to that plan. While it is obviously a significant change for the individual employee, the language permits amendments to the plan with the only limitation being that the pension plan must be maintained. I was referred to no authority or evidence directing me to a different meaning or interpretation of amendment, nor was I presented with a compelling reason why I should impose limitations on what types of amendments ought to be restricted. It is important to keep in mind that the provision makes no reference to the DB plan or more generally to a defined benefit pension. The union would have me read this guarantee into Article 27.01. I am not persuaded that it would be appropriate to do so based on the clear and straightforward meaning of the provision. This interpretation is supported by the factual context underlying the genesis of the provision.

25. The employer asks me to consider the factual matrix of Article 27.01 which includes the context of how it was negotiated and treated by the parties. I was referred to the decision of Arbitrator Hayes in *Waterloo Region Record*, a decision that helpfully canvasses the law and principles. I have carefully considered the cases referred to in his award.

26. In *Waterloo Region Record* Arbitrator Hayes was asked to interpret the phrase "8% commission on all sales" for a group of telesales employees. The provision had been negotiated in the most recent round of collective bargaining. Arbitrator Hayes explained that universally accepted canons of construction applied to the interpretation of the language, but also that it was appropriate to consider extrinsic evidence as part of the factual matrix of the provision. Through a review of a series of cases, Arbitrator Hayes explained that "…the approach is not encumbered by any formal necessity to first demonstrate 'ambiguity', or some sufficiency of ambiguity as a precondition to the admission of otherwise illuminating evidence".

27. The "context of the particular collective bargaining relationship" was considered by Arbitrator Burkett in *Air Canada*, [2012] O.L.A.A. No. 64, a case where he was asked to determine whether Air Canada violated the collective agreement by not assigning a particular aircraft to bargaining unit members. The Association relied on a written commitment from the employer that "all aircraft" of a specific seating capacity would be flown exclusively by its members. It argued that the plain meaning of "all aircraft" meant both jet and propeller aircraft. The employer argued that the interpretation must be considered in the context, which led to a narrower interpretation to include jet aircraft only (and not propeller aircraft).

28. Arbitrator Burkett found in favour of the employer's narrower interpretation after considering the context of the provision. He explained:

As with any issue of interpretation, *I must give effect to the language used by the parties, albeit read within the context of the specific clause or provision, read within the context of the agreement as a whole and read with the context within which the disputed letter was negotiated into the agreement.* A failure to consider these contextual factors renders the arbitrator as nothing more than a linguistic technician. An arbitrator, however, is far more than that. An arbitrator is required to bring to bear a specialized knowledge of labour relations generally and of collective agreement applications specifically in order to decipher the meaning of the contested language read in context. *The objective must always be to find the meaning of the disputed language within the context of the particular collective bargaining relationship.*

If there is any doubt that a contextual analysis is the correct way to proceed, that doubt is dispelled on a reading of the judgement of the Ontario Court of Appeal in *Re Dumbrell.* In that case, the Court of Appeal, reviewing a judgement of the lower court with respect to whether a contract of employment provided for remuneration for projects completed after the date of its termination, spoke eloquently and forcefully concerning the need to engage in a contextual as distinct from a linguistic analysis. While concluding that the inquiry must be into the meaning of the words as distinct from the subjective intention of the parties, the Court cautioned that "the meaning of the written agreement must be distinguished from the dictionary and syntactical meaning of the words used in the agreement". The court went on:

> No doubt, the dictionary and grammatical meaning of the words (sometimes called the "plain meaning") used by the parties will be important and often decisive in determining the meaning of the document. However, the former cannot be equated with the latter. The meaning of a document is derived not just from the words used, but from the context or the circumstances in which the words were used…[quotation and citation from Canadian Contract Law omitted]
>
> The text of the written agreement must be read as a whole and in the context of the circumstances as they existed when the agreement was created. The circumstances include facts that were known or reasonably capable of being known by the parties when they entered into the written agreement: [authorities omitted]
>
> *A consideration of the context in which the written agreement was made is an integral part of the interpretative process and is not something that is resorted to only where the words viewed in isolation suggest some ambiguity.* To find ambiguity, one must come to certain conclusions as to the meaning of the words used. A conclusion as to the meaning of words

