LEGISLATIVE DEVELOPMENTS AND THE TOP 20 CASES OF 2009 - 2010

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

Prepared by:
Mark Zigler and Michelle Landy-Shavim

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LEGISLATIVE DEVELOPMENTS AND COURTS AND TRIBUNALS

INTRODUCTION – 2009 – 2010

The latter half of 2009 and first half of 2010 have provided revised and modernized legislative developments in the pension and benefits field. The new legislation follows last year's economic downturn caused by the crash in markets, low interest rates, and insolvency problems of major employers; and the release of the Reports of Expert Commissions on Pensions in Nova Scotia, Ontario and the combined Alberta British Columbia Report.

Many of the legislative developments for pensions are still reacting to the solvency funding problems. However, certain governments have looked beyond solvency funding issues to begin more serious pension reform. While the new legislation does not solve every pension challenge, the nature of the debates and issues emerging from the changing legislation and economic landscape have ensured that, yet again, pensions are on the political radar screen.

The Courts and Tribunals have also had a demanding year with pension issues again on the judicial forefront. The Supreme Court of Canada recently released its decision in the *Burke v. Hudson's Bay* case. As well, the jurisprudence has seen an increasing amount of cases focused on issues of discrimination, family property division and the slow end of the partial wind up.

The Courts have also considered settlement issues relating to pensions from within insolvency and bankruptcy litigation. *Abitibi*, *Fraser Papers* and *Nortel* continue to generate major concerns about continued pension funding during a restructuring or liquidation process.

LEGISLATIVE HIGHLIGHTS

The primary legislative highlights across Canada have focused on general pension reform. The most extensive legislative changes belong to the Ontario Bill 236, the *Pension Benefits Amendment Act, 2010*, which received royal assent on May 18, 2010. Bill 236 makes a number of significant changes to the Ontario *Pension Benefits Act*, representing the first of two steps in the Ontario government's quest to reform pensions in response to the 2009 report by the Ontario Expert Commission on Pensions. Such significant reform of the Ontario legislation has not taken place in over 20 years.

The Bill incorporates some simple housekeeping and drafting amendments as well as more significant changes such as: immediate vesting, elimination of the partial wind up, and extension of grow-in benefits to all employees whose employment has been involuntarily terminated without cause. Multi-employer plans (MEPPs) may seek to exempt themselves from the grow-in provisions. Due to changes instituted by Bill 236, an employer is now able to access surplus upon a full wind up of a plan when agreed to by the Superintendent and permitted by the plan documents or pursuant to an agreement between employer, members, former members, retired members and other beneficiaries.

The Superintendent has been given the additional power to order a wind up when all or substantially all of the employees are terminated or are affected by a divestiture and no successor pension plan is in place. This power replaces the Superintendent's power to order a wind up on the discontinuance or reorganization of a business. The Superintendent also has been granted the power to order valuations if he has reasonable and probable grounds to believe that there is a

substantial risk to the security of the benefits payable under the plan or if there have been significant changes in the circumstances of the plan. Proclamation of certain amendments is still pending, and a new round of legislative amendments is expected this fall. The new round will feature a permanent solvency funding exemption for qualifying Ontario MEPPs.

Last spring, the federal government amended the *Pension Benefits Standards Act* to include amendments regarding plan funding, wind-ups, vesting, and "work out schemes" for plans at risk. On September 30, 2010, the federal government introduced Bill C-47, which includes another round of pension reform amendments. The Bill introduces a "negotiated contribution plan"; a new type of pension plan that is similar to the Ontario jointly sponsored pension plans. The Minister of Finance is gaining new authority - to designate an entity for the purposes of receiving, holding and disbursing the pension benefit credit of any person who cannot be located. The Minister will also have the authority to enter into bilateral and multi-lateral agreements with the provinces respecting pension plans that are subject to the pension legislation of more than one jurisdiction.

In March, 2010, the government of Manitoba proclaimed long-awaited amendments to its *Pension Benefits Act* and Regulation. Most of the new provisions came into effect on May 31, 2010. This new legislation represents the most significant overhaul of the province's pension legislation in 35 years. Changes to the legislation include immediate vesting, mandatory pension committees with member participation, broadened criteria for part-time member participation, phasing out the Locked-in Retirement Income Funds, and amending the minimum post-retirement survivor benefits payable to a spouse from 66% to 60%

There have been two key changes to the area of tax and pensions and benefits. The first change occurred when the Registered Plans Directorate amended the rules applicable to making lump-sum catch-up payments for defined benefit registered pension plans. Lump sums may now be paid immediately, and confirmation that the plan is not in a revocable position can be obtained by providing details of the payment in an annual report. The second change concerns the announcement by the Federal Minister of Finance to amend the *Income Tax Act* to permit the establishment of a new vehicle for the delivery of health and welfare benefits to be known as an "Employee Life and Health Trust" (ELHT). ELHTs will be the first Canadian pre-funded health and welfare plans provided with tax incentives. If passed, the proposal will apply to trusts established after 2009. It is uncertain at this stage what will happen to health and welfare trusts established before 2009 under the old CRA Inter-Bulletin IT85-R2. Special rules will allow full deductibility of contributions for qualifying multi-employer plans.

COURTS AND TRIBUNALS

The leading themes in cases before the Courts have again centered on judicial "conservatism" in favour of plan sponsors to try and protect benefits in tough economic times. The decision in *Kerry v. Nolan* reverberated through the jurisprudence, playing a role in *Burke v. Hudson's Bay Co.* and *Sutherland v. Hudson's Bay Co*.

The recent Supreme Court of Canada decision in *Burke* stating that actuarial surplus need not necessarily be transferred along with employees, will have implications for future corporate transactions and will surely be viewed as favourable to business. From a legal perspective, *Burke* merely continues the position from the jurisprudence that an actuarial surplus only crystallizes on plan termination. This decision will require additional due diligence in corporate transactions, as

the Supreme Court emphasized that in order to determine whether a surplus must be transferred, each situation must be evaluated on a case-by-case basis. The interests in the surplus must be determined according to the words of the relevant documents and applicable contract and trust principles and statutory provisions. *Burke* may now require companies involving the transfer of assets to a new pension plan to obtain surplus ownership legal opinions.

Cases concerning the partial wind up continue to be heard by the Ontario Courts and Tribunals, even following its gradual elimination under Ontario Bill 236. Pension plan administrators will no longer have to annuitize pensions following a partial wind up. The Court of Appeal of Ontario has confirmed that partial wind ups may be ordered where a significant number of members of a subset of pension plan members are terminated. Employers who sponsor pension plans with Ontario members will not be able to use a simple mathematical comparison of the number of terminated employees to the entire membership of a plan for purposes of evaluating the risk of a partial wind up.

