LEGISLATIVE DEVELOPMENTS AND THE TOP 20 CASES OF 2014-2015

48TH ANNUAL CANADIAN EMPLOYEE BENEFITS CONFERENCE

KOSKIE MINSKY LLP
20 Queen Street West
Suite 900, Box 52
Toronto, ON M5H 3R3

Prepared by:
Mark Zigler and James Harnum

TABLE OF CONTENTS

LEGISLATIVE DEVELOPMENTS AND COURTS AND TRIBUNALS

LEGISLATIVE DEVELOPMENTS

The past year has seen a variety of changes to pension and benefits law across Canada. British Columbia has, as of September 30, a new pension benefits act. B.C.'s new act mirrors legislative changes that occurred earlier in Alberta. B.C.'s new legislation includes new provisions for Target Benefits plans in the province. Such plans will allow for benefit reductions when plan liabilities exceed plan assets and required contributions are insufficient to eliminate the unfunded liability. Benefits can also be temporarily improved when the plan experience a surplus funding. It will also be possible to convert existing DB plans to target plans, and this possibility includes the ability to reduce accrued benefits that arose prior to the conversion date. Under the new Act and Regulations, all plans must have a funding policy which is reviewed annually. For target benefit plans,

Alberta has also moved forward with the introduction of Target Benefit plans, with their regulations coming into force in September of 2014. Both BC and Alberta's target benefit regime utilizes a provision for adverse deviation ("PfAD") for the purposes of funding and risk management. Under the BC and Alberta rules, the PfAD is a function of the percentage of the fund that is invested in equities and the extent to which the plan's discount rate exceeds a benchmark discount rate. Stress testing is also required in both jurisdictions.

On July 24, 2015, Ontario released a consultation paper on Target Benefit plans, and sought input from the public on a variety of issues. The consultation paper references the development of a single framework for the development of both single and multi-employer target benefits plans. The consultation paper focuses on providing reasonable safeguards against benefit reductions while also providing a permanent exemption from solvency funding. The basic premise is that going-concern valuations will be strengthened, and will include the establishment of a provision for adverse deviation or PfAD. The PfAD reserve would first have to be satisfied before any steps that could harm the plan's funded status are taken, such as improving or adding benefits. Some people in the industry have criticized this focus on PfAD, noting that the funded ratio is not a measure of plan health if the contributions to the plan are adequate. This means that plans may be overfunded and additional costs will be borne by the plan without additional returns for the plan members.

2015 also saw the introduction of sweeping changes to the treatment of MEPPs in Quebec. Quebec's Bill 34 amended the *Supplemental Pension Plans Act* with respect to funding and the restructuring of certain MEPPs. The amendments will result in certain MEPPs in Quebec being treated in the same way as MEPPs are treated in other provinces. Solvency funding will no longer be required, and going-concern deficiencies are to be amortized over a 12 year period. The new rules apply to multi-employer defined benefit and defined contribution pension plans in force on February 18, 2015 that may not be amended unilaterally by a participating employer. The inability for trustees to unilaterally reduce accrued benefits in Quebec has, in the past, created some difficulty for multi-provincial MEPPs that include members from Quebec. The new rules, which allow for benefit reductions in certain circumstances, will facilitate the participation of Quebec employers in multi-provincial plans.

The Liberal government in Ontario continues to advance the development of the Ontario Retirement Pension Plan that was discussed in this paper last year. Two consultation papers were released this year, and the government continues to fine tune the model that the ORPP will follow. The most significant development to emerge from the consultation thus far is that the definition of "comparable plan" – i.e. the threshold where employers will not need to enroll in the ORPP – will include DC plans, but only if the total employer and employee contribution is equal to at least 8% of salary.

Just prior to the completion of this paper, there was a federal election in Canada. The Liberal Party was elected to a majority, and there is some indication that their victory will lead to a broadening of the Canada Pension Plan. If this occurs, the ORPP may no longer be pursued by the Liberal government in Ontario.

The Federal jurisdiction may have had the most significant changes in 2015, but as these changes occurred to the income tax regime, the effects will be felt throughout the country.

First and most importantly, on July 29, 2015 the CRA released a new administrative policy – now called the Income Tax Folio – to replace the health and welfare trust Interpretation Bulletin IT-85R2 (the "Bulletin"). The Bulletin was the primary policy document governing health and welfare trusts ("HWTs"). If adopted, the new Income Tax Folio is the first revision in almost 30 years to the Bulletin. There is a three month comment period so it may not be the final policy.

For the most part, the new HWT Folio confirms pre-existing policy, but also includes some clarifications and new provisions which may impact various unions and HWTs. The key aspects of the new folio include:

1. **MEPs**: Express confirmation that MEP HWTs are permissible. While not covered in the old Bulletin, the CRA has accepted MEP HWTs in the past.

2. **Non-Employees Excluded:** The new provision reads "a health and welfare trust cannot provide benefit coverage to non-employees such as partners of a partnership, shareholders, or independent contractors, even if these individuals pay for the coverage themselves". This is not really a new policy, but the exclusion was not explicit in the old Bulletin and there was some ambiguity. I do not believe the CRA intended to exclude non-employee beneficiary, but the language is not clear. The beneficiary issue aside, the express exclusion of independent contractors and other non-employees, which may include individuals who are not currently working under a collective agreement, may be problematic for some MEP HWTs.

3. **Self-Insured Benefits:** The new Folio now expressly recognizes that qualifying health and welfare benefits may be provided on a self-funded/self-insured basis, but it explicitly states that group term life insurance benefits cannot be self-insured.

4. **ELHTs:** The Folio confirms that new plans can be established either as an HWT or ELHT but directs that the trust should maintain evidence to support the type of trust that is intended.

5. **Off Side Benefits:** The Folio continues the administrative allowance under the old Bulletin which permits an HWT to provide non-eligible benefits provided the contributions, income and disbursements are separately identified and accounted for.

6. **Union/Employee Funded HWTs:** There has now been an explicit statement that a trust solely funded by employee or union contributions does not qualify as an HWT. This is consistent with earlier CRA Interpretation Letters.

7. **Prohibited Investments:** An explicit statement prohibiting investments in an employer or related party was added.

8. **Surplus Distribution to Employees:** The Folio continues to prohibit surplus distribution to employees in general, with the only exception being on wind-up of the trust.

9. **Surplus:** The Folio confirms the past policy that contributions cannot exceed the amount required to provide benefits. The Folio creates a distinction between temporary and permanent surplus – temporary surplus is a surplus arising from lower than expected benefit costs or higher than expected investment returns.

10. **Wind-Up:** The Folio limits the use of remaining assets on wind-up to providing additional benefits, cash distribution to employees or payment to a registered charity.

11. **Employer Deductions:** The Folio continues the general rule - "contributions that are reasonable and laid out to earn income from a business are generally deductible in the year in which the obligation to make the contribution arose." However, with respect to insured plans, the Folio states that the employer may only deduct in the year contributions equal to the premiums paid or payable by the trust to acquire the insurance coverage plus reasonable administrative costs. MEPP employers typically deduct the entire contribution and do not know which portion might be used to fund insured benefits.