> used in a written contract can only be properly reached if the contract is considered in the context in which it was made: [authority omitted]…
>
> There is some controversy as to how expansively context should be examined for the purposes of contractual interpretation: [authority omitted]. *Insofar as written agreements are concerned, the context, or as it is sometimes called the "factual matrix", clearly extends to the genesis of the agreement, its purpose, and the commercial context in which the agreement was made*: [authorities omitted].
>
> *The court could not have been more clear in directing that even when there is no ambiguity an expansive contextual analysis be undertaken* where there exists a dispute as to the interpretation and/or application of contractual language.

29. Of particular relevance to the interpretation issue before me is the Supreme Court of Canada's observations in *Sattva Capital Corp.,* 2014 S.C.R. 53, where Justice Rothstein wrote,

> [47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

30. The Court cautioned against placing too much weight on the surrounding circumstances as it could undermine the meaning of the words of the impugned provision. The Court explained,

> [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that

agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 1997 CanLII 4085 (BC CA), 101 B.C.A.C. 62).

[58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

31. After considering the authorities referred to me, in particular the decisions in Sattva, *Dumbrell, Air Canada* and Arbitrator Hayes' instructive award in *Waterloo Region Record*, I am persuaded that this is an appropriate case to consider the contextual evidence. The practice, and existing pension obligations and entitlements, at the time the collective agreement was executed was well known to the parties and is undisputed. The issue of pensions was discussed when Article 27.01 was negotiated and addressed in subsequent rounds in collective bargaining without any amendment to the provision. Again, that evidence was not seriously contested by the union and the union did not call any evidence to contradict the employer's evidence.

32. Mr. Addario testified extensively about the first round of collective bargaining when Article 27.01 was negotiated as well as subsequent rounds when the issue of pensions was raised. I found Mr. Addario's evidence to be compelling. His credibility was never seriously challenged. Mr. Addario is an experienced negotiator in collective bargaining. He was called to the bar in 1980 and practiced law until his retirement in June 2021. While in practice, he was the chief spokesperson in more than 200 rounds of collective bargaining, including the first two collective agreements negotiated between these parties.

33. Mr. Addario testified that when the Corunna facility was certified, the employer had more than 2500 employees, with approximately 60 unionized employees at a different facility and approximately 290 unionized employees at the Corunna facility. All non-union

employees participated in the DB plan in either the Eastern or Western plans. The 60 unionized employees at a different facility participated in a separate pension plan that was in place when the facility was purchased by the employer.

34. In relying on his notes from the first round of collective bargaining, Mr. Addario testified that the union sought to remain in the company pension plan but wanted a veto to any unilateral amendments made to either the pension or benefit plans. Up to that point, the company had made unilateral amendments as it saw fit and it intended to continue to do so. Mr. Addario explained to the union that its proposal was unacceptable if it intended to remain in the company pension plan. He told the union that the company was not willing to let the union bargain the pension plan on behalf of the non-union workforce. The union was told that it had two options. It could either remain in the plan or negotiate a separate plan for the Corunna facility. It was not an option to remain in the plan but on different terms of the other non-union employees, which made up a significant majority of the workforce. If the union wanted to negotiate a separate plan, it would have to start from the beginning, including whether it would be a DC plan or DB plan.

35. Similarly, with respect to benefits, Mr. Addario advised that the company would not entertain proposals about benefits if the union intended to remain in the company-wide benefit plan.

36. Ultimately, the parties signed off on the language of Article 27.01 on July 9, 1999, and that language has not changed.

37. During negotiations, the company advised the union that a review of the pension was underway and that any changes would be announced upon conclusion of that review, which was expected after collective bargaining was concluded. The review was completed in the Fall of 1999. The company announced that it was closing entry to the DB Plan effective December 31, 1999, to new entrants (including new hires to the bargaining unit) and enrolling them in the DC Plan. The company also announced an option for employees to take the commuted value of their DB Plan and transfer it to the DC Plan. This did not impact the smaller unionized facility because its pension plan was not part of the company-wide pension plan.