In a cautionary note to pension plan trustees, the Courts found trustees guilty of breaching investment rules, specifically, the quantitative limits offence and failure to supervise compliance with quantitative limits. The accused, however, were acquitted of all other counts relating to the prudent person standard, including the requirement to supervise prudent investment decisions, due to a lack of expert evidence. However, the Court in *R. v. Christophe* emphasized the need for supervision by members of the Investment Committee and the duty to supervise statutory compliance.

Nortel continues to generate novel litigation; the Ontario Court of Appeal has recently dismissed two appeals concerning Nortel-related litigation. The Court of Appeal dismissed an appeal by the British pension regulator for their attempt to bring Nortel into a separate legal battle in the United Kingdom over a multibillion-dollar claim on behalf of Nortel's 40,000-plus pensioners in Britain. The Ontario Court of Appeal also denied leave to appeal to a group of Opposing Long Term Disability Employees who were appealing an Amended and Restated Settlement Agreement. In the later case, the Court of Appeal concluded that the appellants were unable to demonstrate that they were subjected to any procedural unfairness nor were they able to demonstrate that there was any substantive unfairness in the reasonable settlement. A preceding version of the Agreement had been disapproved by the lower Court on the basis of uncertainty due to the inclusion of the "No Preclusion Clause". This clause stated that that if there is a subsequent amendment to the *Bankruptcy and Insolvency Act* regarding "changes the current, relative priorities of the claims against Nortel, no party is precluded by this Settlement Agreement from arguing the applicability" of that amendment to the claims ceded in the Agreement. The parties subsequently agreed to – and the lower court approved- an Amended and Restated Settlement Agreement, an identical agreement save for the exclusion of the No Preclusion Clause.

The Court continued to face the issue of whether special payments to pension plans ought to be suspended during the *Companies' Creditors Arrangements Act* (CCAA) process. In both *Abitibibowater* and *Fraser Papers*, the courts determined that the companies could suspend special payments to the pension plan during the statutory stay period under the CCAA. It was noted by the Court in *Fraser Papers* that "a trend has developed not to make special payments in the course of CCAA proceedings."

A detailed summary of leading cases in 2009 - 2010 follows this introduction.

SUPREME COURT OF CANADA DECISIONS

1. *Burke v. Hudson's Bay Co.*

The Supreme Court of Canada recently released its long-awaited decision in *Burke v. Hudson's Bay Co.*[1] The unanimous decision was written by the author of last year's *Nolan v. Kerry*[2] decision, Justice Rothstein. The decision confirms the Ontario Court of Appeal's decision that on the sale of a division of a company, pension surplus in a defined benefit plan need not necessarily be transferred to a successor plan established for transferred employees.

Hudson's Bay Co. (HBC) provided a defined benefit pension to plan members. For its first twenty years of existence, the Plan was in deficit, requiring HBC to provide additional payments to keep the plan solvent. In 1982, the Plan generated its first actuarial surplus and HBC began paying administration expenses out of the fund. In 1987, HBC sold a division of the company to North West Company (NWC), transferring approximately 1,200 employees. The companies entered into an agreement to protect the pensions of the transferred employees, providing that NWC would establish a new pension plan and would provide the transferred employees with benefits "at least equal to those presently provided under [the HBC plan]." HBC agreed to transfer cash assets equal to the pension liabilities of the transferred employees, but would have no further obligation for their benefits. At the time of the transfer, HBC's pension plan had an actuarial surplus of approximately $94 million. There was a discussion about whether a portion of the actuarial surplus should be transferred, but, when HBC suggested that transferring part of the surplus would increase the purchase price, the matter went no further.

The transferred employees alleged that HBC, as plan administrator, breached its fiduciary duty to treat all pension plan members with an even hand. The employees argued that the fiduciary duty obliged HBC to transfer a portion of the actuarial surplus to the successor plan. They further alleged that HBC improperly charged pension plan administration expenses to the pension fund for approximately six years prior to their transfer.

The trial judge found in favour of HBC on the issue of administration expenses and in favour of the employees on the surplus issue. The Ontario Court of Appeal overturned the trial judge on the matter of the surplus, finding that the company had no obligation to transfer any portion of the surplus under the terms of its pension plan documentation and in the absence of legislation mandating such transfers.

The Supreme Court dismissed the appeal, reiterating its determination in *Kerry* that absent a statutory or common law authority creating an obligation on the employer to pay for expenses, such an obligation must arise from the text and the context of the pension plan documents. The Court found that in the particular circumstances, there were no statutory or common law obligations on HBC to pay administration expenses and the original trust agreement and the Plan text do not expressly address administrative expenses. Subsequent trust agreements included a provision which expressly allowed HBC to charge administration expenses to the fund, thereby

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[1] 2010 SCC 34.

[2] 2009 SCC 39.

confirming what was already implicitly provided for in the original trust agreement. HBC was therefore permitted to charge administration expenses to the pension fund.

The Supreme Court noted that the issue of transferring a portion of the actuarial surplus as part of the sale of the company raises a novel question in pension law, as the sale occurred in the context of an ongoing pension plan, rather than a terminated or wound up plan. The Court determined that each situation must be evaluated on a case-by-case basis as in all cases, as the interests in the surplus must be determined according to the words of the relevant documents, as well as applicable contract and trust principles and statutory provisions. The Court found that HBC complied with the 1987 Ontario *Pension Benefits Act* when it transferred the pension assets; however, it also had to comply with the terms of the relevant plan and trust documentation that may impose a higher standard.

The Court determined that according to the provisions of the pension plan documentation, it cannot be said that the transferred employees had an equitable interest in the surplus on termination, and therefore they had no floating equity in the actuarial surplus during continuation of the plan. The original and subsequent pension plan documentation indicated that the only employee benefits that are provided for under the terms of the plan are the employees' defined retirement benefits. Although HBC may have voluntarily chosen to increase pension benefits out of surplus funds or otherwise, this does not change the nature of the employees' interest in the pension fund or extend fiduciary obligations to voluntary actions of the employer. Moreover, employees have no right to compel surplus funding to provide a cushion against insolvency.

