LEGISLATIVE DEVELOPMENTS AND THE TOP 20 CASES OF 2008 - 2009

42nd ANNUAL CANADIAN EMPLOYEE BENEFITS CONFERENCE

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LEGISLATIVE DEVELOPMENTS AND COURTS AND TRIBUNALS

INTRODUCTION – 2008 - 2009

The latter half of 2008 and first half of 2009 have provided a selection of the new legislative and adjudicative developments in the pension and benefits field.

Pensions particularly have come to the forefront given the economic tsunami caused by the crash in markets, low interest rates, and the insolvency problems of major employers including automakers, Nortel, paper producers and the auto parts industry among others. Also coinciding with these events have been the release of the Reports of Expert Commissions on Pensions in Nova Scotia, Ontario and the combined Alberta-British Columbia Report. The Nortel situation has also focused the difficulties of single employer, self-funded long term disability benefits and retiree health benefits.

The solvency funding problems and legislative reactions for pension funds have led to legislative developments designed to assist both single employer and multi-employer plans. Politicians have become very nervous about pensions and in many respects have been coming up with small solutions to major problems and generally have tried to deflect the concerns of pension plan members by focusing on Canadians who do not have pensions. Many questions remain unanswered but, at least, pensions are on the political radar screen.

Not to be outdone by legislative and economic developments, the Courts have been busy as well. The Supreme Court of Canada in the *Nolan v. Kerry* case has again spoken on pensions and most recently granted leave to appeal in the *Burke v. Hudson's Bay* case. Pensions are again on the judicial forefront for this season. Retiree health benefits have also been the subject of major decisions including the *Bennett* decision in British Columbia, and the *Peel Region* and *Labatt* cases in Ontario. There is also a case involving *Vivendi* in Quebec. Fiduciary duties are always on the agenda of cases before the Courts as is evident from cases such as the *Ruffolo v. Carpenters* case in British Columbia and indeed references in the *Kerry* case by the Supreme Court.

Finally, insolvency and bankruptcy courts have become much concerned about pension issues. The Nortel situation and the *Abitibi* case indicate major concerns about continued funding during a restructuring process. Legislative amendments to the Wage Earner Protection Program legislation with respect to pensions in both CCAA and bankruptcy situations have focused on the problems of protecting the retirement income security and the health benefits of employees whose employers have gone through these situations. Changes protecting collective agreements but permitting new negotiations during restructuring are now in force. The *Ted Leroy* case in British Columbia is the first of several which will interpret the *Wage Earner Protection Program Act* and no doubt there will be more as the *Ted Leroy* case is dealt with by the British Columbia Court of Appeal.

LEGISLATIVE HIGHLIGHTS

The main legislative highlights across Canada have focused on funding problems of pension plans. With respect to multi-employer plans they have generally been moratoria on solvency funding recognizing that solvency funding is not necessarily appropriate for these plans. This has been the general approach in Alberta and British Columbia as well as Ontario. The trade off

generally has been increased going concern funding usually on a 10 year timetable (in Western Canada) or a 12 year timetable in Ontario. Special filings are generally required and statistical data has shown that in Ontario at least 28 plans have already made use of the SOMEPP Regulation and that many more will do so once they file their December 31, 2009 actuarial valuations. The key issue as noted by the Expert Commission Report in Ontario would be to make this a permanent regulation rather than a temporary measure. The Expert Commission for Alberta and British Columbia has taken the same approach. It is expected that other provinces would largely follow suit.

For single employer plans generally a 10 year solvency funding period (vs. 5 years) together with re-scheduling amortization of past liabilities has been the preferred approach across Canada. We expect to see companies taking advantage of this. More recently the Federal Government has loosened the *Income Tax Act* restrictions on funding to allow accumulation of larger surpluses given the volatility of investments and markets and its impact on pension plans.

In the realm of overall pension reforms there have been consultations resulting from the "Expert Reports" in provinces where they have been prepared and there will be legislative amendments to deal with some of the proposals. Many of those pertain to "target plans" and better governance. In many respects these are attempts to emulate the MEPP model outside of the traditional multi-employer, collectively bargained sector. It remains to be seen whether this will be a useful method of continuing retirement income security through quasi "defined benefit" arrangements. The trend towards defined contribution arrangements in Canada outside of the multi-employer and public sector seems to be irreversible and indeed the whole issue of retirement income security has become a major political concern. Talk of expanding the Canada Pension Plan is seen as one solution and indeed the December 2009 "Pension Summit" of a Finance Ministers in Whitehorse, Yukon will deal with many of these issues.

On the insolvency front, amendments to the WEPPA and proclamation of amendments to the *Companies Creditor's Arrangement Act* ("CCAA") have extended severance pay and termination pay protection to terminated employees in both bankruptcies and restructuring situations. The question of whether statutory severance pay must be paid in a CCAA restructuring filed prior to the recent legislative changes is before the Ontario Court of Appeal in the *Nortel* case. The issue of reducing commuted values was litigated in the *Nortel* case and approved by the Court, resulting in regulatory amendments in Ontario and in other provinces to permit reductions of commuted values for terminated members to the wind up funded ratio. The issue of paying the balance over five years still remains outstanding.

Finally the matter of "guarantee funds" such as Ontario's Pension Benefit Guarantee Fund ("PBGF") or extending other insurance protections to members of pension plans whose employers have gone out of business are now at the forefront. Despite the reluctance to provide such protection by governments, there is great public pressure to have such protection from affected employees, retirees and union groups. The Arthurs Report in Ontario advocates enhanced PBGF coverage. The existence of much more generous systems in the United States and the United Kingdom have brought this issue to the forefront in Canada. Ontario is studying its PBGF and will be presumably dealing with legislative amendments regarding how to deal with these pension plans of insolvent employers in the future.

COURTS AND TRIBUNALS

Leading themes in cases before the Courts have centered on judicial "conservatism" in favour of plan sponsors to try and protect benefits in tough economic times. This is certainly evident in the *Kerry* case where issues such as plan expenses and use of surplus in a defined benefit plan to pay for defined contribution costs in a "converted plan" were upheld. This is a change in the judicial temperament from the cases that were being decided by the Courts in the 1990s. However, many of these issues seem to be cyclical in nature and when it comes to reductions of benefits perhaps the Courts will take a different approach. However, this has not been the case in the retire health benefit cases such as *Bennett v. B.C.* (now under appeal) and the failure to certify a class action for retiree health benefits by the Ontario Superior Court in *Nadonly v. Peel*. Further, settlements have been approved which permit reduction of retiree health case benefits to an acceptable level to retirees in order to avoid continued litigation as was done in the *Labatt's* case.

The Supreme Court decision in *Kerry* also highlights matters of costs and expenses of litigation and effectively makes it very risky for former employees or employees to challenge employer pension decisions without risking significant costs if they are not successful. This can have nothing but a chilling effect on such litigation. However there has been a bit of a resurgence of paying employee costs as was seen in the *Burke v. Hudson's Bay* decision and indeed in the *Sutherland and Scott v. Hudson's Bay* decision in 2008.

Other issues involve the Courts being more sympathetic to collective rights in protecting pensions and health benefits as opposed to individual claims for what many view as preferential treatment. This was the case in the *Ruffolo* decision of British Columbia where Trustees were found to be within their rights to use "excess contributions" made by employers on behalf of certain members for the overall welfare of the fund rather than to provide additional benefits to the specific members involved. This general trend to recognizing the discretion of the Trustees if exercised properly in many of these cases is helpful to Trustees' multi-employer pension and health and welfare trusts particularly in times when benefit reductions will be required.

Another new line of case that seems to be arising is that pertaining to supplemental benefits for executives and partial wind ups and wind up of such plans. This is evident in the *Caponi v. Canada Life* case which has been certified by the Ontario Court. Losses of supplemental pensions and unfunded retirement allowances have come to the forefront in cases such as *Nortel*.

I am particularly indebted to Michelle Landy-Shavim for her assistance in compiling the Top 20 Cases and to all of the lawyers and articling students at Koskie Minsky LLP who assist in writing articles for the IF Canadian Benefits and Compensation Digest, Legal and Legislative Reporter.

A detailed summary of leading cases in 2008 - 2009 follows this introduction.

SUPREME COURT OF CANADA DECISIONS

1. *Nolan v. Kerry (Canada) Inc.*, [2009] S.C.J. No. 39

Facts

Kerry (Canada) Inc. ("Kerry") became the sponsor of a 40-year-old defined benefit pension plan in 1994, upon its purchase of the business from another company. Its actuarial, investment management and audit services had been paid from the pension fund, and not directly by the employer. Upon its purchase of the business, Kerry continued paying plan expenses out of the trust fund, as it was purportedly allowed to do under a 1958 trust agreement that replaced the original 1954 agreement. By 1985 the pension had been in a surplus position for a number of years and the employer started taking contribution holidays from its funding obligations.

Kerry amended and revised the plan again in 2000 to provide for the addition of a defined contribution ("DC") component. Those in the DC component were one type of participant, while employees who did not exercise the conversion option remained in the first part of the defined benefit ("DB") component of the 2000 plan. For the latter group, the pension entitlements continued to be provided from the trusteed fund. Amendments to the 2000 plan authorized the company to take a holiday from its contribution obligation in respect of certain members by using the surplus in the original trusteed fund established in 1954; Kerry announced its intention to take contribution holidays from its obligations to DC members of the plan, by applying the surplus accumulated in the fund from the DB component to satisfy the premiums payable in respect of the DC component.

The 1954 trust agreement stated that "[n]o part of the corpus or income of the Fund shall ever revert to the Company or be used for or diverted to purposes other than for the exclusive benefit of such persons or their beneficiaries or personal representatives as from time to time may be designated in the Plan except as therein provided." The employer contribution provision of the plan stated: "The Company shall contribute from time to time but not less frequently than annually *such amounts as are not less than those certified by the Actuary* as necessary to provide the retirement income accruing to members …"

After Kerry introduced the 2000 amendments, the Employees Pension Committee requested the Ontario Superintendent of Financial Services order the company to reimburse the plan for all the additional contributions, and the income that would have been earned from them, which would have been in the fund were it not for the contribution holidays that the company and its predecessor had taken since 1985. The Committee also asked the Superintendent to deny registration of the 2000 plan and to order the wind-up of the plan.

In April 2002, the Superintendent gave notice that he intended to refuse to take any of these requested actions. However, the Superintendent agreed with the Committee's objection to the practice of paying plan expenses out of the trust fund, and proposed to make an order requiring Kerry to reimburse the fund for all administrative expenses.