    The Folio does explicitly recognize that contributions that are not deductible in a current year may be deducted in a subsequent year. Notwithstanding the above general rules, the CRA will accept the deductibility of contributions made in accordance with actuarial recommendations.

12. **Taxation of Benefits:** The Folio was updated to reflect changes in the taxation of benefits that have occurred since 1986 – (a) premiums for group life insurance became fully taxable in July 1994; (b) contributions related to lump-sum payments from a group sickness or accident insurance plan (i.e. AD&D, Critical Illness) became taxable effective 2013.

13. **Taxation of Trust:** The Folio confirms HWTs are taxable on income earned in the trust as an inter vivos trust. The CRA added an explicit confirmation that HWTs are also subject to the Alternative Minimum Tax (AMT) rules. The AMT rules calculate the tax that would be payable if certain deductions, credits and other differential tax treatment were not available. HWTs should do the AMT calculation annually using the CRA Form T-691E.

14. **Gross Trust Income:** Employer and employee contributions continue to be excluded from the taxable income calculation, but all other income, now including delinquency fees charged to employers, is included.

15. **Trust Deductions:** Some clarifications of the deductions available to HWTs were added and it appears that the range of deductible expenses may have been expanded.

In addition to this change to the CRA's administration of HWTs, on June 30, 2015, the Senate passed Bill C-377 ("the Bill"). The Bill creates public disclosure requirements for "labour organizations" and "labour trusts", as defined:

> "labour organization" includes a labour society and any organization formed for purposes which include the regulation of relations between employers and employees, and includes a duly organized group or federation, congress, labour council, joint council, conference, general committee or joint board of such organizations.
>
> "labour trust" means a trust or fund in which a labour organization has a legal, beneficial or financial interest or that is established or maintained in whole or in part for the benefit of a labour organization, its members or the persons it represents.

Fortunately, the Bill provides exemptions for any "labour trust the activities and operations of which are limited exclusively to the administration, management or investments of":

1. a deferred profit sharing plan;
2. an employee life and health trust;
3. a group sickness or accident insurance plan;
4. a group term life insurance policy;
5. a private health services plan;
6. a registered pension plan; or
7. a supplementary unemployment benefit plan.

The Bill as passed also exempts "a labour-sponsored venture capital corporation" from its requirements.

Bill C-377, as passed, imposes extensive disclosure requirements on labour organizations and trusts. The Bill requires that "[e]very labour organization and every labour trust" file a "public information return" within six months of the end of each fiscal period.

The information that must be filed includes a set of statements for the fiscal period setting out the aggregate amount of all transactions and disbursements. All transactions and disbursements the cumulative value of which is over $5000 must be shown as separate entries and must include the name of the payer and payee, the purpose and description of the transaction, and the specific amount that has been paid or received. In prior versions, the address of the payee also had to be disclosed, but this requirement has been removed from the Bill as passed. For each day that the relevant entity fails to comply with the Bill, a $1,000 penalty will be imposed, up to a maximum of $25,000.

As with the prior versions, Bill C-377 as passed includes a provision exempting the material that is to be disclosed from the privacy protections of the *Income Tax Act*, instead mandating that the information which is disclosed be made available on a public website by the Minister of National Revenue.

The Bill is poorly drafted and confusing, and many unions, provinces and funds are considering legal challenges to it. It may also be possible for funds which are not exempt – such as training funds, vacation pay funds and stabilization funds – to avoid the impact of the legislation through downloading their responsibilities to non-profit corporations.

The Liberal Party's victory in the federal election may also impact Bill C-377 as the new Prime Minister, Justin Trudeau, committed to repealing the bill during the campaign.

COURTS AND TRIBUNALS

Since the last IF Conference in August of 2014, there have been a variety of developments in pension jurisprudence, although the list of "really important" cases is shorter than it has been in the past. Likely the most important pension cases arose out of Nortel's insolvency, where a cross border trial to determine jurisdictional allocation of proceeds led to a very significant victory for Canadian employee and pensioner creditors.

There were two Supreme Court of Canada decisions which involved pensions, but neither will alter the legal landscape the way that some decisions have in the past. In *Re British Columbia Public School Employers' Association and BCTF (Supplemental Employment Benefits),* the Supreme Court dealt with a judicial review proceeding involving the employer's failure to separately provide supplemental employment benefits to birth mothers in relation to both EI maternity benefits and parental leave benefits. The arbitrator held that this was discriminatory conduct contrary to s. 15 of the Charter and the Human Rights Code. The BC Court of Appeal allowed employer's appeal, but in a one paragraph decision, the Supreme Court allowed the union's appeal, holding that the Court of Appeal erred in failing to give deference to the Arbitrator's interpretation of the collective agreement and failing to recognize the different purposes of pregnancy and parental benefits.

In *Potter v. New Brunswick Legal Aid Services Commission*, the Supreme Court reaffirmed that a fired employee's pension benefits should not be deducted from the damages awarded to them for wrongful dismissal, and held so despite s. 16 of the *Public Service Superannuation Act*.

A variety of cases arose out of Ontario, with perhaps the three most important all involving employer insolvencies and single-employer plans. Two cases arose out of the Nortel insolvency, with one holding that the "long-arm" claim of the UK pension plan, which was made on the basis of UK legislation, did not have application in the Canadian CCAA. The second case to arise out of Nortel was both jurisprudentially and economically significant. That decision, which was issued along with a companion decision by the American court overseeing Nortel's Chapter 11 proceedings, held that over $7 billion dollars held in escrow should be divided pro rata among Nortel's worldwide creditors.

In *Grant Forest Products Inc. v. The Toronto-Dominion Bank*, the Ontario Court of Appeal continued to build on post-*Indalex* jurisprudence. In the case, which raised issues concerning the timing of wind ups, deemed trusts and the effect of bankruptcy applications, the court avoided the most contentious issues (whether a plan must be wound up prior to CCAA proceedings for a deemed trust to arise and whether the deemed trust ha priority over traditional security holders) by deciding that the motions judge exercised his discretion appropriately in granting a bankruptcy application which had the effect of subordinating any amounts owing to the pension plans.

Ontario also saw a series of other important or interesting cases on pensions and benefits. In *O'Neill v. General Motors of Canada Ltd.*, the Superior Court approved a class action settlement between GM and a class or non-unionized retirees. The affected retirees had commenced a class action on the basis of reductions to their retirement benefits as a result of the auto-sector restructuring that occurred in 2008 and 2009. The settlement established a $9 million fund for past life and health claims.

Garcia v. LIUNA Local 1059 (Trustee of), a decision of the Ontario Court of Appeal, dealt with an employee who was a member of LIUNA. The employee joined the rival Carpenters' Union, and subsequently, the LIUNA local adopted a policy requiring its members not to be members of the Carpenters' Union. Despite a warning, the employee did not resign from the Carpenters' Union. After trial, the employee was expelled from LIUNA and his benefits were suspended. The Court of Appeal held that the trust agreement gave trustees the power to determine when eligibility for benefits would terminate, and when the employee ceased to be a member of the local he ceased to be a beneficiary of the benefit trust.

Another decision of the Ontario Court of Appeal, *Garneau v. Industrial Alliance*, concerned an appeal by a plaintiff from a summary judgment motion dismissing her action for a declaration that the insurer was not entitled to reduce her long-term disability benefits for overpayments that had been made. The court held that the insurer was entitled to use the "self-help" remedy of deducting benefits to repay the overpayment pursuant to the terms of the disability policy.