HBC had a duty to ensure that their defined benefits were adequately funded, not that an actuarial surplus be funded. HBC's fiduciary duties as plan administrator did not obligate it under the duty of even-handedness to confer benefits upon a class of employees who had no rights under the Plan:

> The duty of even-handedness must be anchored in the terms of the pension plan documentation. It does not operate in a vacuum. The duty of even-handedness requires that where there are two or more classes of beneficiaries, each class receives exactly what the terms of the documentation confer (Waters', at p. 966). In its role as pension plan administrator, HBC was a fiduciary and had fiduciary obligations. However, just because HBC has fiduciary duties as plan administrator does not obligate it under any purported duty of even-handedness to confer benefits upon one class of employees to which they have no right under the plan. It was the obligation of HBC to carry out the terms of the pension plan documents and to ensure that in the administration of the plan they do not give an advantage or impose a burden when that advantage or burden is not found in the terms of the plan documents (Waters', at pp. 966-67). Neither the retained nor the transferred employees had an equitable interest in the plan surplus. Accordingly there is no duty of even-handedness applicable to the surplus.

HBC's legal obligations with respect to its employees, including the fiduciary duties that it owed to the transferred employees, were satisfied by protecting their defined benefits. Based on the plan documentation, HBC did not have a fiduciary obligation to transfer a portion of the actuarial surplus.

The employees had argued that it is their equitable interest in the total assets of the pension fund that allows them to compel due administration of the pension fund which they say would require transfer of a portion of the actuarial surplus. While the Court agreed that the employees had a right to compel the due administration of the pension trust fund, it did not agree that it was because they have an equitable interest in the surplus. The Court found that a beneficiary of a trust has the right to compel its due administration even if it does not have an equitable interest in all of the assets of the trust. Because the transferred employees had an equitable interest in their defined benefits, they had the right to compel the due administration of the trust and to ensure that the employer, trustee and plan administrator were complying with their legal obligations in the pension plan documents. However, the circumstances in this case did not suggest that the actuarial surplus was abused by HBC or used for an improper purpose. The Court determined that HBC's legitimate commercial transaction had complied with the legislative requirements.

The Court of Appeal had found that it was appropriate for costs to be paid out of the pension trust fund because this case dealt with issues surrounding the due administration of the pension trust fund and was for the benefit of all the beneficiaries. The Supreme Court noted that this point was not appealed and ordered costs on a solicitor-and-client basis, including costs of the leave application, to be paid to both parties out of the trust fund.

QUEBEC DECISIONS

2. *Abitibibowater inc. (Arrangement relatif à)*

In 2009, AbitibiBowater Inc. filed for protection under the *Companies' Creditors Arrangement Act* (CCAA). In *Abitibibowater inc. (Arrangement relatif à),* [3] Abitibibowater and its affiliates attempted to suspend payments of past service and certain special payments into its pension plan while undergoing restructuring in accordance with the CCAA. AbitibiBowater brought a motion on the grounds that, should it have to continue making these payments, it would be unable to proceed with the restructuring as it would not have sufficient assets. It is made clear in the decision that AbitibiBowater did not seek to alter the existing pension plans or their obligations with respect to those plans. Instead, they sought to suspend contributions only until the CCAA restructuring was complete.

The two main issues were whether the Court had jurisdiction over this matter, and if it was appropriate, in the circumstances of the case, to suspend payments into the pension plans during restructuring. Citing the Ontario decision in *Collins & Aikman*,[4] Justice Mayrand reiterated the distinction between the rights that arise under a collective agreement, which include pension plan rights, and the obligations that give effect to those rights.

Justice Mayrand described the financial situation of Abitibi and Bowater, noting that both companies were in a desperate financial situation and had minimal liquid assets. In order for restructuring to be a success, she noted, the company requires "breathing room" during this "crucial" time. As a result, the applicant's motion was granted, allowing AbitibiBowater to suspend its past service contributions and special payments to the pension plan during the

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[3] [2009] J.Q. no 4473.

[4] [2007] O.J. No. 4186 (Ont. S.C.).

statutory stay period under the CCAA. The Court further ordered that none of the petitioners, officers, or directors shall incur any obligations for failing to make such contributions during that same time.

ONTARIO DECISIONS

3. *Campos v. Sun Life Assurance Co. of Canada*

In *Campos v. Sun Life Assurance Co. of Canada*,[5] the Ontario Superior Court of Justice held that a dispute over entitlement to long term disability benefits under the Hospitals of Ontario Disability Income Plan (HOODIP) was within the exclusive jurisdiction of an arbitrator under a collective agreement. In dispute was whether long term disability (LTD) payments should be offset by Canadian Pension Plan (CPP), Old Age Security (OAS) or Employer Pension Payments (EPP) when the recipient of LTD benefits turned 65.

Betty Campos was a member of the Ontario Nurses Association and had been employed at North York General Hospital until she became disabled and retired. Before she turned 65 she had been receiving $2,966 a month in LTD payments; at age 65 she began receiving other retirement benefits in the form of OAS, CPP and EPP. Sun Life subtracted these amounts from her LTD payments. Ms. Campos claimed that this offset was not allowed and initiated a proposed class action as a putative representative plaintiff.

Sun Life, with the Ontario Hospital Association as an intervenor, argued that the Court did not have jurisdiction to hear a dispute regarding HOODIP and LTD payments. It was argued that an arbitrator had exclusive jurisdiction over the dispute since is arose out of the application or interpretation of the collective agreement.

Ms. Campos argued that the essential nature of the dispute involved insurance law and that a labour arbitrator did not have jurisdiction over a dispute that involved the plaintiff and a third party insurer.

Justice Joan Lax of the Superior Court agreed with the position of Sun Life and the Ontario Hospital Association. Justice Lax looked to Article 12.07 in the collective agreement that specifically referenced HOODIP disputes and provided that "[a]ny dispute which may arise concerning a nurse's entitlement to short-term or long-term benefits under HOODIP may be subject to grievance and arbitration under the provisions of this agreement." Arbitrators had previously interpreted article 12.07 as giving them jurisdiction. Justice Lax noted that she had not been referred to any decisions whereby an arbitrator did not have jurisdiction in regards to a HOODIP dispute. The Court found that the fact that the action was brought in the form of a class action did not mitigate in favour of the Court taking jurisdiction. Regardless of the form of the proceeding the Court found that the subject matter of the proceeding was to govern any decision as to jurisdiction.

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[5] [2009] O.J. No. 3408 (Ont. S.C. J.).