The Committee and Kerry both appealed the Superintendent's decision to the Financial Services Tribunal. The Tribunal approved paying some administrative expenses from plan fund and upheld company's right to take contribution holidays. The Divisional Court ruled that the

company cannot pay administrative expenses out of pension fund; while some of the contribution holidays are lawful, a company cannot cross-subsidize the plans.

The Ontario Court of Appeal found that the Company can pay plan expenses out of pension fund, designate certain members as beneficiaries, and take contribution holidays. The unanimous three-member panel of the Court of Appeal allowed Kerry's appeal from the decision of the Divisional Court, dismissed the Committee's cross-appeal, and affirmed the Tribunal's rulings. Justice Eileen Gillese held that nothing in the original plan and trust documents prohibited the taking of contribution holidays; that the company was at liberty to amend the plan to introduce a new category of member; and that if the company introduced a new category of plan member, it would be entitled to take contribution holidays in respect of that new category. Therefore, she concluded, "[o]nce the … members are designated Fund beneficiaries ... use of the Fund's surplus by way of contribution holidays in respect of them meets the requirement that the Fund be used exclusively for the benefit of Fund beneficiaries." Finally, Justice Gillese rejected the Committee's cross-appeal of the Divisional Court's decision that Kerry was entitled to take contribution holidays in respect of the defined benefit component of the plan.

Supreme Court Decision

Writing for a 5-2 majority of the Supreme Court of Canada, Justice Marshall Rothstein denied the Committee's appeal, ruling that the Tribunal's reasons "clearly satisfy review on a reasonableness standard." In Rothstein's view, the decision of Justice Gillese in the Ontario Court of Appeal was "cogent," and he expressly adopted "large portions of her analysis."

Justice Rothstein held that the prohibition in the original trust agreement against use of trust funds for any purpose other than the "exclusive benefit" of employees could not be construed as imposing an obligation on the company to pay plan expenses. Because payment of those expenses was "necessary to ensure the plan's continued integrity and existence," he reasoned that the payor was in fact for the employees' "exclusive benefit." Rothstein rejected the submission that payment of plan expenses from the trust fund constituted a partial revocation of the trust. "In the absence of an obligation on the employer to pay the plan expenses," he declared, "to the extent that the funds are paying legitimate expenses … the employer is not purporting to control the use of funds in the trust."

Justice Rothstein then considered whether Kerry was entitled to take contribution holidays in respect of funding obligations on behalf of the original group of DB members. In general, he observed, contribution holidays are permitted where "plan documents provide that funding requirements will be determined by actuarial practice." In light of the wording of plan amendments adopted in 1965, which stipulated that the company was to contribute such amounts as were "not less than those certified by the Actuary as necessary to provide the retirement income accruing to members during the current year," the majority of the court held that contribution holidays were allowed under this plan because the employer's contributions were determined by actuarial calculations.

On the third issue, i.e. whether Kerry was entitled to take contribution holidays from its obligations to DC members by using the DB component's surplus to cover the DC component's premium costs, the Court again held in favour of the employer. It was found to be reasonable to hold that DC members could be designated as beneficiaries under the trust. As there was no

legislative or contractual impediment to structuring a pension plan in the way proposed by the employer, the Committee's arguments failed, and its appeal was dismissed.

Justices Louis LeBel and Morris Fish dissented. In Justice LeBel's view, "Kerry's use of the DB surplus to eliminate its contribution obligations to the DC plan resulted in a violation of the provisions in the Plan and Trust Agreement that prohibit the use of trust funds for other than the exclusive benefit of fund beneficiaries." Justice LeBel continued: "This is a clear example of the employer's controlling and encroaching on funds that are irrevocably held in trust for the benefit of DB members. This action violates the general trust principle against revocation as well as the provisions in the Plan's documentation that expressly prohibit the employer's revocation of trust funds."

Referring to the tension between providing incentives for employers to establish pension schemes and the need to protect pensioners' rights, Justice LeBel stated: "I believe that the use of surplus from a DB plan to fund an employer's obligations with respect to a separate DC plan disrupts this careful balance, to the detriment of plan members." To this, the minority opinion added: "As I will explain in these reasons, no support for this type of contribution holiday can be found in the legislative framework or in the provisions of the Plan and Trust Agreement. Rather, the Plan documentation and the principles of trust law effectively forbid the taking of a contribution holiday in the DC plan that is funded from the surplus in the DB plan."

FEDERAL COURT DECISIONS

2. *Buschau et al. v. Canada (Attorney General) et al.* 2009 FCA 258

Facts

The Plan was established in 1974 for the employees whose successor employer is Rogers Communications Inc. ("Rogers"). There was a large surplus in the Plan in the 80s which allowed Rogers to take contribution holidays. In addition, the Plan actuary recommended to Rogers that it use the surplus to increase pension benefits or provide bonus pensions for Plan members, to which the employer refused. Rogers then closed the Plan to new employees allowing existing employees to continue to accrue benefits under the Plan in respect of their continued service.

In July 1984, Rogers wrote to the Plan trustee requesting that some of the surplus be paid out to it. The trustee advised that it could not do so without a legal opinion.

In the early 1990's Rogers amended the Plan to merge it with four other pension plans. The merged plan, unlike the original Plan, had a provision that allowed for the withdrawal of surplus by the employer while it was ongoing.

Shortly before going to trial, the employer repaid the surplus that was removed from the Plan. The trial judge found that the contribution holidays were legal, that the repayment of the withdrawal was correctly repaid to the trustee, and that the merger was legal because the Plan's trust continued to exist despite the merger. The members appealed the decision to the British Columbia Court of Appeal. The Court of Appeal found that Plan members could bring proceedings to terminate the Plan, which would in turn access the surplus, by either 1) the rule in *Saunders v. Vautier* (that the terms of a trust can be varied or the trust can be terminated if all

beneficiaries of the trust, being of full legal capacity consent) or 2) the *Trust and Settlement Variation* Act, to the extent it is applicable. There was no further appeal of this decision.

In 2001, the Plan member brought a second legal proceeding to terminate the Plan pursuant to the rule in *Saunders v. Vautier*. In June 2006 the Supreme Court of Canada handed down their decision, finding that the right to any surplus only crystallizes when there is surplus on termination, and that members could not invoke *Saunders v. Vautier* to force a Plan termination. The Supreme Court further held that the ancient rule of *Saunders v. Vautier* is not compatible with modern pension plans because the *Pension Benefits Standard Act* ("*PBSA*") governs the termination of plans and the distribution of pension plan assets of federally regulated plans.

In the wake of the Supreme Court's decision, the Plan members requested that the Superintendent exercise her discretion to terminate the Plan. The Superintendent refused the request to terminate the Plan, having decided that the "continued existence of the Plan was a worthy goal and the employer was continuing to provide the promised benefits and was complying with solvency requirements." The Superintendent was satisfied that the general purpose of the Plan was continuing and that the Plan met the prescribed tests and standards for funding. The Superintendent also refused to replace the administrator, finding that the current administrator was not administering the Plan and fund in contravention of the terms of the Plan (and trust) or the *PBSA*.

In the appeal from the Superintendent's decision, Justice O'Keefe of the Federal Court of Canada defined a number of issues, starting with the question of what was the appropriate standard of review to apply to the Superintendent's decision. Justice O'Keefe concluded that the appropriate standard of review of issues identified as questions of law and jurisdiction is one of correctness, and for issues identified as questions of mixed law and jurisdiction the standard is reasonableness. Justice O'Keefe allowed the application for judicial review and remitted the matter to the Superintendent for re-determination.

From there, the Court looked at the issue of whether the Superintendent erred in refusing to exercise discretion, to which Justice O'Keefe called for a mid-level of deference, as it was a question of mixed law and fact. Justice O'Keefe concluded that the Superintendent's decision *not* to exercise her discretion to terminate the Plan under paragraph 29(2)(a) was unreasonable. Because of Justice O'Keefe's finding on this issue, he did not deal with the other issues. He then referred the matter back to the Superintendent for re-determination.

<u>Decision</u>

The Federal Court of Appeal allowed the appeal and set aside the order of the Federal Court. The Court of Appeal found that the difficulty with the judge's decision was that it did not engage the Superintendent's reasoning in support of her conclusions. Without that analysis, the Court of Appeal found it difficult to say on what basis a Court would be justified in intervening to set that Decision aside.

The unanimous decision written by Justice Pelletier focused on whether the Superintendent either improperly exercised her discretion or made a reviewable error of law when she allowed Rogers/Cable Inc. to revoke the merger of the Plan and to amend the Plan to open it to new employees of Cable Inc. The Court found that since a proper standard of review analysis had already been conducted, it was not necessary to conduct another. It also found that the

Superintendent's decision was grounded in her assessment of the policy and objectives of the *PBSA*, specifically, that the continued existence of a pension plan is a worthy goal.

The Superintendent had found that the objects of the Plan and of the *PBSA* were better served by using the actuarial surplus in the Plan to fund pensions for members of the Plan, including new members, than by providing a windfall to the current members of the Plan at the cost of terminating a viable pension plan. Once the Superintendent decided to allow the amendments to the Plan, the question of terminating the Plan had to be assessed in light of the existence of a viable Plan with a growing membership. The Supreme Court found that the interpretation of the *PBSA* and the associated regulations fell within the Superintendent's interpretative mandate. The Court of appeal found that there is nothing unreasonable about the Superintendent's conclusions which would call for the lower Court's intervention.

In considering whether the Superintendent must act when plan members ask her to do so, the Court of Appeal found that it does not follow that the action which the Superintendent takes in response to such a request must necessarily be that sought by the plan members. The Superintendent is bound to exercise her discretion with a view to the remedial purposes of the *PBSA*.

In considering whether the Superintendent is precluded from doing what she did by the application of the doctrine of *res judicata*, the Court of Appeal found that while the majority of the Supreme Court raised the issue of Rogers' power to amend the Plan to reopen it to new members, it did not decide the question, preferring to leave it to the Superintendent, subject only to the application of *res judicata.* Thus, the application of *res judicata* did not prevent the Superintendent from allowing Rogers/Cable Inc. to revoke the merger of the Premier Plan into the consolidated Rogers plan or to reopen the Premier Plan to new employees of Cable Inc.