In *Toronto (City) v. CUPE Local 79*, the Divisional Court affirmed the award of Arbitrator Marilyn Nairn finding that the City was required to adjust and top-up a grievor's pension when she retired, as if she had been an employee on active payroll of the City for the entire period she was entitled to WSIB.

The Divisional Court also heard the case of *Navistar Canada Inc. v. Ontario (Superintendent of Financial Services)*, which concerned a Navistar seeking the review of a decision of the Financial Services Tribunal. Navistar truck manufacturing closed and the pension plan was

ordered to be partially wound-up. Navistar challenged the finding that a reorganization of the business had taken place, but the court held that the Tribunal's analysis was reasonable.

There were also a series of minor decisions out of Ontario, including the certification of a class action in *Lacroix v. CMHC,* and a dismissal of an appeal from a decision holding that a limitation period did not apply by Sun Life in *Kassburg v. Sun Life of Canada.*

There were also some significant decisions out of Ontario tribunals and arbitrators. *Greater Essex District School Board and OSSTF (OMERS Pension Plan),* concerned the jurisdiction of an arbitration board. The arbitrator held that while 48(12)(j) of the OLRA gave the arbitrator concurrent jurisdiction to interpret and apply OMERS legislation, the arbitrator did not have jurisdiction with respect to the period between 1992-2006 when there was no collective agreement. In *Dodd v. Canada Revenue Agency,* the employer discovered that the grievor had undercontributed to the pension plan, and proposed to recover the undercontribution to correct the deficiency through salary deductions. The grievor disagreed with employer's actions, but the adjudicator held that there was nothing in the collective agreement that prohibited legitimate deductions from the grievor's salary.

Administrators and trustees continue to deal with the fallout from *Carrigan v. Carrigan Estate.* In *Re IUOE Local 793 Pension Plan for Operating Engineers in Ontario,* the Financial Services Tribunal ordered the Superintendent to carry out his proposal to order the Board of Trustees to make payment of a death benefit to designated beneficiaries, in accordance with evidence agreed to by most of the parties and the decision in *Carrigan* v. *Carrigan*. The FST's decision addresses plan administrator responsibilities generally, and suggests that administrator should have paid the designated beneficiaries sooner, notwithstanding the change in law brought about by *Carrigan*.

Case law in other provinces was also relatively minimal compared to prior years. In *NCR Canada Ltd. v. International Brotherhood of Electrical Workers, Local 213,* the British Columbia Court of Appeal dealt with the jurisdiction of the court to hear a case concerning the conversion of a DB plan to a DC. The BCCA also dealt with the interaction of pension benefits and wrongful dismissal damages in *Maxwell v. British Columbia.*

The most significant case out of Quebec was likely *Louben Sportswear Inc. c. Caisse de retraite des industries de la mode (UIOVD),* which involved an employer withdrawing from a pension plan and the subsequent termination of that plan.

The most significant cases out of Atlantic Canada came from the Nova Scotia Court of Appeal, and involved the interaction of pension benefits and human rights legislation. In *Holland and Tri-County Regional School Board, Re,* the complainant was school bus driver who turned 65 and was denied a request to continue employment in accordance with his pension plan and collective agreement. The Court of Appeal found that the plain language of the *Human Rights Act* preserves a bona fide pension plan as an exception to age discrimination. There was no indication that the pension plan was anything other than a plan to provide for retirement, therefore overturned Human Rights Commission decision. See also *Foster v. Nova Scotia (Human Rights Board of Inquiry),* 2015 NSCA 66, another human rights case based on age due stemming from mandatory retirement, which was also dismissed.

Finally, at the Federal Court, in Moors v. Canada Revenue Agency, the issue of whether past service pension adjustments might be discriminatory was dealt with. The Federal Court held that the Applicant's inability to purchase pension credits did not stem from discrimination related to sex or family status, and in fact found that the provisions pertaining to Registered Pension Plans are *more* sensitive to women on maternity leave compared to those taking leave for other reasons

Case Summaries

Supreme Court of Canada

1. ***British Columbia Public School Employers' Association and BCTF (Supplemental Employment Benefits), Re,*** **2014 SCC 70, reversing 2013 BCCA 405**

   Teachers' union filed grievance alleging that employer's failure to separately provide supplemental employment benefits to birth mothers in relation to both EI maternity benefits and parental leave benefits was discriminatory conduct contrary to s. 15 of the Charter and the Human Rights Code. Arbitrator upheld grievance, BC Court of Appeal allowed employer's appeal. In a one paragraph decision, the Supreme Court allowed the union's appeal, holding that the Court of Appeal erred in failing to give deference to the Arbitrator's interpretation of the collective agreement and failing to recognize the different purposes of pregnancy and parental benefits.

2. ***Potter v. New Brunswick Legal Aid Services Commission,*** **2015 SCC 10**

   In *Potter*, the issue was whether and in what circumstances a non-unionized employee who is suspended may claim to have been constructively dismissed.

   Potter was a lawyer employed as the interim director of New Brunswick Legal Aid between 1993 to 2005. In 2005, the *Legal Aid Act* (the "*Act*") was amended. The amendments created the position of Executive Director of Legal Aid ("Executive Director" or the "position"); Potter was appointed to the position on March 16, 2006 for an appointment of seven years. The position was governed by the *Act* and a Board of Directors under the *Act* established terms the terms and conditions of Potter's appointment.

   After nearly four years of working as the Executive Director, in October of 2009, Potter began doctor recommended medical leave. Initially, the medical leave was scheduled for a month but was eventually extended until January 18, 2010. Potter delegated his powers in his absence. In the Spring of 2009, Potter and the Board had commenced negotiations for a buyout of Potter's contract that would result in Potter resigning in exchange for an agreed upon compensation package. The negotiations were not completed.

   On January 5, 2010, the Board made a decision that if the buyout negotiations were not concluded by January 11, 2010 the Board would recommend that Potter's appointment to the position be revoked. Accordingly, on January 11, 2010, the Board recommended that Potter's appointment be revoked and the Chairperson of the Board recommended that Potter be dismissed for cause. None of these steps or decisions taken by the Board were communicated to Potter.

On January 11, 2010, the Board sent a letter to Potter saying that he was not to return to work "until further direction". Eight weeks after the Board's instructions to stay away from the workplace, Potter commenced an action for constructive dismissal. In response, the Board stopped payment of Potter's salary and benefits and took the position that Potter had resigned. Potter reiterated that he had not resigned.

The trial judge ruled that Potter had not been constructively dismissed because the Board had the power to place Potter on administrative suspension with pay. The New Brunswick Court of Appeal dismissed the appeal. On appeal to the Supreme Court ("SCC"), the court found that Potter had been constructively dismissed.

In coming to its conclusion, the SCC reviewed the law of constructive dismissal. The test for constructive dismissal has two branches. The first branch has two steps. First, the employer's unilateral change must be found to constitute a breach of the employment contract. Second, if a breach is found, it must be perceived by a reasonable person in the circumstances as substantially altering an essential term of the contract. The SCC noted that step one of the first branch is objective and step two of the first branch considers the employee's subjective knowledge. The second branch of the test for constructive dismissal will be met where the employer's conduct was such that a reasonable person would conclude that they were no longer bound by the contract.