38. Mr. Addario testified that the DB Plan and DC Plan were part of the Eastern Plan and thus were components of the same plan. Although I have referred to them throughout this decision as “Plans”, the company made a point of emphasizing to me that these were all components of the Eastern Plan, and thus components of a single Plan. The evidence of Mr. Addario was that the introduction of the DC plan in 2000 was simply amending an existing plan that already had a DB Plan. It was his evidence that the company maintained a single Eastern Plan that had both a DB and DC component. There was no evidence to contradict Mr. Addario’s characterization of the pension plan.

39. The factual matrix of the origins of Article 27.01 – the original proposals, the dialogue at the collective bargaining table, and the final iteration of the provision in the collective

agreement – clearly support the company's contention that the reference to *current pension, savings and benefits plans* means the company-wide plan that existed at the time the provision was negotiated. This is consistent with the phrase *shall be continued* which indicates that whatever existed before the negotiations would continue.

40. The changes that flowed from the pension review in 2000 must also be considered as part of the factual context since it was made known to the union when Article 27.01 was negotiated. Following the announcement in 2000, new hires into the bargaining unit were placed in the DC Plan. There was no grievance filed by the Union. The existing bargaining unit members were permitted (without negotiations with the union) to convert from the DB plan to the DC plan with the transfer of their commuted value.

41. I also heard evidence about subsequent changes made to the pension, benefits and savings plans and evidence of discussions in negotiations. This evidence falls into two categories: the company's refusal to follow the pattern bargaining in 2001 and then the unilateral changes made by the company that were not grieved by the union. The employer urged me to consider this evidence as part of the interpretation of Article 27.01. While I will describe the evidence in greater detail since it must also be considered as part of the employer's argument against an estoppel, I have decided not to consider this evidence as part of the interpretation of Article 27.01. In my view, this evidence goes beyond the factual matrix of the negotiation of Article 27.01.

42. In the negotiations for the second collective agreement in 2001, the employer refused to follow the pattern bargaining for the sector because it involved a commitment with respect to the pension and benefit plans. Mr. Addario explained that the national bargaining program was a pattern method of bargaining in the energy and petrochemical industry in Canada. If the union voted to participate, they would get the settlement on the national issues in the collective agreement provided the employer agreed. If the employer did not agree (e.g. the wage settlement was too rich), then by virtue of participating in national bargaining, the union authorized a strike to achieve the national settlement. In essence, the union had to go on strike if it participated in national bargaining. Initially, the national proposals included wages and term. But over the years the union expanded the range of items that were subject to negotiations to include severance pay, vacation, and contracting out.

43. The pattern bargaining in 2001 included a letter of commitment to consult the union and provide an opportunity for meaningful input if there were going to be changes to the pension or benefit plans. Mr. Addario testified that the employer was not willing to make this same commitment. Thus, the parties agreed to a "Letter on File" which was a document describing a commitment made at the bargaining table. The "Letter on File" assured the union that the benefit plan would not be reduced without giving three months' notice. However, it did not contain a commitment to consult or provide meaningful input. In a second Letter on File, the employer followed the pattern bargaining and agreed to provide the union with copies of the pension text and actuarial valuations. Mr. Addario

testified that the company refused to commit to consultation with the union about changes to the pension plan.

44. During the 2001 negotiations, the union made several significant proposals with respect to the pension plan. Mr. Addario explained that the employer could not agree to them because the unionized employees were part of the same class in the pension as non-union employees. I was taken through Mr. Addario's notes and the various proposals made by the union. Mr. Addario testified that the company maintained its position that it would not negotiate for one group of employees that were part of a larger class of employees in the same pension. In the end, there were no changes to the pension plan.

45. Mr. Thompson has been involved in every round of negotiations since 2004 and has been the spokesperson on behalf of the company in every round since 2007. He gave evidence about various union proposals to amend Article 27.01 over the years. On each occasion, the company was unwilling to negotiate a change to the provision. It is not necessary for me to review each of these proposals and responses.