NOVA SCOTIA DECISIONS

3. *Police Association of Nova Scotia Pension Plan v. Amherst (Town),* 2008 NSCA 74

<u>Facts</u>

The Police Association of Nova Scotia ("PANS") has collective agreements with various towns (the "Towns"). Incorporated into these collective agreements is the Police Association of Nova Scotia Pension Plan ("Plan"). The Plan provides a defined benefit, but the pension fund had insufficient assets to pay its beneficiaries' earned benefits. The Superintendent, under Nova Scotia's *Pension Benefits Act* ("*PBA*"), ordered the Towns to contribute the amounts needed to eliminate the funding deficiency. The Nova Scotia Supreme Court overturned the Superintendent's order and the Plan trustees appealed. There were two main issues on the appeal. The first was whether the Supreme Court judge erred by applying a "correctness" standard of review to the Superintendent's decision. If so, the next issue was the appropriate standard of review and whether the Superintendent's order could be maintained.

On appeal to the Nova Scotia Supreme Court, the court applied the "pragmatic and functional" approach to determining the appropriate standard of review and concluded that the Superintendent's decision was to be reviewed on a correctness standard, meaning that the court

need not show deference to the Superintendent's decision and may undertake its own analysis of the questions at issue.

The Nova Scotia Supreme Court held that the Superintendent erred in concluding that the Towns were obligated to make good the unfunded liabilities either under the terms of the Plan, or the *PBA*. The court held that the collective agreements trumped the *PBA* as they expressly stated that the Towns agreed to contribute a fixed percentage to the Plan and did not express any intention that the Towns would participate in the Plan as employers or that they were liable for any payments other than the specified percentage contribution.

Decision

The Nova Scotia Court of Appeal had the benefit of the Supreme Court of Canada's ruling in *Dunsmuir* to assist it with establishing the appropriate standard of review applicable to the Superintendent's decision.

The Court of Appeal applied the *Dunsmuir* decision by first reviewing the existing jurisprudence, and then considered four contextual factors set out in *Dunsmuir*. The court noted that in the *PBA* there is no privative clause indicating less deference to the Superintendent's decision. However, the issues the Superintendent had to deal with were not a matter of straightforward statutory interpretation. The Court of Appeal summarized the case as involving mixed issues of fact and law.

These issues reflect the core function of the Superintendent's statutory authority to see that pension plans are funded. The Court of Appeal made the following conclusions on the standard of review for decisions of the Superintendent pertaining to the pension plan funding:

> Straightforward matters of pure law that do not involve inextricably mixed issues of fact and law, discretion, policy or technical pension expertise, should be reviewed for correctness. Issues of fact, inextricably mixed fact and law, discretion, policy, or complex legal issues under the *PBA* that engage the Superintendent's pension expertise are governed by reasonableness.

The Court of Appeal overruled the lower court's use of a correctness standard of review and instead applied the reasonableness standard to review the Superintendent's decision. The Court of Appeal held that the Superintendent correctly interpreted the legislation to conclude that the Towns were employers "required to make contributions under the pension plan" according to the definition of "employer" in s. 2(p) of the *PBA*. The court further stated that the evidence and the Superintendent's findings supported the conclusion that there was a contractual connection whereby the Towns' collective agreements expressly adopted the Plan and that the parties' conduct made it clear that the collective agreements' pension provisions were not sterile.

Finally, regarding the Superintendent's decision that the solvency payments were required by the *PBA* and that the parties could not contract out of these minimum statutory standards, the Court of Appeal overturned the lower court's decision and found that the Superintendent's conclusion was both reasonable and correct. In reviewing that particular agreement the Court of Appeal stated:

> Pension benefits legislation establishes floor funding standards from which the parties may not contract out except as expressly authorized by the legislation…

> If the employer wants to limit its obligation only to the fixed contribution, it should agree to a money purchase plan or an employee RRSP account. When, instead, the employer dangles the pension prospect of a defined benefit plan, the *PBA*'s funding standards spring to attention.

The Nova Scotia Court of Appeal unanimously restored the Superintendent's order and has provided helpful guidance on the appropriate standard of review to be applied to a Superintendent's decision pertaining to funding issues.

4. *Smith v. Michelin North America (Canada) Inc.* 2008 NSCA 52

Facts

In June, 2008 a decision of Supreme Court of Nova Scotia regarding an application for the interpretation of the Michelin Pension Plan (the "Plan") concerned whether the terms of the Plan permitted Michelin, the employer and Plan sponsor, to take contribution holidays. The application was dismissed, and the court ordered costs of just under $300,000 payable by Everett Smith, an individual pensioner acting on behalf of all beneficiaries under the Plan. An appeal of the dismissal of the application and the costs order was decided by the Nova Scotia Court of Appeal in late 2008.

Unlike in some other provinces, filing a notice of appeal in Nova Scotia does not automatically prevent execution of the judgment under appeal. However, a judge has the discretion to make such an order, provided that an applicant meets a three part test, or can show "exceptional circumstances". Smith applied to the Nova Scotia Court of Appeal to stay the execution of the costs order against him, and Michelin brought a counter motion applying for security for costs of the appeal.

Decision

The three things an appellant must demonstrate for a stay of execution pending an appeal are: (i) the appeal raises an arguable issue; (ii) if the stay is not granted and the appeal is successful, the appellant will suffer irreparable harm; and (iii) that the balance of convenience favours granting the stay because the irreparable harm is greater than any harm that the responding party might suffer if the stay were granted but the appeal eventually dismissed.

The Court was unconvinced by Smith's arguments, and noted that he voluntarily assumed the risk of acting as a representative, without taking any steps to insulate himself from an adverse costs award. It was not realistic for Smith to ask that his representative status be used to shield him from a known risk that he understood. Moreover, alleged errors in the decision from the Court below could not constitute exceptional circumstances unless they were plainly egregious.

Examining Smith's conduct, the Court was unable to avoid the conclusion that he had behaved in an "insolvent manner" by failing to pay the previous costs order. The Court believed Smith's assertion that he did not have the funds to satisfy the costs order. However, the Court was not persuaded that the group of persons on whose behalf Smith acted could not raise further funds, which had been the vision from the outset of the litigation. In the result, the Court ordered payment of $50,000 security for costs. The Court noted that if the $50,000 could not be raised

by members affected by the proceeding, this would signify a lack of interest among the membership, and there would be no injustice if the appeal were to terminate for this reason.

QUEBEC DECISIONS

5. *AbitibiBowater Inc. (Re)*, [2009] J.Q. no 7160; *Abitibibowater inc. (Arrangement relatif à)*, [2009] J.Q. no 4473.

<u>Facts</u>

In early May 2009, the Quebec Superior Court released two significant decisions in its capacity as supervising court over AbitibiBowater Inc.'s insolvency proceedings under the *Companies' Creditors Arrangement Act* (the "CCAA"). The Court held that a collective agreement cannot be unilaterally altered by the employer once CCAA protection has been granted. In a second decision released only days later, the Court allowed AbitibiBowater to suspend the special payments made to its subsidiaries' pension plans, which provincial pension law requires the company to make. Contentious issues arose in AbitibiBowater's restructuring surrounding active employees who continued to provide post-filing services. The Court released two decisions which clarify the law in this area. Both decisions have implications for the AbitibiBowater restructuring and for CCAA restructurings at large.

Company's Inability to Make Unilateral Changes to the Collective Agreement

In July 2004, the Communications, Energy and Paperworkers Union of Canada (CEP) and AbitibiBowater signed a Memorandum of Agreement which affected at least 18 collective agreements that the CEP had negotiated on behalf of its members. The Memorandum of Agreement provided for modifications to the company's pension plans to be effective on May 1, 2009. Among other things, the modifications provided the following enhanced pension benefits to active AbitibiBowater employees:

1) Beneficial changes to the eligibility criteria for early unreduced retirement benefits; and

2) A favourable adjustment to the pension formula, increasing the multiplier from 1.70% to 1.75%.

After obtaining CCAA protection, AbitibiBowater's informed CEP of its decision to suspend certain rights that flowed through the existing collective agreements. The CEP actively opposed AbitibiBowater's decision not to honour its collective agreement obligations.

After obtaining CCAA protection, AbitibiBowater unilaterally and without the consent of the CEP chose not to honour these pension benefit improvements that formed a part of the existing collective agreements. AbitibiBowater argued that it did not have the financial capacity to make the consequential payments that flowed from the pension benefit improvements. The CEP challenged AbitibiBowater's motion on the basis that the suspension of the pension benefit improvements was an illegal repudiation of the collective agreement's negotiated terms, which were in force and applied to active employees.

<u>Decision</u>

In its decision released on May 4, 2009, the Quebec Superior Court delivered a twofold decision: First, AbitibiBowater cannot unilaterally terminate or suspend the clauses of the collective agreements that bind its active employees. Any modifications must be mutually agreed upon by the interested parties. Secondly, the Court specified that although the provisions of the collective agreement continue to apply, unionized employees do not benefit from any priority or entitlement to immediate payment for services rendered by virtue of the collective agreement. Section 11.3 of the CCAA provides that no court order shall have the effect of prohibiting a person who provides goods, services or other valuable consideration *after* the date of the Initial Order from requiring immediate payment for those goods or services. It is through the operation of section 11.3 that active employees are entitled to immediate compensation for the supply of services rendered during the post-filing period. The Court did not purport to adjudicate further on the section 11.3 issue.

The Court noted that AbitibiBowater has a duty to act diligently and in good faith with respect to commitments to which it has agreed on and cannot, even on a temporary basis, deny employees from the collective agreement right from which their claims arise.

Company's Ability to Cease Making Special Payments to the Pension Plans

The Quebec Superior Court delivered a second decision in respect of AbitibiBowater's pension plan on May 8, 2009. As AbitibiBowater was experiencing liquidity issues, the company sought to reduce its financial obligations by requesting temporary relief from the past service pension costs of the pension plans of two of its subsidiaries, Abitibi and Bowater. AbitibiBowater did not purport to cease making current service payments (i.e. the contributions required for its current employees) but only requested permission to suspend its special payment obligations for past service.

The Quebec Court first determined whether it had jurisdiction to make such a decision. The Court held that despite provincial pension legislation which requires an employer to make special payments, such payments are claims that can be suspended during CCAA, if necessary for the successful operation of the CCAA.

Before determining the issue on its merits, the Quebec Court addressed the unions' submission that pension plan participants have a "distinct status" and should be treated differently from other ordinary creditors in a CCAA proceeding. The Quebec Court clearly stated that pension plan members are ordinary unsecured creditors who are not offered additional protection in the context of a CCAA restructuring.

Section 11.3: When Were the Services Rendered?