The SCC then applied the above test to the facts of the case. Potter's suspension was found to be a breach of the employment contract because the Board did not have the authority to order the suspension under the *Act*. Potter had statutory duties under the *Act* and therefore the Board had a duty to provide Potter with work. Additionally, the SCC cautioned that generally an employer's right to withhold work is not unfettered. Work has an important social meaning within society and therefore a factual driven inquiry based on the circumstances of each case will be required to determine if a suspension is reasonable and justified. Usually, the employee bears the burden of proof in constructive dismissal cases, however, in cases of suspension, the burden shifts to the employer to show that the suspension is reasonable and justified.

There is no one test to determine whether an administrative suspension is reasonable and justified. However, the SCC listed some factors to consider: 1) the duration of the suspension, 2) whether the employee is replaced 3) whether the suspension is with pay, 4) legitimate business reasons of the employer, and 5) good faith of the employer. In Potter's case, the suspension was indefinite, he was replaced, and the Board failed to act in good faith because it withheld its intentions from Potter. Therefore, the suspension was not reasonable or justified. The SCC concluded that it followed that a reasonable person in Potter's circumstances would have viewed the suspension as a substantial change to his employment contract. The SCC noted that when an employer is unable to show that a suspension is reasonable and justified it will usually follow that a reasonable person in the circumstances would view the suspension as a substantial breach of the contract.

The SCC refused to consider whether the bringing of Potter's action for constructive dismissal amounted to resignation.

Finally, the SCC relied on its decision in *Waterman v. IBM Canada Ltd.*, 2013 SCC 70 in holding that Potter's pension benefits should not be deducted from his damages. Section 16 of the *Public Service Superannuation Act* applies to stop individuals in receipt of a public service pension from receiving their pension benefits while earning a public service salary. There was no indication that the legislation intended the pension benefits to compensate employees in the event of wrongful dismissal and the pension plan was contributor. Therefore, the SCC held that Potter's pension benefits should not be deducted from his damages.

Justice Cromwell and Chief Justice McLachlin concurred in disposition but approached the analysis differently. The concurring decision primarily considered when a substantial breach may arise from surrounding circumstances rather than one specific act. Finally, the concurring decision suggested that Potter should have been able to rely on the actions of the Board up to the time he sued for constructive dismissal, regardless of the fact that he was not aware of their actions at the time.

Ontario

3. *Kassburg v. Sun Life Assurance Company of Canada,* 2014 ONCA 922

Karen Kassburg ("Kassburg") was an employee of the North Bay Police Service and insured under a group policy issued by the appellant Sun Life Assurance Company of Canada ("Sun Life") to the North Bay Police Association. On October 22, 2007, the respondent stopped working due to physical and psychological disabilities. In April of 2008, five months before the expiry of the elimination period under the policy, Kassburg submitted her long-term disability claim.

On December 4, 2008, Sun Life denied Kassburg's claim based on insufficient medical evidence. Sun Life advised Kassburg that should she wish to appeal the decision, she would have to submit new medical information. Over the next two years, Sun Life and Kassburg (or her representative) corresponded. Repeatedly, Kassburg submitted further medical information and was advised to submit more medical information. On February 24, 2011, Sun Life informed Kassburg that her information was not sufficient to support total disability and that her claim was denied.

In February 2012, Kassburg started an action claiming entitlement to the disability benefits. Sun Life brought a motion for summary judgment asserting that the action was out of time based on either the one year limitation period under the insurance contract or the general two year limitation period under the *Limitations Act, 2002*.

The motion judge declared that Kassburg's action was commenced within the applicable limitation period. Sun Life appealed the decision and the Ontario Court of Appeal dismissed the appeal.

The Court of Appeal affirmed the motion judge's finding that the contractual limitation period was ambiguous and therefore the parties did not validly contract out of the statutory limitation period. The contractual limitation period was ambiguous because the limitation period was expressed differently in two different documents. The Court of

Appeal relied on *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 in applying a deferential standard of review to the issue of contractual interpretation.

Since the contractual limitation period was unenforceable, the applicable limitation period was the general two year period which runs from the day on which the claim was discovered. The motion judge concluded that the claim was discovered on February 24, 2011, the date of the letter in which the appellant advised the respondent that her appeal had failed. Sun Life asserted that the claim was discovered on December 4, 2008, when Sun Life first denied her claim. The motion judge held that the claim was discovered when the claim had been "clearly and unequivocally denied" which was on the date of final denial in 2011. The Court of Appeal refused to reweigh the evidence as proposed by Sun Life because the motion judge considered the relevant evidence and there was no palpable and overriding error.

Finally, Sun Life asserted that the motion judge erred in granting a declaration of the limitations question on a final basis. The Court of Appeal rejected this ground of appeal because the motion judge's ruling was consistent with the summary judgment powers described in *Hryniak v. Mauldin*, 2014 SCC 7.

The Court of Appeal made some further comments on whether the insurance policy was a "business agreement" under the *Limitations Act, 2002*. The motion judge had found that the insurance policy was a "business agreement". The Court of Appeal held that the motion judge erred in this regard. In order for a business agreement to exist under the *Limitations Act, 2002*, the parties must not include individuals, and the contract must not have been for personal, family or household purposes. The motion judge found that since the insurance policy was between Sun Life and the North Bay Police Association, it was a business agreement. The Court of Appeal noted that the word "parties" should be given a broader, purposive reading to recognize Kassburg's role in the action. Since Kassburg brought a personal claim for personal purposes, the insurance policy is not a business agreement in these circumstances.

4. ***Grant Forest Products Inc. v. The Toronto-Dominion Bank,* 2015 ONCA 570**

This case was an Appeal by the Superintendent of Financial Services from a bankruptcy order made in a CCAA proceeding, as well as from a decision granting relief to the debtor's secured creditors. This was a "liquidating" CCAA proceeding, and the First Lien Lenders had been paid in full in 2012. The Second Lien Lenders received $6 million, but that left a deficiency of $150 million still owing.

Two of the company's pension plans were ordered wound up, and some fund were held back to satisfy any deficit resulting from the windups. On the motion of one of the secured creditors, the CCA judge ordered that the funds held back by the debtor companies were not subject to any trust obligations and granted a motion sending the debtors into bankruptcy.

The Court of Appeal dismissed the appeal. Justice Gillese, for the court, held that the CCAA judge did not err in exercising his discretion to make the bankruptcy order. It was held that the secured creditor did nothing improper in seeking the bankruptcy order as a creditor is allowed to seek an order to alter priorities in its favour. The Court of Appeal

held that since the bankruptcy order could be granted and the deemed trust was no longer applicable as it was provincial law which becomes inapplicable in a bankruptcy. It did not decide a few other issues that were on the table, as it was not necessary to do so.

5. ***Garcia v. LIUNA Local 1059 (Trustee of),* 2015 ONCA 230**

In *Garcia v. Labourers' International Union of North America, Local 1059,* the Ontario Court of Appeal found that a trustee had the power to determine when to terminate eligibility for employment benefits. The Employee had lost his eligibility after being expelled from Local 1059 after breaching the union's constitution and policy.