46. Mr. Thompson gave evidence about various changes made to the pension and benefit plans over the years that were not grieved by the union. These were generally summarized in the company's step 2 grievance response. The changes included reducing the short-term disability benefit period from 12 to 6 months, the discontinuance of the stock purchase component, the discontinuance of the profit sharing and the introduction of a new profit-sharing program. Mr. Thompson explained that in 2011 the company unilaterally increased the company's contributions to the DC Plan and then in 2012 it increased the period between dental recall visits from 6 to 9 months. There was a new savings plan introduced in 2014 and then a cap imposed on dispensing fee drugs. The purpose of the evidence was to show that the company had been acting, presumably within its authority under Article 27.01, to make unilateral changes to the pension, benefits and savings programs and these changes had never been grieved by the union.

47. Mr. Grunte addressed the issue in his evidence. He explained the reasons why the union did not file a grievance when the company made unilateral changes. For example, he explained that allowing employees to convert to the DC Plan and placing new hires in the DC Plan had no adverse effect on bargaining unit members. Thus, the union decided not to file a grievance. A similar explanation was put forward by Mr. Grunte for each of the changes identified by the company in the Step 2 Grievance response. For each change, Mr. Grunte testified that the change was not significant enough to grieve or, in the union's view, was beneficial to its members. The point being made by Mr. Grunte was that the union decided not to grieve the changes after weighing the matter.

48. In *Air Canada*, Arbitrator Burkett cautioned that contextual evidence is about the "…circumstances as they existed when the agreement was created". The Supreme Court of Canada in *Sattva Capital Corp*. explained that the overriding concern is "…the intent of the parties and the scope of their understanding". While this evidence will vary from case to

case, the Court said that it should consist of the background facts at the time of the execution of the contract.

49. In my view, the evidence of subsequent rounds of bargaining offers little value in interpreting Article 27.01. Furthermore, the evidence of the unilateral changes by the company (except for the changes made in 2000 which were in the context of the negotiations of Article 27.01) and the evidence of the union's decision not to grieve have not been helpful in interpreting Article 27.01. I recognize that the company made changes to the pension, benefit and savings plans since 1999 and that those changes were not grieved. But, given the explanation from Mr. Grunte, I am unable to conclude that the union acceded to the company's position that it could make unilateral changes pursuant to Article 27.01. In my view, this is not the contextual evidence contemplated in *Air Canada, Sattva Capital Corp,* or *Waterloo Record* and I am unable to rely on it to interpret Article 27.01.

50. While I conclude that the employer has not offended Article 27.01 because the pension plan has remained the same and its announced change is an amendment to the plan, the contextual evidence of the negotiations buttresses this conclusion. In particular, the state of the pension plan in 1999, the communications in collective bargaining, and the subsequent change in 2000 all inform the interpretation of Article 27.01 as it was the circumstances that existed and were known to the parties at the time the provision was negotiated.

51. Thus, I conclude that the employer's announcement to freeze the DB plan and move the remaining employees to the DC plan does not offend Article 27.01. The flexibility in that provision, when considered with the context in which it was negotiated, leads me to conclude that the employer may proceed in freezing the DB plan and moving employees to the DC plan. This does not end the analysis as I must address the union's estoppel argument.

The union's estoppel argument

52. I will now turn to the union's alternative argument that the employer is estopped from freezing the DB Plan.

53. There was no dispute that I have the jurisdiction to apply the equitable doctrine of estoppel. As explained in the cases referred to me, the doctrine may be applied to decline to enforce a collective agreement provision. In *Toromont Industries Ltd.* Arbitrator Surdykowski explained the purpose of the doctrine:

> *Estoppel operates to prevent the unfairness that can result when one party represents to the other party that it will either not enforce a right or obligation under the contract between them, or that it will apply the contract in a particular way, and subsequently either seeks to enforce the particular right or obligation, or to*

apply the contract differently, after the other party has acted in reliance on the representation and the situation cannot be restored.