The Quebec Superior Court dismissed the union's submission that the special payment contributions to the plans were aimed to satisfy obligations that flow from services rendered *after* the Initial Order. The Court noted that the actuarial valuations which establish the amount of special payments all originated prior to the motion for the Initial Order and were not amounts outstanding for services rendered after the filing of the motion.

Suspension of the Special Payments

The Court finally concluded that given the financial situation of AbitibiBowater, it was appropriate to suspend the company's requirement to make its special payment obligations. The Court took into account the Monitor's assertion that AbitibiBowater's restructuring would fail if the company were required to make the special payments of $13 million per month. The Court noted that if Abitibi was unable to successfully restructure, this could result in greater overall losses to the company's stakeholders. The company could ultimately become inoperative, resulting in significant job loss and a wind up of the pension plan. Based on the above analysis, the Court allowed AbitibiBowater to suspend the special payments to its subsidiaries' pension plans.

ONTARIO DECISIONS

6. *Burke v. Hudson's Bay Company*, 2008 ONCA 690

Facts

In its recent decision in *Burke v. Governor and Co. of Adventurers of England Trading into Hudson's Bay*, [2008] O.J. No. 3936 ("*Burke*"), the Ontario Court of Appeal held that the costs of the plaintiffs and the defendant in litigation involving an actuarial surplus in the pension fund (the "Fund") sponsored by the Hudson's Bay Company ("HBC") were properly payable from the Fund on a full indemnity basis. In so ruling, the Court relied upon the principles developed in its recent decisions in *Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)* (2007), 282 D.L.R. (4th) 625 ("*Kerry*") and *MacKinnon v. Ontario Municipal Employees Retirement Board* (2007), 88 O.R. (3d) 269 ("*MacKinnon*").

The litigation involved the question of entitlement to surplus in an ongoing plan. In 1987, HBC sold its Northern Stores Division to the North West Company. As part of the transaction, HBC's Northern Stores Division employees had their employment transferred to the North West Company, their participation in the HBC plan ceased, and they were transferred to a plan sponsored by the North West Company. At the time of the transfer, the transferred members' accrued liabilities and corresponding assets were transferred to the North West Company's pension plan; however surplus assets attributable to the transferred members were not transferred. The claims in *Burke* included breach of fiduciary duty and breach of trust for failing to transfer a *pro rata* portion of the surplus existing in the Fund at the time of the transfer attributable to transferred members to the North West Company's pension plan.

In a decision dated December 16, 2005, Justice Campbell held that HBC was liable for breach of trust to transferred members. The trial decision was overturned by the Court of Appeal. In its reasons dated May 20, 2008, the Court held that the members of the plan had no entitlement to surplus under the terms of the trust pursuant to which the Fund was held. The costs decision of the Ontario Court of Appeal was released on October 10, 2008.

Decision

Writing for a unanimous Court, Justice Gillese held that the costs of appeal and cross-appeal were properly payable from the Fund on a full indemnity basis. The Court relied upon its earlier decision in *Kerry* in holding that the costs of pension litigation are properly payable out of the

pension fund in two types of cases: 1) where proceedings are commenced to ensure the due administration of the pension trust fund; or, 2) where the proceedings are commenced for the benefit of all beneficiaries (i.e. whether the proceedings were adversarial). The Court found that *Burke* fell within the first category, and also fell "within the spirit of the second."

In commencing the action, the representative plaintiffs sought to determine whether HBC was obliged to administer its plan in a way that recognized contributions made by transferred employees to the surplus funds in its ongoing pension plan, and as such, were aimed at ensuring the proper administration of trust funds in an ongoing pension plan. Furthermore, the Court observed that the action, had it been successful, would have benefited all of the transferred members.

With respect to the scale of costs to be awarded, the Court held, following its decision in *MacKinnon*, that the parties' costs on a full indemnity scale were properly payable from the Fund. However, the Court underlined that its decision in *MacKinnon* still required the litigants to satisfy the Court that their costs were reasonable. In assessing the reasonableness of the costs of the appeal, the Court held that the representative plaintiffs' claim for $43,000 in costs for the appeal was reasonable, but that HBC's claim for $280,000 was excessive, and thus reduced HBC's costs award for the appeal to $140,000.

Although it ruled that the costs in respect of both the appeal and the trial were properly payable out of the Fund, the Court held that it was not in a position to properly assess the reasonableness of the costs claimed for the trial and that such a determination should be left to the trial judge.

7. *Caponi v. Canada Life Assurance Co.* (2009), 74 C.C.P.B. 89

Facts

The Plaintiff, Dennis Caponi, was employed by Canada Life from 1970 until 1992. In 1983, he joined the Canada Life Canadian Supplemental Pension Plan. In January 2001, a Plan text was drawn up and a trust fund established to hold funds that Canada Life contributed to the Plan. The original trustees of the fund were replaced by the present trustees in 2003.

Mr. Caponi commenced a class proceeding in the Ontario Superior Court on behalf of himself and the other affected members. He argued that had he known that Canada Life intended to partially wind-up the Plan he would have retired earlier so that he would have been excluded from the wind-up. The annual statements, explanatory booklets, and a summary of the terms of the Plan text or Trust Deed – which might have provided this information – had not been provided to either himself or the other affected members.

Due to the number of affected members, Mr. Caponi moved for an order certifying the proceeding under the *Class Proceedings Act,* ("*CPA*") and appointing himself to represent the members, known as the Class, for the purposes of litigation. He claimed damages for breach of contract, breach of fiduciary duty and breach of trust resulting in financial loss to the Plan members.

Canada Life and the trustees argued that they were entitled to partially wind-up the Plan retroactively to January 31, 2005 because an amendment made to the Plan text permitted them to do so.

Decision

Justice Maurice Cullity of the Ontario Superior Court examined all five elements of the certification test as described below.

(a) Disclosure of a Cause of Action

Based on Canada Life's control over the administration of the Plan, Justice Cullity found that Mr. Caponi could possibly succeed in showing that Canada Life had breached its fiduciary duties in winding-up the Plan. Furthermore, Justice Cullity held that it was it was possible for Mr. Caponi to make the argument for breach of contract against Canada Life.

The claims against the Trustees were more complex. Justice Cullity held that Mr. Caponi had not pleaded that there was a contractual relationship between the Trustees and the Plan Members. The statement of claim also alleged that the Trustees had breached their fiduciary duties to the Class Members by failing to monitor the administration of the Plan by Canada Life to ensure that the best interests of the Class were being protected**.** They alleged that the Trustees participated in the impugned decisions with respect to the partial wind-up and the manner of its implementation, and did so for the purpose of reducing the participants' entitlements. As such, Justice Cullity found that there were sufficient facts pleaded that a finding of wrongdoing could not be made, and that a cause of action against the Trustees had been disclosed in the statement of claim.

(b) Identifiable Class

The proposed Class was defined as "All persons, wherever resident, who were former employees of the Canada Life Assurance Company, and who were included in the partial wind-up of the Canada Life Canadian Supplemental Pension Plan (the "Supplemental Plan") as of January 31, 2005, and their estates and beneficiaries (collectively, the "Class" or "Class Members")." Justice Cullity held that the proposed Class, consisting of 257 members, was neither over-inclusive nor under-inclusive and was therefore appropriate.

(c) Common Issues

Justice Cullity held that the common issues proposed on behalf of the Class appeared "defective" in that they failed to address the Class' entitlement to damages if there was a finding that the Defendants were not entitled to wind-up the Plan. As a result, Justice Cullity reformulated the common issues and suggested that a determination of the common issues would likely determine whether the Defendants are liable in damages.

(d) Preferable Procedure

In determining whether a class proceeding will be the preferable procedure for resolving the common issues, the court must consider whether the procedure under the *CPA* will be a fair, efficient and manageable method of advancing the Plaintiff's claim. Furthermore, the court must be conscious of the three main objectives of the *CPA*: promoting access to justice, judicial economy and behavioural modification.

(e) The Representative Plaintiff and the Litigation Plan

The Defendants challenged Mr. Caponi's suitability to represent the Class. They argued that because some of the Class Members did not start working for Canada Life until after the Plan text was adopted in 2001, certification of the proceeding should be conditional upon creating a subclass of those persons and finding appropriate representatives for that subclass. Justice Cullity disagreed. He held that there was no evidence to suggest that Mr. Caponi would have any "consequential conflict of interest" in representing the claims of post-2000 Class Members. Moreover, Justice Cullity held that should the interests of members of the subclass require separate representation, such representatives could be appointed after certification or even at trial if necessary.

With regard to the Plaintiff's litigation plan, Justice Cullity conceded that the methodology used to determine the damages could be rather complex; however, he did not consider this possibility as a sufficient reason to deny certification.

8. *Employees of Hunter Amenities v. Hunter Amenities*, 2009 CanlII 4509 (ON. L.A.)

Facts

Since 2000, Hunter Amenities (also referred to as the "Employer") has provided an optional pension plan to its full-time employees (the "Plan"), including employees who are members of a bargaining unit represented by a Union. Under the Plan, contributions are made by both the members and the employer, with employee contributions being deducted from payroll as a percentage of income. The dispute in this case arose from Hunter Amenities' practice of ceasing to make contributions on behalf of employees who are absent due to work related injury or on a leave which is subject to Part XIV of the Ontario *Employment Standards Act* ("*ESA*"), for example, pregnancy. The Union filed a grievance under the *Labour Relations Act*, alleging that this practice is contrary to s. 51 of the *ESA* and s. 25 of the *Workplace Safety and Insurance Act* ("*WSIA*").

In his written reasons, the Arbitrator summarized the obligations imposed on employers under each of the above provisions:

> Section 51(1) confers a right on an employee to continue to participate in "benefit plans" during a leave, which the employee may choose in writing to waive. Section 51(2) provides that s. 51(1) applies with respect to a wide variety of benefit plans: pension plans, life insurance plans, accidental death plans, extended health plans, dental plans and any prescribed type of benefit plan. Section 51(3) provides that during an employee's leave an employer shall continue to make the employer's contributions to those benefit plans, of which the employer is relieved if the employee gives notice in writing that she does not intend to make her contributions. I note that the employer's obligation to continue to make contributions is separate from and additional to the employee's right to continue to participate.

The Arbitrator concluded that *WSIA*'s s. 25 is analogous to the *ESA's* s. 51(1), by deeming a worker as continuing to be employed for the purposes of determining the worker's entitlement to benefits under a benefit plan. Arbitrator Anderson further stated that s. 51 (3) of the *ESA* was

similar to s. 25 (1) of *WSIA* by requiring an employer to make contributions to employment benefits in respect of the worker who is absent from work because of a work related injury, if the worker elects to continue to pay his or her contributions (provided employee contributions are required by the Plan).