The Employee worked in the construction industry where, uniquely, unions administer benefits rather than employers. The Employee joined Local 1059 in 1999. In October 2010 he also joined the United Brotherhood of Carpenters and Joiners of America (the "Carpenters"). After joining the Carpenters he ceased working for employers bound by agreements with Local 1059. In 2011, Local 1059 adopted a "Dual Union Policy," whereby being a member of an affiliate of the Carpenters would lead to expulsion from Local 1059. Not only did the Employee not resign from the Carpenters, he supported them in challenging Local 1059's policy before the Ontario Labour Relations Board (the "Board").

Local 1059 expelled the Employee on two grounds: by remaining a member of the Carpenters he violated the local's Dual Union Policy, and by supporting the Carpenters' challenge before the Board he interfered with the local's performance of its lawful obligations. The Board later upheld the validity of Local 1059's Dual Union Policy. Following the Board's decision, Local 1059 suspended the Employee's benefits.

Local 1059 and two employers' association maintained a trust agreement, which provided that employers bound by collective agreements with Local 1059 would contribute on behalf of members whom they employ. Those funds were used to purchase group insurance that provided members with benefits. The plan administrator determined eligibility based on contributions made on behalf of each individual employee. To be eligible for benefits, an employee's personal account (contributions made on that employee's behalf) must have had sufficient monies to fund the employee's share of the monthly premiums.

The Employee had had approximately $20,000 contributed on his behalf – more than enough to qualify for benefits. Since having his benefits suspended, the Employee did not incur any expenses that would ordinarily have been covered under the plan, as he was covered by the Carpenters' plan. The Employee sought an order stating he was permitted to make claims against the benefit plan as long as he had a sufficient balance in his account. The Superior Court of Justice dismissed his application, finding that he ceased to be a beneficiary upon his expulsion from Local 1059. Nor was he able to reclaim the balance of his contributions. The judge also found that the plan administrators, who were also union officials, did not face a conflict of interest and therefore had not breached their fiduciary duty to the Employee.

The Court of Appeal found against the Employee. The court noted that the trust agreement gave the trustees the power to determine the conditions of eligibility for beneficiaries, and to adopt procedures, rules, by-laws, and regulations it deemed necessary. The court upheld the application judge's reading of the trust documents, which held that those who cease to be members of the local are no longer beneficiaries of the plan.

The court found "no merit" to the Employee's argument that he did not receive adequate notice that he would lose access to the benefit plan if he ceased to be a member of Local 1059. The court found that the evidence, as well as common sense, both suggested he was fully aware he could lose his coverage if he was expelled from the local. The trust literature provided to members stated clearly that the benefit trust was created for members of Local 1059.

Citing the Supreme Court of Canada's decision in *Re Indalex Ltd.*, 2013 SCC 6, the court found the trustees did not breach their fiduciary obligations to the Employee. The court noted that employers often have financial interests that conflict with those of pension beneficiaries, and that a "permissible dual role which could potentially result in a conflict of interest, was the common starting point for all three *Indalex* judgements." The court reiterated the reasoning of the application judge:

> […] a conflict of interest or duty does not arise merely because the entity or individual makes a decision in its non-trustee role […] Rather, a conflict occurs "when there is a substantial risk that the [business manager/trustee's representation of plan beneficiaries would be materially and adversely affected by the [business manager/trustee's] duties to the [union] […]

The court adopted a contextual approach to determine whether a conflict of interest arose leading to a breach of fiduciary duties. The court distinguished the facts in *Indalex*, noting that the trust was not facing the prospect of shortfall. Further, being a trade union, Local 1059's main function was to bargain on behalf of employees. Therefore, unlike in *Indalex* the trustees' duties did not conflict with their other statutory duties. Finally, the trust agreement stipulated that the business manager was to be appointed as trustee. Unlike with an employer-administrator, this provision was put in by the union, meaning in essence it was under the employees' control.

6. ***O'Neill v. General Motors of Canada Ltd.*, 2014 ONSC 4742**

In *O'Neill v. General Motors of Canada Ltd.*, the Superior Court of Justice approved the settlement of a class action. In his decision, Belobaba J. observed that the proposed settlement both was in the best interests of the class and reflected well on General Motors of Canada (GM), and therefore "[…] would easily be approved by this court […]."

During the financial crisis of 2007-2009, GM reduced the retirement benefits it had been paying to its non-unionized salaried and executive retired employees. For years GM had provided class members with healthcare and basic life insurance benefits. Executive employees received additional benefits, including pension top-up benefits and additional

insurance benefits. In late 2007, GM announced reductions to healthcare benefits, such as increased co-payments for prescription drugs and reduced out-of-province coverage. Through 2008 and 2009, GM announced a number of additional reductions, including a new monthly healthcare contribution, reductions and cuts to various supplementary executive benefits, and substantial cuts to basic group life insurance benefit.

The retirees began a class action in October of 2011. The proceeding was certified on consent. In June 2013, the representative plaintiff moved for a partial summary adjudication of the claim for breach of contract. The motion was successful on most issues. The parties settled the action in its entirety just days before the appeal and cross-appeal from the summary judgment were to be heard. The settlement applied to the entire class, including those who retired after the cuts were announced and therefore would not have recovered under the summary judgment, as well as early retirees whose agreements limited their ability to recover.

The settlement restored most of the class members' health and life insurance benefits going forward. However, members were required to make additional healthcare contributions, ranging from $15 to $70 depending on age and external coverage. GM retained the right to modify or increase contributions, provided the modifications were reasonable and proportionate. GM did not reserve the right to reduce healthcare benefits, except as specifically provided in the agreement.

Two-thirds of the reduced life insurance benefits were reinstated, and GM did not reserve the right to reduce either the basic or the supplemental insurance benefits in the future. The settlement did not restore supplementary executive benefits (as the summary judgment had also declined to do), with the exception of supplemental group life insurance, which was restored.

The settlement also created a $9 million fund to compensate class members for the loss of life insurance and health benefits from the time the cuts took effect until the benefits were restored. The beneficiaries of class members who died while benefits were reduced were to be compensated at two-thirds the rate of the rest of the class. The remaining funds compensated members for the loss of health benefits on an equal basis.

The judge found that, given the age and financial as well as physical vulnerabilities of class members, the cuts had had a "significant impact" on the approximately 3200 class members. The settlement would provide "a real and immediate benefit" by restoring their benefits and compensating them for past losses. Many members had lost $80,000 or more in life insurance coverage, which the settlement would compensate. The court also noted that a settlement would help avoid litigation risk as well as a potentially lengthy litigation process.

GM also agreed to pay $3 million in costs, including a substantial "premium" that GENMO Salaried Pension Organization, which funded the class action, had agreed to pay to class counsel in the event that a favourable result was achieved.

7. ***Toronto (City) v. CUPE Local 79,*** **2015 ONSC 1123 (Div. Ct.)**

The Divisional Court affirmed the award of Arbitrator Marilyn Nairn finding that the City was required to adjust and top-up a grievor's pension when she retired, as if she had been an employee on active payroll of the City for the entire period she was entitled to WSIB.