Justice Lax looked to the Supreme Court of Canada decision of *Bisaillon v. Concordia University*[6], noting that that the "Supreme Court of Canada has adopted a liberal position according to which grievance arbitrators have a broad exclusive jurisdiction over issues relating to conditions of employment if they can be shown to have an express or implicit connection to the collective agreement." He went on to conclude that "[t]his is a dispute that has an express connection to conditions of employment. It involves the interpretation of benefits obtained through the collective bargaining process."

Justice Lax also addressed the third party status of the insurer to the collective agreement, and the fact that they would therefore not be bound by the arbitration award. Relying on Arbitrator Thorne's decision in *Trenton Memorial Hospital v. ONA*,[7] Justice Lax held that the arbitrability was not affected by the fact that the insurer was not a party to the collective agreement and would not be bound by the arbitration award.

4. *Frasier Papers Holdings Inc. (Re)*

In the decision *Fraser Papers Holdings Inc. (Re),*[8] the Ontario Superior Court of Justice determined that during a *Companies' Creditors Arrangement Act* (CCAA) restructuring, special payments to a pension plan can be temporarily suspended to allow the company the opportunity to successfully restructure its operations, but that such a suspension does not remove the obligations of an employer to make such payments.

The Fraser Group brought an application before the Court to temporarily suspend the special payments in respect of underfunded and going concern solvency deficiencies in the defined benefit plans. They argued that, should the obligation to make the special payments not be stayed, their business and ability to restructure would be jeopardized on account of the fact that they did not have the assets to make those payments while restructuring was taking place.

Justice Pepall determined that there were two separate issues for determination: first, whether she had the jurisdiction to order a suspension of the special payments, and second, whether she should exercise that jurisdiction and order the relief requested. With respect to the first issue, Justice Pepall noted that the CCAA should be broadly interpreted, keeping in mind that the purpose of the *Act* is to facilitate restructuring. Referencing section 11.3 of the CCAA, which allows a court to make an order to stay proceedings against a company under CCAA protection, Justice Pepall stated that "a trend has developed not to make special payments in the course of CCAA proceedings." She also conducted a review of the relevant jurisprudence on the issue of special payments and insolvency, and concluded that she does have jurisdiction to stay the requirement to make special payments.

The Court then considered whether the suspension of the special payments should be ordered. In her analysis, Justice Pepall highlights the fact that the requested stay does not "extinguish or compromise" the respondent's right to those payments, nor does it remove the obligation of the applicant to fund the deficits in the plan. Allowing for the special payments to be temporarily

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[6] [2006] 1 S.C.R. 666.

[7] [2000] O.L.A.A. No. 506.

[8] (2009) C.C.P.B. 254 (ON S.C.).

suspended merely gives the Fraser Group the opportunity to restructure their business, which is something that benefits all those involved in the proceeding, including the employees. As such, Justice Pepall granted the relief, ordering that the special payments need not be made during the statutory stay period under the CCAA and that the officers and directors of the company cannot be held liable for those amounts during the same period.

5. *Hydro One Inc. v. Ontario (Superintendent of Financial Services)*

The Ontario Court of Appeal, in a judicial review decision of the Ontario Financial Services Tribunal, has broadened the permissible analysis for determining whether termination of a group of employees is "significant" for the purposes of a partial wind up. In deciding whether terminations are significant for a partial plan wind up under section 69(1)(d) of the Ontario *Pension Benefits Act* (PBA), the Court in *Hydro One Inc. v. Ontario (Superintendent of Financial Services)*[9] endorsed the use of a "subset analysis" as a correct interpretation of the PBA. Application of the analysis on the facts was also held to be reasonable. The fact that the terminated employees were not covered by a collective agreement was also found to be a reasonable consideration in the exercise of discretion in ordering a wind up.

The judicial review stemmed from a partial wind up order given by the Ontario Financial Services Tribunal regarding a Hydro One pension plan. The partial wind up was based on the termination of 73 employees who were members of a plan covering 3,913 employees.

The Superintendent rejected an application for a partial wind up, on the basis that the loss of 126 employees in a plan of 3,913 was not "significant" as required by the PBA. In prior decisions, "significant" had been found to be about 20% of plan members, although sometimes a large number of terminated members – although less than 20% of the total workforce – had been found to be "significant." The applicants appealed the decision to the Tribunal.

The Tribunal held that a termination of 126 plan members out of a total of 3,913 members was not significant in absolute or comparative terms. A third type of analysis was adopted by the Tribunal despite this finding. The Tribunal segregated the total number of employees in the Plan, being 379, and considered whether a termination of 73 employees out of 379 was significant. A subset was created for purposes of analyzing significance, and the Tribunal found that since 73 employees represented 18% of 379, the termination was significant.

On review, the Ontario Court of Appeal considered whether the interpretation given to section 69(1)(d) was correct and then whether the application of such an interpretation to the facts was reasonable. The Court held that the unrestricted language of the section and the remedial nature of the PBA permitted a flexible approach in the significance inquiry. The Court summarized that a "…significance inquiry…may be based on a subset analysis in order to evaluate the materiality of the number of plan member terminations occasioned by a business reorganization."

The Court also found that the use of the subset analysis in the context of these terminations was reasonable. When ordering the partial wind up based on the subset analysis the Tribunal noted that such an analysis would only be appropriate in "rare" circumstances. The Court of Appeal

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[9] 2010 ONCA 6.

noted that in some situations such an analysis will be unreasonable and set out eight factors to be considered when deciding whether a subset analysis is appropriate:

(i) whether the pension plan at issue distinguishes between different groups, categories or classes of employees;

(ii) whether the plan members whose employment has ceased represent an identifiable subset of the employer's workforce, such that a separate pension plan could have been established for them;

(iii) the size of the suggested subset of members in relation to the employer's overall workforce;

(iv) whether the applicable business reorganization or discontinuance affected only specific targeted employees and if so, whether the number of targeted employees is a material portion of the plan membership;

(v) whether the terminated members represent proportionately older members of the pension plan whose retirement years are approaching;

(vi) whether the terminated members ceased their employment voluntarily or involuntarily;

(vii) whether a partial plan wind up in respect of the identified subset of plan members would threaten the continued viability of the employer's entire pension plan; and

(viii) any other circumstance indicating that the proposed wind up could jeopardize the security of pension benefits for continuing plan members.

The Court considered the existence of collective agreements as a factor in the discretion in ordering a wind up. Once the threshold of “significance” had been met, the absence of a collective agreement was a positive factor for the Tribunal in its exercise of discretion in ordering a wind up. The Ontario Court of Appeal found the consideration of this factor to be reasonable in the exercise of discretion.