54. There are four elements that the union needs to establish. Again, I turn to *Toromont Industries Limited* where the elements were summarized as follows:

    1. that the other party to the collective agreement made a clear and unequivocal representation concerning the interpretation or application of the agreement;

    2. that the representation was intended to and does in fact affect the legal relations between the parties to the agreement;

    3. that it relied upon the representation by doing something, or foregoing the opportunity to do something, and that it would have acted otherwise but for the representation;

    4. that its reliance is detrimental because the situation cannot be restored to what it was when the representation was made.

55. The doctrine of estoppel does not amend the collective agreement. It simply prevents the party who made the representation from relying on the strict wording of the collective agreement until there has been an opportunity to respond. This opportunity typically arises during the subsequent round of collective bargaining where the parties can address the issue. As described by Arbitrator Knopf in *Versa Services Ltd.*, estoppel is applied to prevent an injustice. The arbitrator explained:

    > 20 The doctrine of estoppel is applied to protect against injustice and unfairness. It protects people from situations where they have chosen a course of action, to their detriment, as a result of promises made to them. The application of the doctrine carries with it the potential of amending or suspending clear contract language. Estoppel should be applied to prevent an injustice. But it should be applied only where it is clear an injustice would result because the promise relied upon led a party to the contract to act to its detriment.

56. Extrinsic evidence of past practice is admissible to establish an estoppel (*Elementary Teachers' Federation of Ontario v Elementary Teachers' Federation of Ontario Staff Association*, 2021 CanLII 3125 (ON LA) (Surdykowski).

57. The evidence before me closely resembles the decision in *NCR Canada Ltd.* In that case, the employer had a DB plan for its employees. It provided a one-time opportunity in 2001 for employees to choose to move from the DB Plan to the DC Plan. Nineteen employees chose to remain in the DB Plan. In 2012, the employer announced that all employees were required to change to the DC Plan. The issue before the arbitrator was whether the employer was estopped from requiring the employees to participate in the defined contribution plan because of representations made a decade earlier.

58. The arbitrator found that there were two instances of representation in 2001. In the Transition Guide provided to employees, the option to remain in the DB Plan was described as "With this option, you will continue to participate in the DB Pension Plan until you leave or retire from NCR." In the Enrollment Form, employees were told that whatever choice they made, it would "remain in effect as long as you are actively employed by NCR." Although the Transition Guide contained a caveat that the employer reserved the right to amend the plan, the arbitrator found that this did not supersede the commitment that had been made. In any event, the same caveat was not on the Enrollment Form. The arbitrator reasoned:

> 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.

59. In the matter before me, the employer argued that the union's evidence of a promise made to employees twenty years ago was plagued by an unclear recollection of the witnesses. The only documentary evidence was a powerpoint presentation, which the employer argued, was fairly balanced and did not contain any promises about the DB plan being maintained into retirement. It relied on *Coca-Cola Bottling* for the principle that there must be clear and cogent evidence of a representation.

60. In *Coca-Cola Bottling*, the issue was whether the company could change the pay period from weekly to bi-weekly. The case deals with the application of estoppel absent a specific link to the collective agreement. The evidence in that case was that the chief negotiator for the company commented about a possible move to weekly payroll in the context of a union proposal. When the union proposal was withdrawn, there was no further discussion about moving to a weekly pay system. It was ten months later that the company implemented a North American-wide change to its payroll system that affected the particular bargaining unit at the Brampton facility. The arbitrator rejected the union's argument that the company had proposed a weekly pay system and then withdrew it. He further rejected the union's argument that the comment was a representation to form the basis for estoppel. The company referred me to the following statement of the arbitrator:

> 55 The jurisprudence on estoppel by representation is abundantly clear that there must be clear and cogent evidence of such a representation upon which one of the

parties relied to its detriment, see *Sud*b*ury District Roman Catholic Separate School Board v. Ontario English Catholic Teachers' Assn.* (1984), 15 L.A.C. (3d) 284 (Ont. Arb.), at 286-7 (Adams). There is no such clear and cogent evidence here. There was merely a comment made by the Company's chief negotiator in response to a new concept put forward by the Union. And after that single comment the matter was not raised again. That is far from constituting a representation upon which the Union relief to its detriment.