8. ***Navistar Canada Inc. v. Ontario (Superintendent of Financial Services),*** **2015 ONSC 2797 (Div. Ct.)**

Appeal by Navistar from decision of Financial Services Tribunal dismissed. Navistar truck manufacturing closed and retirement plan was partially wound-up. Navistar challenged the finding that a reorganization had taken place. The Tribunal's analysis was reasonable, and the definition of the Windup Group was also reasonable.

9. ***Lacroix v. Canada Mortgage and Housing Corp,*** **2015 ONSC 387**

Class proceeding where plaintiffs were former employees of defendant, who due to downsizing did not receive their alleged share of pension surplus. Plaintiff claimed common issues included determining whether defendant was in a conflict when it failed to advise class members they had or may have had beneficial interest in pension fund surplus prior to those class members electing to take commuted value and leave plan. Proposed common issue certified by court.

10. ***Nortel Networks Corp., Re,*** **2015 ONSC 2987**

Nortel Networks Corporation, a publicly-traded telecommunications company with numerous world-wide subsidiaries commenced bankruptcy and insolvency proceedings on January 14, 2009. The Canadian incorporated entities (the "Canadian Debtors") filed under the *Companies' Creditors Arrangement Act* (CCAA), most of the U.S. incorporated entities (the "U.S. Debtors") filed under chapter 11 of the *U.S. Bankruptcy Code*, and most of the entities incorporated in Europe, the Middle East and Africa (the "EMEA" Debtors") were granted administration orders under the *UK Insolvency Act, 1986.*

In June 2009, Nortel decided to liquidate its global business lines and residual assets. The intellectual property of Nortel represented the largest portion of the assets sold. The proceeds of sale from the liquidation were held in an escrow account referred to as the "lockbox funds", pursuant to the Interim Funding and Settlement Agreement.

At issue in *Nortel Networks Corporation, Re,* was the allocation of the $7.3 billion held in escrow among Nortel's debtor estates, including the Canadian Debtors, the U.S. Debtors, and the EMEA Debtors. A joint allocation trial, conducted by way of video-link by Justice Newbould of the Ontario Superior Court of Justice (Commercial List) and Judge Gross of the U.S. Bankruptcy Court for the District of Delaware, commenced in May 2014.

The Monitor, advancing the position of the Canadian Debtors in this proceeding, argued that the Master Research and Development Agreement (MRDA) applied to the allocation of the proceeds of sale from the liquidation. Under the MRDA, Nortel Networks Limited (NNL) was the legal owner of Nortel's intellectual property and each Residual Profit Entities ("RPEs") other than NNL was granted an exclusive license by NNL to make and sell Nortel products in its territory and a non-exclusive license to do so in territories that were not exclusive to an RPE. The MRDA also stipulated that the residual profits of Nortel would be paid to the RPEs proportionally based on each RPE's expenditure on research and development ("R&D").

The UK pension claimants (the Trustee of the UK Pension Plan and the Board of the UK Pension Protection Fund) and the Canadian Creditors Committee contended that the MRDA should not govern the allocation and that a pro rata allocation based on a *pari passu* distribution to all creditors should be used to allocate the lockbox funds.

Following a thorough review of the MRDA and the governing legal principles on the interpretation of a commercial contract, Justice Newbould held that the MRDA did not apply to the issue of allocation. He found that the MRDA was a transfer pricing document drafted for tax purposes and was not intended to address entitlement to the proceeds of the sale of assets on insolvency. Further, while NNL held legal title to the intellectual property, he held that "[t]he patents and application rights to apply for patents were held in the name of IP for administrative purposes." Since Nortel was a highly integrated multi-national enterprise and all RPEs were involved in R&D that led to the patents, Justice Newbould found that "NNL would be unjustly enriched by being entitled to all of the proceeds of the sale of Nortel IP at the expense of other RPEs who contributed to the creation of that IP just because the patents were registered in NNL's name."

Having found that the MRDA did not govern how the sale proceeds are to be allocated, Justice Newbould turned to section 11(1) of the CCAA, which gives a court in a CCAA proceeding broad inherent jurisdiction to make any order it considers appropriate in the circumstances. Justice Newbould, citing the "fundamental tenet of insolvency law that all debts shall be paid *pari passu*" and that "all unsecured creditors receive equal treatment" held that the $7.3 billion in funds generated from the Nortel liquidation should be allocated on a pro rata basis among the debtor estates, according to each estate's share of the total indebtedness.

Justice Newbould held that a pro rata allocation would not constitute an impermissible substantive consolidation of the debtor estates. The doctrine of substantive consolidation applies in a liquidation or reorganization of a corporate group when a court treats the separate legal entities belonging to the same corporate group as one entity. In essence, claims of creditors against separate debtors instantly become claims against one single entity under substantive consolidation. However, as observed by Justice Newbould, "the lockbox funds are largely due to the sale of IP and no one Debtor Estate has any right to these funds." Further, each debtor estate remains separate with its own distinct set of creditors. Even if the allocation scheme amounted to a consolidation, Justice Newbould determined that there was no case law precluding it in the unique circumstances of the Nortel insolvency.

Numerous appeals and related proceedings have followed, and the story is far from over.

11. ***Nortel Networks Corp., Re,* 2014 ONSC 6973**

In *Nortel Networks Corp., Re,* claims were brought by the Trustee of the Nortel Networks UK Pension Plan and the UK Board of the Pension Protection Fund (PPF) against Nortel Networks Limited (NNL), the direct operating subsidiary of Nortel Networks Corporation (NNC).

The Nortel Networks UK Pension Plan was a defined benefits plan under which employees made specified contributions and the employer was required to fund the balance of the cost of providing the benefits after taking into account the contributions paid by the employees and the investment performance of the plan's assets. An actuarial valuation of the UK Plan conducted in 2002 disclosed a deficit of £177 million on an on-going basis. The next actuarial valuation made as of April 5, 2005 indicated that the deficit had increased to £356 million. As a result, a 2006 Funding Agreement guaranteed by NNL was made between Nortel Networks UK Plan Limited (NNUK) and the Nortel Networks UK Pension Trust Limited (the "Trustee") to reduce the deficit. NNL also owed debt on an interest-free loan to NNUK, for which transfer of other subsidiaries to NNUK was to be arranged. NNL signed a guarantee on the interest-free loan ("Swift Guarantee") to account for any potential loss that would accrue to NNUK if it failed.

On January 14, 2009, NNC, NNL and a number of other Canadian corporations filed for bankruptcy protection under the *Companies' Creditors Arrangement Act* (CCAA). In this CCAA proceeding before Justice Newbould, the Trustee and the Board of the PPF made claims based on the amount they stated would be owed under the financial support direction (FSD) regime set up under the *Pensions Act 2004*, (UK) c. 35 ("2004 Act"), amount under the funding guarantee, amount under the guarantee on interest free loan, and amounts for oppression and unjust enrichment. The Monitor, acting in the interests of NNL and NNC in this CCAA proceeding, disallowed the claims.