Traditionally, the determination of “significance” contained two branches. One branch of analysis compares the number of terminations to the number of total active plan members; the second branch is a non-comparative consideration of whether the terminations were significant in an absolute sense. The Court of Appeal has now approved a third branch of analysis. The third branch differs from the first two though, since the context in which the subset analysis will be reasonable are limited by the factors set out by the Court.

6. *Imperial Oil Ltd. v. Superintendent of Financial Service*

On December 2, 2009, the Ontario Financial Services Tribunal (Tribunal) issued its decision in *Re Imperial Oil Limited and the Superintendent of Financial Services.*[10] The case addresses the pension entitlements of members affected by a partial wind up, and in particular, the issue of whether benefits must be annuitized on a partial wind up. The Superintendent of the Financial Services Commission of Ontario (FSCO) argued that upon partial wind up, all affected benefits must be annuitized, while Imperial Oil Limited (Imperial Oil) argued that the benefits could be provided through the ongoing portion of the plan and need not be annuitized.

The Tribunal found that Imperial Oil is not required to annuitize the affected members' benefits and is permitted to meet its obligations by providing pensions through its continuing pension plan.

Approximately 2600 employees were terminated from Imperial Oil over the period extending from 1992 to 2000, triggering three separate partial wind ups between 1997 and 2003 involving two separate pension plans (Plans). As a result of the wind ups, employees elected either to annuitize their benefits or to keep them in the Plans, pursuant to the transfer options under section 42 of the Ontario *Pension Benefits Act* (PBA). Fewer than 30% of the affected members either elected or were deemed to elect to keep their benefits in the Plans. Despite this, the Superintendent issued a Notice of Proposal requiring Imperial Oil to purchase annuities on behalf of all impacted members, including those who had elected or were deemed to elect to keep their benefits in the Plans. The Notice of Proposal cited *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services),*[11] in support of the principle that benefits must be annuitized upon a partial wind up.

Imperial Oil argued that upon a partial wind up, members must be given benefits and rights that are not less than they would have on a full wind up, in accordance with section 70(6) of the PBA. One of those rights includes the transfer options under section 42(1). However, the PBA is silent on what happens if a member does not make a transfer election. Imperial Oil argued that, contrary to FSCO's Notice of Proposal, the *Monsanto* decision does not require annuitization of pensions upon a partial plan wind up.

Imperial Oil highlighted several reasons for the large number of members electing to keep their benefits in the Plans. First, Imperial Oil has a superior credit rating, thus members' benefits are backed by a secure company. Second, members do not want to lose potential benefit enhancements and post-retirement health benefits promised to members who stayed in the Plans. Finally, members who elect annuitization have no assurance that their ultimate benefit payments would match the pension payments promised from the Plans. Therefore, the only way for members to ensure payment of their full benefits is to remain in the Plans.

The Superintendent argued that keeping the benefits in the ongoing Plans was inconsistent with the concept of a plan wind up. He further argued that the PBA definition of partial wind up requires a "distribution" of the assets; the term "distribution" in turn requires that a payment be

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[10] Tribunal File Nos. P0341-2009/ P0343-2009/P0344-2009, released Dec. 2, 2009.

[11] [2004] 3 S.C.R. 152.

made out of the Plans. FSCO argued in favour of the finding in *Monsanto* that members must sever all ties with the Plans upon a partial wind up and that accounts must be settled.

On the issue of whether a "distribution" was effected, Imperial Oil argued that the transfer of the benefits to the ongoing Plans would constitute a distribution. Moreover, FSCO's argument that a "distribution" is only effected when the benefits are removed from the Plans is at odds with its Policy S900-910 which states that the "distribution" of surplus upon a partial wind up may be achieved by allocating it to the ongoing plan.

The Tribunal considered that in a full wind up situation, pensions are delivered in the form of annuities out of 'practical necessity' since the Plans will no longer exist. The Tribunal examined whether the same kind of 'practical necessity' exists in a partial wind up situation. The Tribunal found that the panel in the *Monsanto* case, although divided on other issues, was unified in deciding that a plan is not required to annuitize all benefits upon a partial wind up, including in respect of members who did not elect a transfer option under section 42(1). Although the *Monsanto* decision was appealed all the way up to the Supreme Court of Canada, it was not appealed on the annuitization issue.

The Tribunal also distinguished the need for a surplus distribution from the need for a distribution upon a partial wind up. The need for a distribution of surplus out of the plan arises because surplus is dependent on the fortunes of favourable markets and is related to a specific time and participation in the plan. The only way for members to realize surplus is for it to be paid out immediately to the affected members, unlike pension benefits which are intended to provide a pension over a period of time.

The Tribunal examined the meaning of "distribution" and considered whether the pension can be distributed by Imperial Oil retaining the benefits in the Plans instead of annuitizing them. Members who did not elect to annuitize their benefits were entitled to an immediate or deferred pension. Payment out of the Plans would fulfill this entitlement, provided the wound-up portion of the Plans was depleted or liquidated in a manner to provide full pensions. This would satisfy the "distribution" requirement. Also, it would be unrealistic to ignore that in a partial wind up there is an ongoing portion of the plan. Therefore, the practical necessities in a partial wind up are different from those in a full wind up. To provide benefits from the ongoing portion of the Plans is a practical, efficient and prudent solution and not inconsistent with an administrator's fiduciary duties. The PBA is intended to protect plan members and in this situation, members would lose valuable benefits if they were forced to transfer their benefits out of the Plans.

In finding that the option of providing the pension benefits through the continuing Plans is not precluded by the PBA, the Tribunal ordered the Superintendent to withdraw his proposal to deny the approval of the wind up reports. It ordered Imperial Oil to amend the reports to specify the method of distribution, in this case a transfer of benefits to the ongoing Plans, to meet its reporting duty under section 70(1)(c) of the PBA. Once amended, the Superintendent was to approve the reports.

The Tribunal was careful to note that this decision addresses the particular facts of this case. Pension plans in future cases may not always be capable of meeting their pension benefit liabilities and annuities may be the only prudent and practical option.