Decision

Arbitrator Anderson's conclusion was that both statutes obligate employers to pay contributions of the same quantum as the employee received prior to the leave period, regardless of the plan's funding scheme. He arrived at that determination after first noting that neither the Plan nor the Collective Agreement were discriminatory against absent employees for the reason that they do not require the employer to make contributions on their behalf; in other words, it is lawful for employers to distinguish between the compensation owed to absent employees compared to the entitlement conferred to those who are actively providing services for the employer.

The arbitrator reasoned that the Employer's position may lawfully match the employee's contribution of zero with an equal contribution of zero fails to given any effect to s. 51(3) of the *ESA*. That section requires employers to continue making contributions during an employee's leave unless an employee opts-out. Similarly s. 25(1) of *WSIA* requires the employer to make contributions as long as the employee continues to make contributions. The inclusion of the word "continue" in each clause was found to communicate that plan contributions are to be maintained in the same condition during the leave as prior to it. The Arbitrator concluded that not only does this interpretation result in a cogent reading of the words in the provisions, but it is also consistent with the purposes of the *ESA* and *WSIA* as benefits conferring legislation

9. *Montreal Trust Company of Canada and Montreal Trust Member Surplus Committee v. Superintendent of Financial Services,* FST File No. P-0307-2008, Decision No. P-0307-2008-1.

Facts

Pursuant to an Agreement dated February 1, 2006, Montreal Trust (the Plan sponsor) and a committee of Plan members (the "Committee") entered into an agreement (the "Agreement") to wind-up the Montreal Trust Pension Plan ("Plan"), and share the surplus remaining in the Plan following the wind-up. In furtherance of the Agreement, which had the support of 83% of Plan members, an application was brought before the Ontario Superior Court of Justice in the form of a class proceeding. In the application, Montreal Trust sought approval of the Agreement and to approve an amendment to the Plan permitting payment of surplus to Montreal Trust. The application was certified as a class proceeding by Order dated June 27, 2006. The Agreement, including the Plan amendment, subject to "all applicable regulatory filings," was approved by Order dated September 20, 2006 (the "Settlement Order").

The Superintendent's arguments before the Tribunal were twofold: 1) the Superintendent argued that regardless of any compromise or settlement between the parties to a surplus sharing agreement, the *PBA* requires the Superintendent to engage in an historical analysis of any plan and trust documents underlying a pension in the context of an application for surplus withdrawal; and, 2) the Settlement Order was expressly made subject to regulatory approval.

Decision

The Tribunal rejected both of the Superintendent's arguments. On the first argument, the Tribunal relied upon the decision of the Ontario Court of Appeal in *Dickson v. Richardson*, [1981] O.J. No. 2451. In that decision, the Court held that the Superior Courts have jurisdiction, in limited circumstances, to vary the trust documents. One such limited circumstance involved cases where there is a real and serious dispute between the parties as to an ambiguity in respect of a trust instrument. Reviewing the evidence, the Tribunal noted that there was a sufficient record before the Court of a dispute over the meaning of the trust and surplus entitlement to ground the Court's jurisdiction to vary the trust and issue the Settlement Order.

Regarding the second argument, the Tribunal noted that it was difficult to characterize the Notice of Proposal as anything other than a collateral attack on the Settlement Order. Reviewing the language of the Settlement Order, the Tribunal held that "the reservations with respect to the involvement of regulatory requirements were not intended to leave the door open to re-litigation" of the issue of surplus entitlement, which had been determined by the Settlement Order. The requirements referred to in the Settlement Order related to regulatory approval other than the issue of surplus entitlement. As such, the Settlement Order, and the regulatory filings made pursuant thereto, could be relied upon for the purposes of establishing surplus entitlement within the meaning of s. 79(3)(b) of the *PBA*.

10. *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006

Facts

The plaintiff, Donna Nadolny, a retired former employee of the defendant Region, brought a motion for certification of her action as a class proceeding. Ms. Nadolny retired in 2003 and subscribed for the early retiree benefit package. She claimed that the premiums for her retirement benefits were fixed and not subject to adjustment.

The Region had increased the premiums payable by its retired non-unionized employees who received early retirement health benefits. Initially the Region paid the premiums for these post-retirement benefits. In 2000, the Region improved the benefits package and decided to share equally the annual premium costs with the early retirees. Because of an administrative error, the Region did not adjust the premium costs charged to the retirees for five years. Once the Region became aware of the administrative error, it began to phase in adjusted premiums.

Ms. Nadolny sued the region for breach of promise and fiduciary duty and negligent misrepresentation. Notwithstanding the corporate policy that clearly contemplated cost sharing of some kind as between the Region and retirees, the Ms. Nadolny pleaded that the Region did not advise any of the retirees in any of its communications with them that benefit premiums were subject to change.

Decision

Justice Quigley dismissed the certification motion, finding that issues of liability in this case would only be determinable once a multiplicity of individual issues were addressed relating to the particular circumstances of each of the proposed class members.

It was found that the following were common issues: issues of whether post-retirement benefits vested when the retirees made their early retirement decisions, whether that vesting included both future benefits and costs, what written documentation was relevant to those vested rights, and whether the cost-sharing stipulated in the policy necessarily contemplated future adjustments. However, the Court found that it was not clear how determinations of these issues at a common issues trial, and in the absence of the individualistic fact finding that would inevitably be required to determine the merit of claims by individual class members, could advance the actual liability claims against the Region in any significant way. Few of the common issues met either the legal or the factual requirements of commonality in the particular circumstances of this case with most issues being "inappropriate for determination as common issues at a common issues trial".

The class definition remained overly broad, potentially encompassing many who did not have a claim, including those who understood before retirement that their premiums were subject to change. Ms. Nadolny had not established that there were any other members of the proposed class aside from herself. Failure to include or recognize the importance of each individual retiree's circumstances inevitably resulted in a class definition that neither had a rational connection to the common issues nor the prospect of achieving the goals of the Class Proceedings Act. Having regard to the factors relating to judicial economy and behaviour modification, Ms. Nadolny had not proven that the proposed class action was the preferable procedure in this case.

11. *Re Nortel Networks Corp.*, [2009] O.J. No. 2257

<u>Facts</u>

Nortel Networks Ltd. ("Nortel") brought a motion in its capacity as sponsor of the Nortel Networks Negotiated Pension Plan and the Nortel Networks Ltd. Managerial and Non-Negotiated Pension Plan (collectively, the "Plans") for directions regarding the appropriate transfer ratio to be applied to commuted value transfer payments from the Plans. At the time, Nortel was operating under Court protection pursuant to the Company's Creditors Arrangement Act ("CCAA")

The Plans were in deficit and pursuant to the Ontario *Pension Benefits Act* ("*PBA*"), payout of commuted values at 100% are not permitted from pension plans in deficit. Nortel requested the court's approval to permit a reduced transfer ratio of 0.69 instead of the transfer ratio of .86 which it had been paying. Nortel believed that the 0.69 transfer ratio represented the actual state of the Plans as of December 2008 while the transfer ratio of 0.86 reflected the funding status closer to December 2006. However, Nortel did not wish to incur the cost of a new actuarial valuation to support the reduction and proceeded only with its estimates of its actuary.

Nortel stated that if the Plans were to be wound up, the difference in transfer ratios would amount to leakage from the Plans. If Nortel were not able to fund the deficits, the leakage would place a disproportionate burden upon those Plan members left in the Plans, which included active members, deferred vested members and retirees. Moreover, payouts at the higher transfer ratio would result in an inequality in treatment among Plan members. All parties, including Nortel's directors Representative Counsel for the Former Employees of Nortel, counsel for Canadian Auto Workers and the Financial Services Commission of Ontario, supported the proposed reduction in transfer ratio from 0.86 to 0.69. A dispute arose with respect to the "Transition

Members", namely terminated employees who had been offered the 0.86 transfer ratio but had not yet been paid. FSCO sought to reduce their benefit as well.

Decision

Justice Morawetz of the Ontario Superior Court of Justice (Commercial Court) agreed to the reduction in transfer ratio to 0.69. The Court accepted Nortel's submissions that the *PBA* Regulation favours preserving pension plan assets as a whole rather than preferring the right of any one individual to a certain level of commuted value payments. The proposed decrease in the transfer ratio was in line with trust law principles and resulted in an outcome that treated all remaining Plan members with 'an even hand'. The Court had jurisdiction to approve a reduced ratio pursuant to the *PBA* Regulation or to section 11 of the *Companies' Creditors Arrangement Act*. The Court's power under the Regulation was inherent and resulted from the absence of a provision addressing the scenario in which a transfer ratio already below 1 becomes further reduced.

The Court found the position put forth was the most "equitable option" as the intention of Nortel was "not to prefer the Transition Members, but to honour a commitment made to the Transition Members". The Court relied on a decision by the Ontario Court (General Division) in the case of *Re Anova* for the proposition that the duty of fairness does not always require strict equality between the treatment of different groups of beneficiaries. The conclusion was that the duty of fairness necessitates that Transition Members be entitled to rely on the election form offered to them and the 0.86/0.85 Transfer Ratio notwithstanding that the remaining Members would not, at this stage, be treated equally.

As to the effective date of the reduced ratio, it was to apply to commuted value transfers for all future terminated employees. Members who had already received election forms using the 0.86/0.85 transfer ratio were entitled to rely on its contents and receive their entitlements at that ratio, since fairness and equity required the promise to be honoured.

12. *Smith v. Casco Inc*. [2008] O.J. No. 5699 (S.C.J.)

Facts

The plaintiff, Judith Smith, was married to her husband James Smith for over 40 years, when he died in December 2003. Throughout the course of their marriage James was the sole income generator and made all decisions regarding the couple's financial affairs. Judith had not completed high school and had no significant history of employment outside of the home. James was employed by Casco Inc. from October 1961 until July 1, 2000 when James elected to take early retirement from the company by over six years.

Prior to his decision to take the early retirement option, James had requested information regarding the defendant corporation's new early retirement incentive packages in 1998 and 1999. On both of these occasions James was offered information relating to these options as well as financial planning advice, however, he did not exercise his right to this advice. In 2000, James was given a specific offer, with a deadline of 2 weeks to accept or reject the offer. There was no offer of consultation with this package of material. Out of the 14 options presented to him, James elected to retire effective July 1, 2000. His chosen package provided a guaranteed pension for five years with higher pension payments at the time but waived the right to survivor benefits for

Judith in the event that James were to predecease her. Judith also signed a waiver of these benefits.