61. I agree with Arbitrator Beck that evidence of a representation must be clear and cogent for such a representation to form the basis of an estoppel. In *Coca Cola*, there was merely a comment made in response to a union proposal in collective bargaining. That was not sufficient to ground an estoppel. The circumstances before me are very different. It was more than just a comment that caused Mr. Grunte and Mr. Fortin to believe the DB Plan would remain intact until their retirement.

62. I find the employer's argument oversimplifies the evidence and ignores the significance that the pension had with the employees, some of whom were part of the union executive and participated in collective bargaining in the most recent round of negotiations. It also does not recognize that the evidence of two employees, who went on to assume roles within the union, including the Unit Chair, testified that they were told that they would have the DB Plan until retirement. Similar to the message in *NCR Canada Ltd.*, it was emphasized to employees that it was an important decision; a one-time decision; and an irrevocable decision (page 40 of the presentation) that needed careful consideration. This is very different evidence than merely a comment made in response to a union proposal, which was the case in *Coca Cola Bottling*. Rather, it was an assurance to employees that the decision they were required to make in 1999 was a one-time decision and that if they chose to remain in the DB Plan, they would do so until their retirement.

63. I recognize that the powerpoint presentation used by the employer in 1999 to educate employees does not expressly promise that employees who choose to remain in the DB Plan would remain in that plan until their retirement. This was a point emphasized by the company. My perspective is two-fold. First, the document (slides 19 and 20) describes two choices for employees to either stay in the DB Plan or opt to the DC Plan. It is a one-time choice for employees to make and such an option was not available after February 1, 2000. Second, the document describes, in considerable detail, the retirement implications for each choice. An employee considering the option of the DB Plan was obviously making that decision in the context of their retirement. The employees were told to consider their retirement plans as a factor in their decision. It was never explained that the DB Plan might be frozen in the future and these relevant considerations in 1999 may disappear. It was also never explained that the employee may have two pensions from the company, that being a frozen DB Plan and a new DC Plan. The powerpoint presentation contemplates those employees will either participate in the DC Plan or the DB Plan.

64. As described by Arbitrator Surdykowski in *Toromont Industries Limited*, a representation can be by words or conduct, including inaction:

> 123 A representation can be by words or conduct (which can include silence or inaction in circumstances in which silence or inaction could reasonably have been taken to signify agreement, or in the face of a notorious longstanding practice contrary to a collective agreement provision). The classic labour relations estoppel arises where one of the collective bargaining parties tells the other in bargaining that it will either not enforce a provision in the existing or expired agreement, or that it will apply the collective agreement in a particular way, the other party accepts that representation and in reliance on it does not seek to negotiate anything into the agreement in that respect, and then after the agreement is concluded the party that made the representation seeks to act in a manner contrary to its representation. As a doctrine of fairness, estoppel is sufficiently flexible to accommodate non-classic circumstances. That makes it a useful labour relations tool notwithstanding that a collective agreement is quite different from commercial contracts.

65. This is what happened in the circumstances before me.

66. Todd Grunte, the Unit Chair, and George Fortin, the Chief Maintenance Steward, both with decision-making roles on behalf of the union in the collective bargaining process, had a reasonable belief that the DB Plan would not be frozen. The silence of the employer at the collective bargaining table (and prior to the most recent round of negotiations) did nothing to disrupt this belief. I reach this conclusion based on the testimony of Mr. Grunte and Mr. Fortin.

67. Mr. Grunte was hired in 1987 and attended the last three rounds of collective bargaining. When he was hired, he was enrolled in the DB Plan and made the election in 1999 to remain in the DB Plan. He attended the meeting where employees were told about their pension options. Mr. Grunte testified that there were between 30 to 40 people in attendance at the meeting. Although he could not remember the individual's name who made the presentation, he knew she worked for the employer and was trying to persuade employees to elect to the DC Plan. Mr. Grunte testified that the presenter told employees that if they elected to remain in the DB Plan, they would stay in that plan until they retired and that the DB Plan would be phased out as employees retired.