7. *Lomas v. Rio Algom Ltd.*

In a unanimous decision, the Ontario Court of Appeal in *Lomas v. Rio Algom Ltd.*[12] reversed a lower court conclusion and held that courts do not have jurisdiction to force an employer to wind up a pension plan. The case turned on the proper interpretation of the Supreme Court of Canada's reasons in *Buschau v. Rogers Communications Inc.*[13]

Rio Algom Ltd. established a pension plan in 1966. Both the original Plan text and Trust Agreement stated that no part of the trust fund was to be used for or diverted to purposes other than for the exclusive benefit of the Plan members. In 1997, the Plan was converted from a defined benefit plan to a defined contribution plan and members were given a one-time option to convert their accrued benefits. All members admitted into the Plan after 1997 participated in the defined contribution portion of the Plan.

Alexander Lomas, a pensioner under the Plan, started a court application seeking over $2 million in damages, as well as other relief, relating to allegedly improper Plan amendments. Lomas asserted that the amendments in question have been to the detriment of Plan members because they have diverted assets away from the Plan, and thereby constituted a breach of trust, contract and fiduciary duty.

Before any steps in the litigation took place, Rio Algom brought a preliminary motion to strike a number of paragraphs in the notice of application. Rio Algom argued that some of the relief requested by Lomas discloses no reasonable cause of action. In particular, Rio Algom challenged the request by Lomas to the Court to direct Rio Algom to apply for a plan wind up under the *Pension Benefits Act* (PBA). This particular question - whether a court can compel an employer to wind up a pension plan - formed the basis of the appeal before the Ontario Court of Appeal.

The original motions judge disagreed with Rio Algom. He found that a court has the jurisdiction to fashion an appropriate remedy where it finds that the rights of pension plan members have been breached, and compelling a plan sponsor to do something that the PBA permits it to do does not offend the supervisory authority of the Superintendent.

The Divisional Court heard the first level of appeal and affirmed the decision of the motions judge. The majority held that a determination of the appropriate remedy in this case required a fuller record than what was before the Court, and that there was no policy reason against the equitable remedy of requiring the wrong-doer to act as permitted by statute. One of the judges dissented, finding that the pension plan members had no right to compel the wind up of a defined benefit pension plan and that they cannot circumvent the wind up provisions of pension legislation by seeking a court order.

The Court of Appeal allowed the appeal and set-aside the majority decision of the Divisional Court. The Court relied on the Supreme Court of Canada decision in *Buschau* as a complete answer to the question before it. The Court stated that *Buschau* stands for the proposition that a

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[12] 2010 ONCA 175.

[13] 1 S.C.R. 973.

court does *not* have the authority to order an employer to wind up a pension plan at the request of plan members because: (a) it would be contrary to the societal purposes for which pension plans exist; (b) contrary to the scheme of legislation governing pension plans; and (c) contrary to the language often found in plans which gives employers the right to terminate the plan and underlying trust.

Justice Eileen Gillese of the Ontario Court of Appeal emphasized that a court cannot do indirectly what it cannot do directly, and ordering an employer to wind up a pension plan is tantamount to exercising a power reserved only for the Superintendent of Pensions. Where there is a statutory scheme governing the termination and wind up of pension plans, that process must be respected and followed, and must not be circumvented by the Court. Justice Gillese reasoned that if a court could require an employer to initiate wind up proceedings under the PBA, the statutory process governing wind up initiated by the Superintendent would be eliminated. This would be an improper interference with the legislative scheme in two ways: first, a court would have to decide issues of fact and law that are necessary to determine whether a wind up is appropriate, which is precisely the authority delegated to the Superintendent. Second, the statutory safeguards and appeal rights of all affected parties would be eliminated.

The vexing issue of whether a court has the power to terminate a pension trust pursuant to trust law principles was also addressed by the Court of Appeal. Justice Gillese pointed out that a pension plan and a pension trust are "dissociable," and if a court cannot order a wind up of a pension plan, it is debatable whether it can terminate a pension trust. In addition, there is no established trust law principle which would permit a court to terminate a trust before the purposes of the trust have been fulfilled.

As this matter arose out of a preliminary motion to strike portions of the statement of claim, the merits of the case remain to be decided.

8. *MTD Products Limited v. Baldwin*

In *MTD Products Limited v. Baldwin,*[14] MTD Products Limited, the administrator and sponsor of a single employer, defined benefit pension plan brought an application before the Ontario Superior Court of Justice seeking "rectification" of an amendment to the Plan registered with the Financial Services Commission of Ontario (FSCO) in 1998.

The amendment was passed by MTD by resolution of its board of directors dated September 16, 1998 (1998 Amendment). The purpose of the amendment was to provide an early, unreduced pension for an individual long-service employee, at the discretion of the board of directors. The amendment was registered with FSCO on November 16, 1998. MTD operated the Plan with the understanding that no other employees were entitled to the early retirement benefit affected by the 1998 Amendment.

In May of 2007, MTD decided to close a plant operated in Kitchener, Ontario, which led it to declare a partial wind up of the Plan in respect of the employees at that facility. A partial wind up report was filed with FSCO. On May 1, 2008, FSCO advised MTD's actuaries that there was

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[14] 2010 ONSC 1344.

a problem with the partial wind up report, relating to the 1998 Amendment. Specifically, FSCO expressed the view that all members affected by the 2007 partial wind up whose combined age and service equalled fifty-five or greater as of the date of the partial wind up would be entitled to unreduced early retirement benefits under section 74 of the *Pension Benefits Act*, regardless of whether MTD had consented to their obtaining those benefits. Because of the wording of the 1998 Amendment, MTD would be required to fund such early retirement benefits for qualifying Plan members, creating a potential liability of approximately $5,700,000.

Since it had never been MTD's intention to provide unreduced early retirement benefits to all Plan members, MTD commenced an application in the Superior Court seeking to rectify the wording of 1998 Amendment to give effect to its original intention. Notice of the application was provided to 145 Plan members who had a potential interest in the early retirement benefits granted through the 1998 Amendment. Of these, seven participated in the hearing of the application as respondents.

In hearing the application, the Court reviewed the history and origins of the 1998 Amendment, as well as communications with Plan members, finding that MTD only ever intended the 1998 Amendment to apply to one single, long service employee. In this regard, the Court noted that "[t]here is no evidence of any other employee retiring early who asked for, or was given, a full pension without reduction. The Plan booklet published in 2004 made no reference to an entitlement to an unreduced pension."

The Court also reviewed the case law regarding the remedy of rectification, pursuant to which a written agreement or document whose drafting does not reflect the true intention of the parties may be revised by the Court to prevent an unjust result. Rectification is an equitable remedy aimed to ensure that one party is not unjustly enriched at the expense of another.