In 2003 James passed away and Judith was shocked to learn that she would only receive survivor benefits for another 18 months. Judith argued that the options presented to James were complicated and difficult for the lay person to understand and that when signing the forms they had not fully appreciated the consequences associated with taking the early retirement option. She also claims that neither herself nor her husband James been told to obtain independent legal advice at the time that he exercised this right to early retirement.

Decision

Judith brought a claim against her late husband's employer for negligent misrepresentation, arguing that neither herself nor her husband James were provided with adequate information in order to understand the nature of the consequences of exercising this right. In order to make a claim for negligent misrepresentation the plaintiff must satisfy five requirements. These include:

1) There must be a duty of care based on the "special relationship" between the representor and representee.

2) The representation in question must be untrue, inaccurate or misleading;

3) The representor must have acted negligently in making said representation;

4) The representee must have relied, in a reasonable manner, on said negligent misrepresentation; and

5) The reliance must have been detrimental to the representee in the sense that damages resulted.

The Court did not hesitate in the determination that the defendant company owed a duty of care to Judith to clearly communicate the consequences of the spousal benefit waive: "[W]hen a spouse, in the position of the plaintiff, is asked to give up survivor benefits, as part of a pension option chosen by their employee, then I find that the special relationship between the defendant and the employee extends to the spouse".

Rather than simply outlining the basic calculations, the consequences of the different retirement options should have been outlined clearly to James. Further, the consequences of these options also should have been clearly communicated to Judith before she was required to sign the spousal benefits waiver form. The Court found that the wording of the spousal benefits waiver signed by the plaintiff was slightly different than Form 3 that had been approved by the Superintendent of Financial Services, and that this waiver did not tie itself to Section 44 of the *Pension Benefits Act* as clearly as it should have.

Finally, the Court held that Judith, as an individual who is completely dependant upon her husband and the income from his employment, relied on the representations made by the defendant. The Court stated that "she had been dependant on that employment…for almost forty years and it would be reasonable to assume that the company was continuing to treat her husband fairly and give him complete financial information on which he could make an informed decision

regarding his pension". The Court was also satisfied that the option selected by James resulted in a loss to the plaintiff and that this loss was a result of a failure to properly advise James on the implications of selecting this option. The test for negligent representation was satisfied and damages were awarded accordingly.

13. *Smith v. Labatt Brewing Company Limited*, 2009 CanLII 595 (ON S.C.)

Facts

On January 13, 2009, a settlement agreement between Labatt Brewing Company Limited ("Labatt") and its salaried retirees was approved by Ontario's Superior Court of Justice as complying with settlement requirements under the *Class Proceedings Act*. The case concerned the unilateral alteration of the retiree health benefit plan by Labatt, with limited notice to retirees.

Decision

The action was commenced as a class proceeding on behalf of all salaried retirees (and their spouses and eligible dependents under the benefit plan), and required approval by the courts as being appropriate in nature to proceed under that procedure. To be "certified" as a class action, the plaintiffs must demonstrate that the five criteria set out in the *Class Proceedings Act* were met. Justice Lax accepted that the criteria were satisfied and made the following findings:

a. The statement of claim disclosed a cause of action against Labatt for breach of contract;

b. There was an identifiable class of persons affected by the proceeding comprising all former salaried employees of Labatt residing in Canada whose date of retirement was before January 1, 2009, and who were eligible to be, or are, participants in retiree benefit plan and those retirees' dependants;

c. There were common legal issues among the class members for determination;

d. The trial of the common issues would achieve judicial economy; and

e. There were proposed representative plaintiffs that would fairly and adequately represent the interest held in common with class members.

The parties to the litigation negotiated a mutually agreeable settlement which required court approval to be effective. When settling a class proceeding without going to trial, the parties must demonstrate that the settlement is fair, reasonable and in the best interests of the class members. Justice Lax found that the settlement clearly met this test, for the following reasons:

The benefits under the original plan were substantially restored under the proposed settlement, and secured by prohibiting future plan modifications. The increased financial burden imposed on retirees is a limited expense, in the form of an increased annual deductible from $25 per person to a sum of $350 per person, or $700 per family. The retirees' primary goal in the action of ensuring that each member received appropriate healthcare without being exposed to potentially catastrophic costs was thus achieved.

Second, the settlement enables a resolution of the dispute in a more expeditious manner than by going to trial. Whereas litigation would have continued for years due to the lengthy stages of the process, the settlement negotiations proceeded comparatively quickly, with the parties having great control of the process and timing. An expeditious process was important to the class members who are elderly and may have health problems, given that such members could have exceeded their lifetime cap of $50,000 during the years of litigation.

In addition to determining that the agreement met the test for court approval, Justice Lax emphasized in her reasons for judgment that a negotiated settlement was the favourable option in this case where a trial would require adjudication of two issues on which there is a dearth of existing precedents. First, the court would be determining whether the rights to the benefits stipulated in the pre-March 1, 2007 plan had vested, and thus whether the class members were legally entitled to restoration of the health benefits plan. Second, it would be for the judge to decide the appropriate means of remedying the harm flowing from a breach of health benefits plans and whether requiring that Labatt restore the full panoply of benefits to the member was an available award. Accordingly, the outcome of the case was unpredictable, and posed risks for both sides.

14. ***Victorian Order of Nurses for Canada v. Ontario (Superintendent of Financial Services)*** **(3 July 2009), No. P0304-2008-1 (FST)**

Facts

Following a declaration by the Victorian Order of Nurses Canada ("VON Canada") of five partial wind ups of the Plan in respect of the following four (separately incorporated) VON Canada branches that became insolvent or bankrupt ("Insolvent Branches"), the Ontario Superintendent of Financial Services ("Superintendent") issued a Notice of Proposal. The Notice refused to approve the Partial Wind Up Reports filed by the VON in respect of the Insolvent Branches and the application for a claim against the Pension Benefit Guarantee Fund ("PBGF"). The Superintendent ordered VON to fund the wind up deficits related to each of the Insolvent Branches, holding VON solely responsible for funding the Plan.

VON Canada challenged the Notice of Proposal before the Financial Services Tribunal. At issue was which entities participating in the Plan were to be considered an "employer" for purposes of the Plan and the *PBA*, and as such required to make contributions to fund the Plan (with respect to the Insolvent Branches), including any funding deficits in relation to the Partial Wind Ups. IN addition, if the answer was yes, was VON Canada responsible for any special payments to the Plan for any solvency deficiencies related to employees and former employees of the Six Separate Branches (the solvency branches), as of the date each Separate Branch ceased to participate in the Plan? The last issue considered was what, if any, Order should the Superintendent be directed to make with respect to any deficits relating to the Insolvent Branches.

Decision

The Tribunal found that VON Canada was not the employer of Plan members employed by the Insolvent Branches and thus could not be responsible for any payments into the Plan with respect to the Insolvent Branches. Further, it found that the Tribunal does not have jurisdiction to make

an order in respect of solvency deficiencies relating to employees and former employees of the Six Separate Branches.

The Tribunal stated that the *PBA* contains a clear and unambiguous definition of "employer", with the only relevant criterion being which person or organization paid remuneration to the Plan members who were Branch employees. The Tribunal looked to a decision by the Ontario Court of Appeal decision that it is sufficient to look merely to the legislation without reference to the Plan terms to determine the status of the person from whom the workers received their wages.

Looking to the evidence, the Tribunal found that at no time did VON Canada pay salaries or other remuneration to individuals employed by the Insolvent Branches or by the other Branches, including the Six Separate Branches, who were members of the Plan. The Tribunal found this sufficient to make a finding that VON Canada was not an "employer" in respect of Branch employees, including Affected Employees of the Insolvent Branches.

This decision is currently under appeal to the Ontario Divisional Court.

MANITOBA DECISIONS

15. *Dinney v. Great-West Life Assurance Co.*, [2009] M.J. No. 116

<u>Facts</u>

Great-West Life Assurance Company ("GWL") recently won a battle in a long-standing conflict with the members of The Great-West Life Assurance Company Canadian Employees' Pension Plan (the "Plan") over whether the company had the right to change wording in the company pension plan document, which tied indexing benefits to the fund's investment performance.

GWL sponsored a defined benefit pension plan that was established in 1943. In July 1971, a trust deed was entered into between GWL and Trustees with the plan assets being administered by the Trustees. The plan was also amended in 1973 to include two provisions, one, which concerned amendments to the plan, disallowed any amendments to reduce benefits accrued to an employee to the date of the amendment. The other pertinent amendment entitled retired employees of GWL to receive increases or increments to the defined benefits otherwise payable under the plan, which were to be "related to" the fund's investment performance. Following this amendment, GWL advised staff in writing that the purpose of this section was to create a "contractual form of indexing" which would be "automatic" so as to replace the "previous discretionary increases" which had occurred when GWL had "topped up" retirees' pensions on an *ad hoc* basis.

Previously, the Trustees had determined the amount of pension increment granted each year based on advice from the plan's actuary. In 1987 GWL itself, and not the pension plan Trustees, began determining the rate for pension indexing purposes. As of October 1990, GWL amended the plan to enable it to exercise complete control respecting calculation of pension indexing and the increments were no longer being related to the investment performance of the fund. By 1993, the Plan was amended to maximize the pension increment to the Consumer Price Index ("CPI"), which resulted in the increments being significantly less than they would have been if the increments were calculated based upon the past formula tied to the fund's investment performance. Meanwhile, GWL enjoyed pension contribution holidays by reason of the surplus investment income in the fund.

In April 2008, the Manitoba Court of Appeal heard an appeal by George Dinney, suing GWL and the Trustees of Plan in respect of the annual increments to the pensions. The parties had returned to Court to consider the commencement date for the calculation and payment of the pension increments. The Court was asked what type of rate of investment return was to be utilized when calculating the pension increments for both the old and new formula.

Decision

At the second trial, the judge found that the "new formula" utilized by GWL was appropriate, but only commencing April 1, 2006. The plaintiff was entitled to be compensated for the increments from September 1990 with pre-judgment interest. He denied any award to the plaintiff for aggravated, punitive or exemplary damages, and he awarded the plaintiff costs of $350,000.