68. This was consistent with Mr. Fortin's evidence about the message communicated at the meeting. Mr. Fortin testified that the message at the meeting was that employees could stay with the DB pension until their retirement and that the DB pension would be phased out.

69. Mr. Grunte testified that as Unit Chair he felt "blindsided" when the company announced that the DB plan was being frozen and that employees would be forced into the DC Plan.

He said that he was angry because there had been no previous discussions about the pension plan.

70. During cross-examination, Mr. Grunte was confronted with a series of changes made to the pension, benefits, and savings plans. Some of these changes were significant, while others less significant. I have already reviewed this evidence earlier in the decision, which was mostly provided by Mr. Thompson. One of these changes was the employer's decision to put new hires in the DC Plan and allow existing employees to make an election to put the commuted value of their DB pension in the DC Plan in 1999. Mr. Grunte testified that even if that change occurred today, the union would not file a grievance because it was not causing harm to the employees. I am unable to place much weight on the changes made over the years to the pension, benefit and savings plans. The evidence is that the union decided not to file grievances in respect to those changes. Some changes obviously benefited the employees, while others were insignificant or part of a trade-off of benefits. Those changes do nothing to undermine the understanding that the DB Plan would continue to retirement.

71. It was also put to Mr. Grunte, in cross-examination, that the company had repeatedly advised employees in the pension newsletter that the company reserved the right to make changes to the plan. He did not dispute that this message was conveyed in all the newsletters. Mr. Grunte said that he did not ignore this message, but rather relied on the collective agreement language. In his words, "I've got a contract that says current pension plan; our contract supersedes that statement". The company argued this message went unchallenged for years and thus makes it clear that the parties understood that there was no guarantee in the pension. I accept Mr. Grunte's reasons for not caring much about the message in the company newsletter. In my view, his reliance on the collective agreement language is a complete answer to the employer's argument. This is particularly true where Mr. Grunte understood that the DB Plan would be maintained until his retirement. The employer cannot create a right by simply repeating that it reserves the right to make changes to the pension plan. It does nothing to change the union's understanding.

72. The evidence leads me to conclude that Mr. Grunte, first in his capacity as an employee and then as the Unit Chair, came to rely on the company's representation that the DB Plan would be maintained until the retirement of those individuals who had decided to remain in the DB Plan. He was the lead negotiator in the most recent round of collective bargaining and had no indication that his DB pension would be frozen or that he would be forced to participate in the DC pension. It is not necessary for me to deal with whether an estoppel can be established by a representation to employees (See the discussion in *Ontario (Ministry of Labour)*) since Mr. Grunte attended three rounds of collective bargaining as a member of the Union executive where the pension issue was never raised. It would be artificial to ignore Mr. Grunte's employment history with the DB Plan – that is both his experience in the 1999 meeting and his reliance on the continuation of the DB Plan – simply because he was not part of the union executive at the time the promise to employees was made in 1999. The fact is that he made decisions on behalf of the union in

the prior three rounds of collective bargaining and assumed, reasonably based on the promises made in the 1999 meeting as well as the continuation of the DB Plan, that there were no pending changes to the DB Plan in this current term of the collective agreement. I accept Mr. Grunte's evidence that had the company raised the issue, the union would have pursued the issue more forcefully in collective bargaining.

73. My conclusion is strengthened by the fact that Mr. Fortin, the Chief Maintenance Steward for the Union, had the same recollection from the 1999 meeting and now sits on the Union executive. He is in the same situation as Mr. Grunte.

74. The company argued that even if there was a promise, it was a promise that employees would retire with a DB pension and this promise was maintained. Under its announcement, employees are keeping their DB pension. It is just that it is frozen with a DC component commencing on December 31, 2021. This is only a partial description of the message received by Mr. Grunte and Mr. Fortin in the 1999 meeting. Their evidence was more than just receiving a DB pension. Their evidence was that the DB plan would be phased out as employees retired. It was their evidence that the message was that the DB plan would continue. That was the message they kept with them in the most recent round of collective bargaining and the reason why they did not pursue restrictions in collective bargaining.