Based upon the evidence filed, the Court held that it was never the intention of MTD to grant an unreduced early retirement pension to all Plan members, that none of the employees were misled by the drafting error in respect of the 1998 Amendment. MTD had not delayed in seeking rectification of the 1998 Amendment. The Court was persuaded that there was a mistake in the wording of the 1998 Amendment, which improperly reflected MTD's objective. Accordingly, the Court granted the application, and permitted a revision to the Plan which conformed with MTD's intention that the early unreduced pension was only to be offered to a single employee.

9. ***National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada), Local 1451 v. The Company Ltd.***

The Ontario Superior Court of Justice (Divisional Court) in *National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada), Local 1451 v. The Company Ltd.*,[15] upheld a labour arbitrator's dismissal of a grievance file by the CAW-Canada (Union). The Union sought severance pay for a group of employees affected by a plant closure. The issue was whether the employees were eligible for severance pay under the Ontario *Employment Standards Act, 2000* (ESA) in light of the value of the pension benefits they received upon termination. At first instance, the Arbitrator ruled that the employer was exempted

[15] [2010] O.J. No. 3041 (Div Ct).

from making severance payment. On review, the Divisional Court held the Arbitrator to a standard of "reasonableness," and concluded that the decision met this standard.

Kitchener Frame Ltd. (Company) had a generous pension plan (Plan) designed to encourage workers to leave employment early with some income security, thereby permitting younger workers to work more regularly without being affected by indefinite layoffs. The Plan specifically contemplated early retirement eligibility upon plant closure, with eligibility for "bridging benefits": periodic payments made on a temporary basis to bridge the period from retirement to the point of eligibility for Old Age Security. Other employees were entitled to a special early retirement allowance payable up to the age of 60, designed to generate the same level of pension benefits as employees who were already 60 years old. The pension benefits received by the employees upon plant closure were not actuarially reduced.

In the normal course, an employer is required to make severance payments to its employees on plant closure. However, the ESA exempts employers from providing severance pay to certain employees, as found in section 9(1) of the Regulation:

> An employee who, on having his or her employment severed, retires and receives an actuarially unreduced pension benefit that reflects any service credits which the employee, had the employment not been severed, would have been expected to have **earned in the normal course of events for purposes of the pension plan**. [emphasis added]

Under the previous version of the legislation, there was an express entitlement to severance pay for terminated employees who received a "reduced pension," which did not include a person who received an "actuarially unreduced" pension.

The issue before the Arbitrator concerned the interpretation of the phrase "pension benefit" in section 9(1) of the Regulation under the ESA, and whether the employees who received "pension benefits" upon plant closure came within the terms of this exemption. The term "pension benefit" is not defined in the ESA, but is defined in the *Pension Benefits Act* (PBA) as "the aggregate monthly, annual or other periodic amounts payable [under the pension plan] to a member or former member ... during the lifetime of the member." Section 40(2) of the PBA provides for an "ancillary benefit" including bridging benefits and other supplemental benefits payable for a temporary period; and early retirement and postponed retirement options and benefits.

Arbitrator Knopf found in favour of the Company. She held that although there was clear arbitral jurisprudence valuing pension benefits without regard to ancillary benefits, changes in the ESA rendered the old case law inapplicable.

The Arbitrator found that the term "pension benefit" should be "…considered in light of what the person would have expected to earn in the normal course 'for purpose of the pension plan.'" The PBA included bridging and ancillary benefits in calculating the value of the pension benefit. Arbitrator Knopf held that the two statutes should be read together and concluded that "it is difficult to see how the ancillary benefits achieved in this pension plan and the commuted value of the pension benefit can be ignored in the analysis applicable to this case." If the Union were correct, she reasoned, then anyone whose service credits are cut short is entitled to severance pay and the exemption would never apply.

Ultimately Arbitrator Knopf concluded that in deciding whether the employees were entitled to severance pay she should determine whether the total pension benefits they received compensated them for the loss of service credits they could have earned in the normal course if the plant had not closed. She decided that this required her to include the bridging benefits and other supplementary benefits in the valuation of the pension benefits received.

The Divisional Court stated that a decision of a labour arbitrator within her expertise is entitled to deference. However, if an arbitrator is interpreting a statute outside her area of expertise, or determining pure questions of law on a point of general application, a correctness standard applies. Although the Divisional Court found that it was "clear" that a reasonableness standard applies to an arbitrator's interpretation of the ESA, an open question was whether Arbitrator Knopf's interpretation of the PBA attracts a stricter standard of correctness. The Court found that it did not.

The Divisional Court found that the Arbitrator's decision fell within a range of acceptable and rational conclusions and was entitled to deference, as she demonstrated a thorough understanding of the prior arbitral jurisprudence and provided sound reasons for why those cases were no longer applicable. Furthermore, the Court of Appeal in *Ahdoulrab v. Ontario (Labour Relations Board)*[16] recognized that the ESA was "substantially rewritten" in 2000 and issued caution in relying upon referees' decisions prior to those significant changes. The Divisional Court noted that given the extent to which the prior case law turned upon the particular wording of the legislation in place at the time, it was reasonable for the Arbitrator to consider the matter before her afresh.

The Court also concluded that the interpretation of "pension benefit" as including supplementary benefits was reasonable, finding the Arbitrator's reasoning process to be transparent and intelligible with her conclusion rational and supported by relevant factors. Furthermore, the Court agreed that there was no reason not to use commuted value in order to compare the value of one pension benefit to another, as it is standard in accounting and actuarial practice to do so.

10. *Nortel Networks Corp. (Re)*

A group of former employees of Nortel succeeded in protecting their supplemental pension payments from being distributed to company creditors. The nine former employees were in receipt of payments from a supplementary retirement benefit plan that was available to senior officers. The Plan was entirely funded by the former employees, but Nortel owned the annuity certificates. Payments under the Plan were made by Sun Life Assurance Company of Canada (Sun Life) to Nortel, Nortel then deposited these payments into their general operating account and made identical payments to the retirees. Shortly after Nortel sought protection from its creditors under the *Companies' Creditors Arrangement Act* (CCAA), it continued to receive the annuity payments from Sun Life, but ceased paying the former employees.

On a motion for advice and direction by Nortel, in *Nortel Networks Corporation (Re),*[17] Justice Morawetz considered the circumstances of the arrangement between the parties, and concluded

[16] 2009 ONCA 491, 95 O.R. (3d) 641.
[17] 2010 ONSC 3061.

that the Sun Life annuity payments were subject to a constructive trust in favour of the former employees. Nortel was ultimately ordered to assign the individual annuity contracts over to the former employees.