The 2004 Act came into existence as part of the UK government's efforts to ensure improved protection of pension plan benefits. Among other protections, the 2004 Act established the Board of the PPF and created the FSD regime. The Board of the PPF is a statutory corporation required under the 2004 Act to hold, manage, and apply the PPF. If the employer of a particular pension plan becomes insolvent, the Board of the PPF investigates and determines whether the plan qualifies for entry into the PPF. If the plan qualifies, the PPF assumes responsibility for the plan and the pension assets of the plan will be transferred to the PPF. To discourage employers to arrange their affairs in such a way that shifts the responsibility for the plan to the PPF, the FSD regime was created to enable the UK Regulator to impose an obligation on some or all of the other group companies to provide reasonable financial support to the under-funded plan. In circumstances of non-compliance, the FSD regime also enables the UK Regulator to impose, through a contribution notice, a specific monetary liability payable to the trustees.

In 2010, the UK Regulator issued a warning notice seeking an FSD to NNC, NNL, and 27 other companies in the Nortel group. In a separate proceeding, the warning notice issued by the UK Regulator was held to be a nullity because of the stay in the Initial

Order under the CCAA. Despite this, the Regulator proceeded in the UK on an uncontested or default proceeding basis and subsequently issued FSDs to NNC and NNL on April 1, 2011. However, no contribution notice was ever issued to NNC or NNL. The Trustee and the Board of the PPF argued that NNC and NNL would have been found to be liable for deficit under the regime.

While Justice Newbould found that the Trustee and the Board of the PPF had status to bring a claim in respect of the FSDs issued, he ultimately held that their claim based on the 2004 Act was "too remote and speculative to constitute a claim in this CCAA process". In measuring the contingency of their claim, the chances that a contribution notice under the FSD regime would be issued had to be determined. Justice Newbould found that there was little guidance available on whether a contribution notice would be ordered by the UK Regulator, or the amount that the Regulator might seek. Further, he found that Nortel's financial structure was complex, and thus offsetting benefits could be a factor that would militate against issuing a contribution notice.

With respect to the guarantee made by NNL on the 2006 Funding Agreement, Justice Newbould allowed the Trustee and the Board of the PPF's claims in the amount of £339.75 million. Under section 133(3) of the 2004 Act, no contributions may be paid during the assessment period where a plan's qualification for entry into the PPF is being determined. The Monitor argued that NNL has no liability under the Funding Guarantee to pay contributions after the assessment period terminates because the assessment period did not end before the Guarantee's expiry date of June 30, 2012. However, as Justice Newbould found, "[b]y virtue of clause 2.6 of the Funding Guarantee, the obligations of NNL are not to be affected by the unenforceability of a guaranteed obligation of NNUK due to the insolvency of NNUK." Therefore, NNL was found to be liable under the Funding Guarantee to guarantee certain payments required by the Funding Agreement.

Justice Newbould then considered the claims based on the Swift Guarantee. Under the Swift Guarantee, an actuarial certificate had to be issued before a demand could be made. Since there was no actuarial certificate at time of demand, and no other demand was made by time the Guarantee expired, NNL was found not to be liable under the Swift Guarantee. The Trustee and the Board of the PPF contended that even if the Swift Guarantee was found to be unenforceable, the Court should nevertheless accept them as valid claims by virtue of the rule in *Ex Parte James* requiring a court officer to act in an equitable way. Justice Newbould found that this rule had no application in this case as the Monitor was acting under the "super monitor" order, was not asserting a claim over property, and the rule could not make an invalid claim valid.

Justice Newbould also disallowed the claim in oppression under section 241 of the *Canadian Business Corporations Act* and the unjust enrichment claims. The claimants had no standing to claim oppression against NNL, given that NNUK had its own distinct board that owed fiduciary duties and NNL did not hold a duty to act in the interests of NNUK. With respect to the claims for unjust enrichment, Justice Newbould found that there was simply no direct nexus between the deprivation claimed by the Trustee and any alleged enrichment to NNL.

In the end, only the claims regarding the guarantee on the 2006 Funding Agreement were allowed.

12. ***Greater Essex District School Board and OSSTF (OMERS Pension Plan), Re,* 2015 CarswellOnt 10142 (ONLA)**

The main issue in this case was the jurisdiction of the arbitration board. The union claimed that the school board had failed to properly apply OMERS rules to individuals. The arbitrator held that the essential nature of the dispute did not arise out of the collective agreement but out of the OMERS plan and related pension legislation. While 48(12)(j) of the *OLRA* gave the arbitrator concurrent jurisdiction to interpret and apply OMERS legislation, the arbitrator did not have jurisdiction with respect to the period between 1992-2006 when there was no collective agreement. Residual jurisdiction should not be exercised in the context.

13. ***Dodd v. Canada Revenue Agency,* 2015 PSLREB 8**

Employer discovered grievor's undercontribution to the pension plan, and proposed to recover the undercontribution to correct the deficiency. The grievor disagreed with employer's actions. The adjudicator held that there was nothing in the collective agreement that prohibited legitimate deductions from the grievor's salary.

14. ***Re IUOE Local 793 Pension Plan for Operating Engineers in Ontario (Nocera),* FST file no. P0604-2014**

In *Re IUOE Local 793 Pension Plan for Operating Engineers in Ontario (Nocera)*, the Financial Services Tribunal examined the effect of the Ontario Court of Appeal's decision in *Carrigan v Carrigan* on the position of spouses with respect to pre-retirement death benefits.

The plan member at issue died prior to retirement on September 8, 2012 and was therefore eligible for the pre-retirement death benefit. The applicant, Cindy Hewlett, was the deceased plan member's common law spouse. At that time of his death, the deceased was still legally married to another woman, although they were living separate and apart. The deceased's two designated beneficiaries under the plan were also parties to the hearing. The issue was to whom the plan administrator, the Board of Trustees for IUOE Local 793 Pension Plan for Operating Engineers in Ontario (the "Plan Administrator") must pay the death benefit.

Section 48 of the *Pensions Benefits Act* creates a priority scheme for the payment of pre-retirement death benefits. The first priority, under s. 48(1), is to the member's spouse at the date of the member's death. The definition of spouse in s. 1(1) of the Act included a common-law spouse, that is, a non-married spouse living in a conjugal relationship with the member continuously for a period of not less than three years. At the time of the member's death, s. 48(6) gave the second priority to the member's designated beneficiary if member did not have a spouse on the date of death or the member was living separate and apart from his or her spouse on the date of death.

Prior to October 31, 2012, this framework was commonly interpreted to require payment of a pre-retirement death benefit to the current common-law spouse where one existed, and was not considered to be affected by the existence of a married but separated spouse. This was referred to as the "spouse in the house" rule.

However, this definition was thrown into question by the Ontario Court of Appeal's October 31, 2012 decision in *Carrigan. Carrigan* applies to any plan member whose death occurred prior to July 24, 2014, where benefits were not paid out prior to October 31, 2012.

The facts in *Carrigan* were analogous to this case. In *Carrigan,* the Court denied payment of a death benefit to the common-law spouse of a plan member because the member was still legally married to another person.

At the time of the Court's decision, s. 48(3) of the Act stated that s. 48(1) did not apply where the member and his or her spouse were living separate and apart on the date of death. The Court held that the word "spouse" in this section could only mean "married spouse" as common law spouses cannot be living separate and apart and still be spouses within the meaning of the definition in s. 1(1). As the member in *Carrigan* was living separate and apart from his married spouse, the Court found that s. 48(1) did not apply to any person; the member's designated beneficiary was therefore the rightful recipient of the benefit.