The Court of Appeal concluded that it was "clear" from reading the plan that the Trustees were afforded the power to administer the assets pursuant to the terms of the trust deed but that GWL retained its authority and discretion to design the plan terms. Thus, while the plaintiff was the beneficiary of vested rights, those rights were only as defined by the Plan and the vested right was the right to payment of an annual increment to be determined by GWL as defined under the amendment. The Court of Appeal reiterated the proposition that certain principles of interpretation should also be applied when interpreting pension plans:

(1) the provisions of a pension plan should wherever possible be construed to give reasonable and practical effect to the scheme, mindful that it will operate over a lengthy period of time and against a constantly changing commercial background;

(2) the approach to construction should be practical and purposive, not detached and literal;

(3) the plan is to be construed in light of the surrounding circumstances when it was created or when an amendment was adopted;

(4) if there is a choice of possible constructions, they must be tested against the consequences they produce in practice; and

(5) a pension scheme should be interpreted as a whole. The meaning of a particular clause should be considered in conjunction with other relevant clauses.

In reading the amendment the Court of Appeal concluded that the amendment gave GWL a considerable discretion as to the method it would use to determine the amount of the increment so long as that method was related to the investment performance of the fund. Further, the GWL was not restricted to any one method or formula, but was at liberty to adopt any other method or formula so long as it maintained some reasonable relationship to the investment performance of the fund.

The Court of Appeal found that trial judge ought not to have inferred with the discretion given to a party under the constating document in question; the Court cited various precedents to the effect that where trustees exercise their discretion with no improper motive, their actions ought not to be challenged in court. Further, the Court suggested that there was strong evidence that the formula determined by the trial judge had never been used by GWL under the plan. The Court of

Appeal allowed the defendant's appeal. The Court also set aside the order of costs made by the trial judge.

16. *University of Winnipeg v. The Superintendent of Pensions of Manitoba et al.* 2009 MBCA 7

Facts

In 2002 the University of Winnipeg Retirement Association (the "Association") raised a number of concerns with the Superintendent about the administration of the Plan. From December 2002 to November 2006 the Superintendent conducted an investigation into the concerns raised by the Association, as well as an issue the Superintendent discovered over the entitlement of Plan members to a share of surplus. On November 16, 2006 the Superintendent issued an order directing the University to:

- i confirm that it will develop and implement a written governance framework for the Plan, and provide a copy of the governance plan to the Superintendent, and
- i provide continuing defined benefit ("DB") Plan members with benefits equal to a proportionate share of the surplus determined under the "Agreement" (discussed below), adjusted with interest to the date of payment.

The University appealed both the issue of Plan governance and the order with respect to a surplus distribution to Plan members, which was heard by the Manitoba Pension Commission (the "Commission") in 2007.

The Plan was established in 1972. As of December 31, 2001 the Plan covered almost 600 members and had assets in excess of $100 million. In early 1999 a substantial Plan surplus was identified. In 2000 an employer contribution holiday was taken for a period of two years, accompanied by a benefit improvement of equivalent value for Plan members. Later in 2000 the Plan Pension Committee reached an agreement among various stakeholders on a comprehensive proposal from the University for sharing of the surplus (the "Agreement"), which was subsequently approved by resolution dated December 4, 2000 of the Board of Regents of the University. Under the Agreement, approximately $11.3 million of Plan surplus and investment reserve was allocated to Plan members.

In November 2002 representatives of the Association wrote to the Superintendent requesting that the University be removed as administrator of the Plan. In December 2002, approximately $6.4 million of the Plan surplus allocated to Plan members had yet to be distributed. However, the University determined that the full implementation of the Agreement was not possible as a result of the serious downturn in the investment market in 2001 and 2002.

Decision

The main issue before the Commission was whether the Plan members had accrued a "pension benefit credit" as a result of the December 4, 2000 motion approved by the Board of Regents, and could thereby enforce their rights under the Manitoba *Pension Benefits Act* ("*PBA*"). Section 26(5) of the *PBA* prohibits amendments to a pension plan which adversely affect the

pension benefit credits of any member in respect of remuneration and service or membership in the plan prior to its effective date.

The University asserted that the December 4, 2000 motion did not result in a Plan amendment, because a formal amendment was not prepared and filed. Alternatively, the University asserted that the motion was "in principle or conditional", and therefore Plan members did not accrue a pension benefit credit. The Commission noted that the *PBA* does not prescribe the form that an amendment must take, and cited case law where amendments were valid and enforceable pending registration.

In the result, the Commission concluded that the December 4, 2000 resolution operated to amend the Plan, and created a pension benefit credit for members. Further, the University attempted to amend the Plan to reduce the benefits when it cancelled the second phase of the surplus distribution to members, contrary to s. 26(5) of the *PBA*. The Commission directed the Superintendent to direct the University to provide to Plan members benefits equal to a proportionate share of the surplus determined under the Agreement, adjusted with interest to the date of payment.

With respect to the request to appoint a new Plan administrator, the Commission determined that the factors it would consider in removing the University as Plan administrator would be dishonesty and/or misconduct. Although there were "serious concerns" about the conduct of the University, these did not justify an order removing it as Plan administrator, and the Commission affirmed the Superintendent's order directing the University to develop a governance plan.

The University appealed the Commission's decision to the Manitoba Court of Appeal. The University alleged that the Commission failed to address one of its arguments, namely whether a term should be implied into the Agreement that was approved by the Board of Regents. In very brief written reasons, the Court confirmed that this argument was not dealt with by the Commission, but noted that it was only raised in passing at the conclusion of the University's written reply submissions. The Court concluded that this is not a case where a contractual term ought to be implied into the Agreement. Overall, the Commission's decision meets the "reasonableness" standard, and the appeal was dismissed.

BRITISH COLUMBIA DECISIONS

17. *Bennett v. British Columbia*, [2009] B.C.J. No. 1955

Facts

The Plaintiffs alleged that the government of British Columbia breached its contractual and fiduciary obligations to 27,000 retired government workers of the British Columbia Sector Pension Plan in October, 2002, when the Trustees of its pension plan unilaterally announced that it would no longer pay 100% of the cost of premiums for Medical Services Plan Benefits and Extended Healthcare Benefits of the retirees. Until January 1, 2003, the members of the class, all retirees, received, as part of their retirement benefit package, premium-free Medical Benefits ("MSP") and Extended Health Benefits ("EHB") On January 1, 2003, changes to those retirement benefits were implemented. As a result, the members of the class were required to pay a portion of their MSP premiums. The changes affected the EHB such that the breadth of those benefits was narrowed and the deductible increased.

The class claimed that the changes to their retirement benefits amounted to a breach of fiduciary duty and contract. A subclass of retirees who had worked directly for the provincial government (rather than a Crown agency or other employer) also claimed breach of contract. They sought a declaration that the Crown owed a fiduciary duty to the class regarding the provision and administration of the retiree benefits and the Crown breached that duty. The plaintiff subclass alleged that from 1978 to 2000, the Crown repeatedly and consistently promised that retirees under the pension plan would receive the retiree benefits on a premium-free basis as part of the pension plan. In 2000, a joint trust agreement (JTA) was entered into between the Crown and the various unions. Under the JTA, pension plan members and employers shared control of the pension plan, meaning surpluses and liabilities were shared. The plaintiffs alleged that in 2002, and effective January 1, 2003, the JTA Board of Trustees made changes to the retiree benefits, which included eliminating funding for the dental plan; increasing the annual deductible for extended health from $25 to $250 per family; changing the pension plan's co-payment structure; eliminating out-of-country coverage; increasing the lifetime maximum for extended health claims to $100,000; and requiring retirees to pay one-third of their MSP premiums.

The plaintiff claimed that the Crown breached a common law and statutory fiduciary duty it owed to class members when it entered into the JTA, effectively making a deal with the plan partners to off-load the retiree benefit obligations to the Board without providing the Board with adequate funding to fuel the retiree benefits program. The plaintiff also claimed that the Crown breached its fiduciary obligation by failing to properly inform retirees that the retiree benefits were contingent and that off-loading the retiree benefits to the Board presented significant risks to retirees.

This action was certified as a class proceeding on November 30, 2005. The class of persons is comprised of individuals who, on November 30, 2002, were retired members of the British Columbia Public Service Pension Plan who were presently entitled to receive premium-free Medical Services Plan and Extended Health Care Benefits and who retired on or before November 2002.

Decision

In dismissing the action, Justice Dorgan found that the Crown had not made an offer of lifelong premium-free retiree benefits in negotiations leading up to contract formation. The now-former contributions of labour from members of the subclass could not constitute good consideration. There was no evidence establishing that the Crown's offer of employment to members of the subclass included any such term. The booklets, pamphlets, information sheets, recollections from meetings and seminars, and application and notice forms were all provided to employees post-hiring and, most often, when retirement was either imminent or had already begun. Even if the statements made were of a promissory nature, there was no evidence of any fresh consideration. Therefore, it was unreasonable to treat these various written and verbal communications as manifestations of the terms of the employment contract.

The retiree benefits were never guaranteed under the legislation and regulations, but, rather, their existence and/or form depended entirely upon either the Lieutenant-Governor's discretion or the Board's discretion. This discretion had been exercised in different ways over time. None of the relevant Acts showed the Legislature intended to cement any form of post-retirement group

benefits as guaranteed or as premium-free in perpetuity. Implying a term that would have guaranteed such a state of affairs into the employment contract of each subclass member was unreasonable given this legislative history.

The employment contracts did not guarantee premium-free retiree benefits. Therefore, the contractual agreements did not vest the retiree benefits, and the plaintiffs had no contractual entitlement to the post-retirement group benefits. It was not reasonable, particularly in light of the legislative history, for the plaintiff class to have expected that the Crown's fiduciary duty extended to an obligation to provide and fund their retiree benefits. While the plaintiff class might well have been in a position of vulnerability as retirees, vulnerability was only one factor to consider. More persuasive factors included the public law nature of the role of the Crown, the legislative history, and the concept of inter-generational equity. The Crown was not under a fiduciary duty to provide and fund the MSP and EHB to any or all of the class members. An appeal has been launched before the B.C. Court of Appeal.

18. *Lieberman v. Business Development Bank of Canada*, [2009] B.C.J. No. 1938

Facts

The representative plaintiffs alleged that the Business Development Bank of Canada ("BDC") breached its fiduciary duties by improperly charging administrative expenses to the Pension Plan for Employees of the BDC (the "Plan"). It is also alleged that the BDC breached its duty to act even-handedly among plan beneficiaries in its use of the Plan's surplus by, among other things, suspending contributions of active members to the Plan while failing to grant a corresponding benefit to retired Plan members.