75. This is a similar conclusion reached by the arbitrator in *NCR Canada Ltd.* where the company's assurance to employees that they would maintain their DB pension formed the basis for the estoppel. The arbitrator explained at paragraph 76:

> 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.

76. The understanding of the union was that the DB pension would continue. Thus, the Union did not pursue its proposals over the years with respect to pensions in collective bargaining. It was not an issue in 2001 when it could not achieve the pattern bargaining language, nor was it an issue worth pursuing in subsequent rounds of negotiations. Although it made numerous proposals with respect to the pension over the years, it never believed it was necessary to pursue the proposals. The evidence of Mr. Grunte was the union's proposal with respect to pensions had been withdrawn because there was no discussion about reducing the plan. There was, in Mr. Grunte's view, no need to pursue a proposal to restrict the company's ability to change the pension plan as it had not been mentioned during collective bargaining. Mr. Thompson confirmed in evidence that the freezing of the DB Plan was not being contemplated at the time the parties were negotiating their last collective agreement. Thus, the union had no opportunity to address the issue.

77. I accept that the union relied on the company's inaction, whether that be a promise from 1999 left undisturbed or silence at the bargaining table and did not pursue the issue. Consequently, the union lost the opportunity to negotiate protections around the DB plan

for those employees still enrolled. The detriment is that its members will have their DB pension frozen and be forced into enrolling in the DC pension without the opportunity to address it in collective bargaining.

78. Estoppel is a discretionary remedy about fairness. Even where the elements are established, an arbitrator may decline to apply the remedy. I find it appropriate to exercise my discretion and apply the doctrine for the balance of the term of the collective agreement. In my view, it would be unfair (or to use Arbitrator Knopf's words in *Versa Services*, "an injustice") to freeze the employees' DB Plan without affording the union an opportunity to address it in collective bargaining. The collective agreement expires in approximately 15 months. This is sufficient notice for the union to prepare for collective bargaining and determine whether it will address the issue of the DB Plan.

79. I will address the employer's argument that the management rights provision in the collective agreement ought to be considered when determining whether there is an estoppel. The employer argued that the collective agreement precluded the reading in of any principle in a way that usurped management rights. The relevant portion of the Management Rights provision reads as follows:

> 1.01…There shall be no attempt by either party or an Arbitrator read into the provisions of this Agreement a principle or authority whereby the process of collective bargaining has in any way usurped the rights of Management, except where specifically modified by this Agreement.

80. I also recognize that Article 4.03 stipulates that the collective agreement constitutes the entire agreement between the parties and that any previous agreements are superseded by the collective agreement.

81. Arbitrators have held that this argument warrants a cautious approach (See *Waste Management*; *NCR Canada Ltd.*). In *Waste Management*, Arbitrator Burkett explained 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). He offered the following reasons:

> 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.

82. It is with this caution that I consider the employer's argument that the management rights provision supersedes the application of the doctrine of estoppel. As already set out, estoppel is a doctrine of fairness that prevents a party from relying on a representation to its detriment. In my view, it would undermine the collective bargaining relationship if the employer could rely on Article 4.01 to avoid the fairness that the doctrine is intended to achieve in a collective bargaining relationship.

83. For the foregoing reasons, I find that the doctrine of estoppel applies to the circumstances before me. There was a representation from the employer that the DB pension would continue. That representation was relied on by the union to its detriment. In my view, the fair result is to give the union an opportunity to address the pension issue should it wish to do so in collective bargaining. This is the purpose of estoppel and it fits aptly to these circumstances.

Conclusion

84. I have determined that the collective agreement allows the employer to freeze the DB pension and place employees in the DC pension as part of a single plan, the Canadian plan. However, the doctrine of estoppel applies to preclude this change until the expiry of the collective agreement.

85. As requested by the parties, I remain seized.

Dated in Whitby, Ontario this 27th day of December, 2021.

Matthew R. Wilson
Sole Arbitrator