The member in the subject case died on September 8, 2012, but benefits were not distributed before October 31, 2012. The Tribunal found that, as such, the decision in *Carrigan* was binding on them. Given the nearly identical facts, the member's named beneficiaries were the rightful recipients of the death benefit.

Following the Supreme Court's refusal of leave to appeal in *Carrigan*, the Ontario legislature passed an amendment to s. 48(3) of the Act restoring the previous "spouse in the house" rule. The amended provision applies to members who pass away on or after July 24, 2014.

The Tribunal also took the opportunity to remind plan administrators of their fiduciary duty to administer plans in the best interest of the plan members and other beneficiaries. They recognised that this duty includes making difficult decisions to pay out benefits in the face of unclear laws. In this case, the Plan Administrator had failed to make any payment pending a decision of the Tribunal.

British Columbia

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

Employer unilaterally changed defined benefit pension to a defined contribution pension, and an arbitrator ruled that the employer was estopped from amending a pension plan based on a representation it had made to employees. The BC Court of Appeal held that it did not have the jurisdiction to hear the appeal because the question pertained to labour

relations principles, and therefore fell within the jurisdiction of the Labour Relations Board.

16. ***Maxwell v. British Columbia,* 2014 BCCA 339**

Maxwell made wrongful dismissal claim, was awarded pension contributions during her 24 month notice period. She was denied additional pension benefits. The BC Court of Appeal held that the College was not obliged to make a deal with Maxwell to extend her participation in the pension plan for a further 24 months, failing which Maxwell would be entitled to damages. At her peril, Maxwell took no steps prior to her anticipated dismissal to ensure her pension would be continued. There was no evidence she was likely to have received a continuance had she sought one.

Quebec

17. ***Louben Sportswear Inc. c. Caisse de retraite des industries de la mode (UIOVD),* 2015 QCCA 42**

Employer ceased contributions to pension plan because it had no employees, pension plan was terminated. Employer brought action to seek modification, pension board and committee successfully brought a motion seeking dismissal of employer's action, claiming the plan was terminated when action was commenced. To withdraw from pension plan, application should have been made before pension plan was terminated, no application was made. No error in trial judge's decision granting motion for dismissal.

Other

18. ***Moors v. Canada Revenue Agency,* 2015 FC 446**

Applicant is a member of the Ontario Teachers' Pension Plan who went on maternity leave three times between 1998 and 2002. When she returned she attempted to buy back her pension credits. The CRA advised her she would be subject to a past service pension adjustment, which Ms. Moors claimed would impede her ability to save for retirement in a discriminatory manner. The Federal Court held that the Applicant's inability to purchase pension credits did not stem from discrimination related to sex or family status, and in fact found that the provisions pertaining to Registered Pension Plans are *more* sensitive to women on maternity leave compared to those taking leave for other reasons.

19. ***Holland and Tri-County Regional School Board, Re,* 2015 NSCA 2**

In *Holland and Tri-County Regional School Board, (Re*), the Nova Scotia Court of Appeal reversed a decision by a Board of Inquiry under the *Human Rights Act* (*HRA*) which found that a pension plan requiring retirement at age 65 was discriminatory.

James Holland, a school bus driver employed by the Tri-County Regional School Board, was a member of the CUPE (Local 964) staff pension plan. Holland did not wish to retire in the year he turned 65 and asked to stay on. The school board declined his request. Holland complained to the Human Rights Commission. The Board of Inquiry (the "Board") decided that Holland's forced retirement constituted discriminatory conduct.

Under a reasonableness standard of review, the Court of Appeal found that the Board's decision was unreasonable.

The Nova Scotia *HRA* generally prohibits age discrimination, but section 6(g) makes clear that this prohibition "does not apply to prevent, on account of age, the operation of a *bona fide* pension plan or the terms or conditions of a *bona fide* group or employee insurance plan". On July 1, 2009, *An Act Respecting the Elimination of Mandatory Retirement* had removed "retirement plans" from this exception. The reference to pension plans remained unchanged. The effect of s. 6(g) is to allow a mandatory retirement age under a *bona fide* pension plan. A *bona fide* plan is defined as a legitimate plan not merely set up as a sham for the purpose of achieving a tax advantage or for defeating rights protected under the *HRA.*

Holland's pension plan (the "Plan") stated that "a member shall retire on his Normal Retirement date [the first day of the month following the month in which the member turns 65] except as otherwise provided in this section". The Plan went on to give the employer discretion to extend the retirement age to 71 on a year-to-year basis. The employer declined to exercise its discretion in this case.

The Collective Agreement between CUPE and the school board required retirement in the school year that the member turned 65.

The issue on appeal was whether the Board unreasonably concluded that the pension plan exception in the *HRA* permitting discrimination based on age should not apply to Holland.

Justice Bryson held that the Board had misapprehended binding authority and made an error of statutory interpretation in deciding that that the Plan was discriminatory and the exception should not apply.

The leading authority on the pension plan exception to age discrimination is the Supreme Court of Canada's 2008 decision in *New Brunswick (Human Rights Commission) v Potash Corporation of Saskatchewan.* It explains how to determine whether a pension plan is *bona fide*, holding:

> It is the plan itself that is evaluated, not the actuarial details or mechanics of the terms and conditions of the plan. The piecemeal examination of particular terms is, it seems to me, exactly what the legislature intended to avoid by explicitly separating pension plan assessment from occupational qualifications or requirements.

Though the Board cited *Potash*, it engaged in just such a piecemeal analysis. It decided that, although the Plan as a whole was *bona fide*, where there was a conflict between the terms of the Plan and an associated document (here, the Collective Agreement), it then had license to engage in a further analysis of the legitimacy of the plan. The Board took issue with the school board's failure to exercise its discretion to allow later retirement.

The Court of Appeal found the Board's decision "confused and confusing". The Court stated that the correct analysis was straightforward: Holland was required to retire by the Plan, and the Plan was *bona fide*, exempting it from a charge of discrimination under the HRA. A *bona fide* plan cannot be defeated by unexercised discretion in any particular case.

In addition, the Court found that the Board had misapplied the principles of statutory interpretation. The Board relied on the legislative amendment removing "retirement plans" from the age discrimination exemption as indicative of a move towards intolerance of any age discrimination, deciding that the exception should therefore not apply to this Plan. The Court held that this went far beyond the Board's authority and affirmed that interpretations that are inconsistent with the wording of legislation are not permitted.

Finally, the Court clarified that the *bona fide* pension plan exemption was intended to balance prevention of age discrimination with preserving the integrity of *bona fide* pension plans.

20. ***Adekayode v. Halifax (Regional Municipality),* 2015 CanLII 13866 (NSHRC)**

The Collective Agreement between the claimant's union and the City of Halifax provided for top-up payments on benefits for new adoptive parents, but not to biological parents. The claimant alleged the distinction between adoptive and biological parents was discriminatory based on family status. The Board found that family status as a protected ground included the care obligations created by a parent/child relationship and how the parent and child came to be in their relationship (i.e. adoption or birth), and that it was discriminatory to use the biology/adoption distinction as the basis for making financial benefits available to adoptive but not biological parents.