This action was certified as a class proceeding in February 2006 and the class was comprised of persons who were retired members, surviving spouses and deferred vested members of the Plan with respect to credited service prior to April 9, 1997.The plaintiffs were retired employees of BDC and recipients of a defined benefits pension provided under BDC's Plan. The plaintiffs claimed that retired Plan members should have received benefits equivalent to the value of a contribution holiday granted to active employees between 1997 and 2005. The plaintiffs also claimed that the Plan Fund was improperly charged with administrative fees that should have been paid by BDC.

The Plan had initially been silent regarding surplus entitlement and payment of expenses. BDC denied that it engaged in any unlawful or improper conduct related to contribution requirements or termination surpluses. BDC submitted that it was lawfully entitled to amend the Plan to provide for its receipt of any surplus upon winding up, and that nothing required it to provide a proportionate benefit to retired members during a contribution holiday. It acknowledged that certain expenses were improperly paid from the Fund, but stated that repayment with interest occurred.

Decision

On September 29, 2009, Justice Pitfield of the Supreme Court of British Columbia issued his judgment in this matter. The Court summarized its findings as follows:

1. “The Bank breached its fiduciary duty to members of the Plan, whether active or retired, by adopting Rule 10.9 to the extent it purports to entitle the Bank to receive payment of any actuarial surplus during the currency of the Plan.

2. The remedy to which the Class is entitled, and therefore granted, is a declaration that the amendment embodied in Rule 10.9 is of no force and effect, as it pertains to actuarial surplus during the currency of the Plan.

3. The Bank breached its fiduciary duty to members of the Plan by directing that expenses of $834,412, which could not reasonably be classified as administrative expenses, should be paid from the Fund.

4. The Class is not entitled to an order requiring repayment of the amount improperly paid because the amount, together with interest, has been fully repaid to the Fund.”

Justice Pitfield found that BDC had breached its fiduciary duty with respect to the amendment purporting to permit recovery of a surplus during the ongoing operation of the Plan. Such amendment was not authorized by the terms of the Plan and was thus of no force and effect.

While the Plaintiffs were partially successful in challenging certain amendments to the Plan entitling the BDC to surplus during the Plan’s currency and in requiring the repayment of certain expenses to the Plan, the Judge did not find that the BDC had breached its fiduciary duty to retirees in not providing a corresponding benefit to retired Plan members when the Plan was made non-contributory. With respect to the amendment regarding entitlement to any surplus upon termination, it was necessary to refer to the legal principle of resulting trust, as the Plan did not confer any interest in a surplus upon termination to members. In such scenario, the resulting trust did not accrue to the benefit of anyone other than BDC as settlor. Thus no breach of fiduciary duty occurred when BDC provided for payment to it of any terminal surplus.

BDC did not owe the plaintiffs a benefit equivalent to that derived by active employees from a reduced contribution, as such benefit for employees was employment-derived rather than a benefit derived from Plan membership. Retired members had no expectation that their pension benefits be enhanced to maintain equivalency with compensation changes paid to active employees.

Furthermore, the Judge did not find that payment of expenses related to the administration of the Plan out of the Fund constituted a breach of fiduciary duty. BDC was found to have breached its fiduciary duty to the plaintiffs by directing payment of non-administrative expenses from the Fund. Nothing in the Plan prohibited payment of administrative expenses from the Fund. However, no further repayment was required as BDC repaid the expenses plus interest to the Fund.

19. *United Brotherhood of Carpenters and Joiners of America, Local 1598 v. Ruffolo*, [2009] B.C.J. No. 1091

Facts

The three plan members, Ruffolo, Lowdon and MacKay, were all employed at Victoria Shipyards (the "Shipyard") in British Columbia. They were union members of Carpenters Local 1598 ("Local 1598") and plan members in the Carpentry Workers Pension Plan and the Carpentry Workers Benefit Plan (the "Plans"). The Boilermakers Union Lodge 191 had a collective agreement with Victoria Shipyards. Under a letter of understanding Local 1598 members would work at the Shipyard and the Shipyard would pay wages and remit to the Carpentry Plans in accordance with the Boilermakers Collective Agreement. This arrangement was at the root of the issues, as the contribution rate under the Boilermakers Collective Agreement exceeded the rate contained in the Standard Carpenters Collective Agreement.

The Plans provided for pensions and benefits calculated using the number of hours of covered employment worked in a year and available funds in the plan. A maximum of 1,750 hours of work a year could be attributed to a member's ultimate entitlement. A proration scheme was available through the plan for situations such as the one in this case, such that "…the Pension Plan and Benefits Plan provided that contributions for members made at rates other than those set out in the Carpenters Standard Agreement would be prorated annually. The proration scheme allowed for those contributions in excess of the rates set in the Carpenters Collective Agreement to be applied to the accrual of additional hours."

The three members qualified for the annual accrual of additional hours under the proration scheme. However, in several years this proration scheme did not benefit the members, as Ruffolo worked consistently in excess of 1,750 hours, and Lowdon and MacKay had at times worked in excess of 1,750 hours. While the Plans as a whole would benefit from the higher contribution rate and the hours above 1,750, the members individually would see no additional gain.

Due to the above issue the three members in conjunction with the Shipyard and their Local agreed on a new scheme of remittance that started in 2001. Until 2001 the Shipyard had remitted directly to the Plans trustees; the new agreement provided that remittances would instead be forwarded to Local 1598. The Local would then only forward onto the trustees "contributions to the Plans at the rates specified under the Carpenters Standard Agreement for each member, up to a maximum of 1,750 hours per year" and the Local would hold in trust for the three members any contributions in excess of 1,750 hours. The trustees claimed to have no knowledge of this agreement. As a result of the new agreement $54,943.00 was retained from remittances by Local 1598 and subsequently held in trust, the three members requested this amount be forwarded to them and Local 1598 applied to the Court for direction.

Ruffolo claimed that he worked long hours and when combined with the higher Boilermakers rate this resulted in "contributions significantly above the norm". He claimed that to not allow his direct entitlement to the so called "excess contributions" would be to allow an unjust enrichment of the other plan members. The other two members were unrepresented. The Plan Trustees argued that the plan was a defined benefit plan and that if Ruffolo, along with the other members, was successful this would frustrate the entire design of the plan. It was argued further by the trustees that there was no such thing as "excess contributions" and no room for such a category, since all remittances were payable to the plan.

Decision

Justice Smith relied on the interpretive principles summarized in the Ontario Superior Court of Justice decision, *Electrical Industry of Ottawa Pension Plan v. Cybulski*. In attempting to ascertain the intentions of the parties Justice Smith considered "…the words they have used in the documents, while having regard to the economic and social purpose of the contracts, and to the obligations of the Trustees to interpret trust agreements in a way that is even-handed as between beneficiaries." Previous conduct of the parties was also considered in interpreting the documents. Justice Smith ultimately found that "…nothing in the Agreements or the Plans creates any right on the part of individual employees to receive back portions of contributions attributable to them." The result following this was that the funds held by Local 1598 were held for the benefit of the Plans and hence should be paid to the Plans.

20. *Ted Leroy Trucking and 383838 BC Ltd. (Re)*, 2009 BCSC 41 (CanLII)

Facts

In September 2008, Ted LeRoy Trucking Ltd. ("TLT"), a British Columbia company, was assigned into bankruptcy. As a result, all legal proceedings against TLT were stayed. However, the *Wage Earner Protection Program Act* ("*WEPPA*") scheme allows employees whose employer is subject to bankruptcy or receivership proceedings to recover wages owing for the six-month period prior to the date the bankruptcy or receivership, subject to a cap of approximately $3,000 or an amount equal to four weeks of insurable earnings under the *Employment Insurance Act.* Payment of the *WEPPA* claim is made from a public fund. Once payment of *WEPPA* claim amounts has been made to an employee, the government is subrogated to all claims of the employee relating to that payment in bankruptcy or receivership.

The main issue before the judge was the interpretation of the term "wages". The union representing the TLT employees took the position that all liabilities arising from the collective agreement between it and TLT are included in the calculation of employee wages under *WEPPA*, whether the amount was payable directly to the employee or to a third party such as the union, a health and welfare trust, or a third party service provider. Century Services, the secured TLT creditor with the highest-ranking priority, took the position that only amounts payable directly to an individual employee were covered under the *WEPPA*. The Receiver also supported this position.

These arguments turn on the interpretation of the relevant provisions in *WEPPA*. At the time the issue was before B.C. Chief Justice Brenner, section 7(1) stated as follows:

> [t]he amount that may be paid under this Act to an eligible individual is the amount of wages owing to the individual that were earned in the six months immediately before the date of bankruptcy or the first day on which there was a receiver in relation to the former employer less any deductions applicable to the payment under a federal or provincial law.

In his analysis of the case, the trial judge refers to section 2(1) of the *WEPPA*, which at that time defined wages as:

> … salaries, commissions, compensation for services rendered, vacation pay and any other amounts prescribed by regulation but does not include severance or termination pay.

Section 81.3(9) of the *Bankruptcy and Insolvency Act*, ("*BIA*") provided a definition for "compensation" that included vacation pay but, like the *WEPPA*, did not include termination or severance pay. The union argued that the definitions of wages in the *WEPPA* and the *BIA* were sufficiently expansive to include all components of an employee's compensation package, including union dues, and monies remitted to third parties for the purpose of providing benefits, entitlements or programs for or on behalf of employees.

Century maintained that the statutory language of the *WEPPA* and the *BIA* did not include third party payments and that those definitions ought to govern, such that other definitions of wages are not relevant to the statutory interpretation. It was argued that the intent of the *BIA* and *WEPPA* is to protect the core wages of workers, which does not include payments to third parties.

Decision

The trial judge agreed with the union. He held that a "reasonable definition of 'compensation for services rendered' must mean all compensation earned by the employee." Former Chief Justice Brenner held that the definition of wages is broad enough to include holiday and overtime pay and all employee benefits and entitlements, except those specifically excluded as severance and termination pay. He held that whatever the specific name of the compensation, it is provided to the employee for services given by the employee.

The implications of this decision are important. Compensation may be defined or characterized in collective agreements to include a number of payments made on behalf of employees in respect of their services rendered, including payments to benefit plans and, as in this case, union dues.

It should be noted that since the date of this decision, the Federal Parliament has gone so far as to amend the *BIA* and extend the definition of wages to include severance and termination pay that relate to employment ended during the 6 month period preceding an employer's bankruptcy or receivership.

An appeal of the decision is pending before the B.C. Court of Appeal.