From 1979 until 1985 Nortel operated a Supplementary Pension Retirement Allowance Plan (SPRAP). This was not a registered pension plan, but a deferred compensation savings arrangement whereby senior officers could elect to either receive annual bonuses in cash or deposit the bonus into an account. On retirement the executives were given several options, one option was to purchase an annuity from Sun Life with the accumulated amount. Nortel was listed as owning the annuity certificate and the individual former employee was noted as the annuitant. Payments were originally structured to take advantage of favourable tax treatment under the *Income Tax Act*, such that Sun Life remitted payment to Nortel, and Nortel paid the former employees. Such arrangements were eliminated in 1986 through amendments to the *Income Tax Act*, although plans already in place were grandfathered.

On January 14, 2009 Nortel was granted protection from its creditors under the CCAA, and stopped making payments under the SPRAP. The market value of the annuities as at July 9, 2009 was $7.5 million. Nortel brought a motion to the Ontario Superior Court for advice and direction regarding the legal ownership of the funds administered by Sun Life.

This decision turned on the nature of the arrangement between the former employees and Nortel. The legal issue was whether the annuities were subject to a trust, or whether the relationship was strictly one of contract, relegating the former employees to the status of unsecured creditors of Nortel. Nortel argued that the annuities were the property of Nortel, and it had a contractual relationship with the former employees for payments.

Justice Morawetz held that the assets making up the SPRAP were subject to a constructive trust in favour of the former employees. In arriving at his conclusion, Justice Morawetz considered the relationship of the former employees to Nortel as a whole. In particular he noted that the assets in dispute were set aside by the former employees for their own benefit in retirement. Nortel's role was characterized as one of a "conduit," which is consistent with the presence of a trust. Justice Morawetz examined the positions of all the parties, stating that although the funds may have flowed through Nortel's accounts, it was "with the understanding that they were earmarked for the Annuitants – not for the interests of Nortel or, in the context of the CCAA proceedings, for the unsecured creditors of Nortel."

In addition to noting the reasonable expectations of the parties to the arrangement, Justice Morawetz also had regard to the equities of the scenario:

> If a constructive trust was not ordered, the general creditors of Nortel would receive a windfall benefit at the expense of the Annuitants who would become involuntary creditors of Nortel. **This would be an unjust outcome**….
>
> In my view, if a constructive trust was not imposed, the general creditors would benefit from a windfall at the expense of the involuntary creditors. **This would be most inequitable in the circumstances and runs contrary to principles routed in fairness and good conscience.** [emphasis added]

Justice Morawetz noted that "fairness" required the Court to impose a trust in order to avoid unjustly enriching Nortel. Nortel was ordered to assign the "property of the Annuitants to the Annuitants."

11. *Nortel Networks Corp. (Re)*

The Ontario Court of Appeal decision in *Nortel Networks Corp. (Re)*[18] is the culmination of a settlement agreement (Settlement Agreement) as agreed to by the Disabled Employees, Former Employees, Nortel Networks Corp., the Monitor, and several other creditors. The Court of Appeal denied leave to appeal on a motion by a group of Opposing Long Term Disability Employees (Opposing LTD Employees) who had sought to appeal the March 31, 2010 decision of the Ontario Superior Court of Justice by Justice Morawetz, approving the Settlement Agreement. The Settlement Agreement ensured the continuation of health, dental, life and LTD benefits through 2010, and also for a lump sum payment as an advance distribution to certain eligible terminated employees.

Following its protection under the *Companies' Creditors Arrangement Act* (CCAA) in January 2009, it was originally hoped that Nortel would be able to restructure their business. However, in June 2009, the decision was made to pursue sales of Nortel's various businesses. Given Nortel's insolvency, the significant reduction in Nortel's operations, the complexity and size of the pension plans, both Nortel and the Monitor believed that the continuation and funding of the Plans and continued funding of medical, dental and other benefits was not a viable option.

In an earlier decision, *Nortel Networks Corp. (Re),*[19] Justice Morawetz had heard a motion where he was requested to approve the Settlement Agreement. Justice Morawetz recognized that pension payments and payments to the Health and Welfare Trust (HWT) while under the CCAA protection are largely discretionary and the "cessation of such payments is inevitable." This situation had been addressed by entering into the Settlement Agreement among Nortel, the Monitor, the Former Employees' Representatives, the LTD Representative, Representative Settlement Counsel and the CAW-Canada (Settlement Parties).

The Opposing LTD Employees put forward the position that the cessation of their benefits would lead to extreme hardship. They submitted that the Settlement Agreement conflicts with the spirit and purpose of the CCAA because the LTD Employees are giving up legal rights, by releasing Nortel from all future claims, in relation to a $100 million shortfall of benefits. The Opposing LTD Employees asserted as follows:

(a) the HWT is a true trust, a breach of which trust creates liabilities;

(b) the claim should not be released;

(c) due to the true trust, the LTD employees should have a priority in the distribution process; and

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[18] [2010] O.J. No. 2361, 2010 ONCA 402.
[19] [2010] O.J. No. 1232, 2010 ONSC 1708.

(d) the releases are not necessary and essential to the restructuring of the debtor, do not relate to the insolvency process, are not required for the success of the Settlement Agreement, do not meet the requirement that each party contribute to the plan in a material way and are overly broad and therefore not fair and reasonable.

The Court found the jurisdiction to approve pre-plan agreements in the CCAA, including settlements. Justice Morawetz stated that the Settlement Agreement could be approved if it is consistent with the spirit and purpose of the CCAA and is fair and reasonable in all circumstances: "What makes a settlement agreement fair and reasonable is its balancing of the interests of all parties; its equitable treatment of the parties, including creditors who are not signatories to a settlement agreement; and its benefit to the Applicant and its stakeholders generally." The Court gave considerable weight to the advice given to the disabled and former employees by Representative Counsel that claims against directors of Nortel for failing to properly fund the Pension Plans were unlikely to succeed and such claims were risky and could take years to resolve, perhaps unsuccessfully. The Court found the releases to benefit creditors as they reduce the risk of litigation and delay, and were not overly broad or offensive to public policy.

However, Justice Morawetz refused to approve the original Settlement Agreement, as he did not approve of the inclusion of the "No Preclusion Clause", stating that it resulted in a "flawed agreement." The No Preclusion Clause, found in Clause H.2 of the Settlement Agreement, stated that if there is a subsequent amendment to the Bankruptcy and Insolvency Act (BIA) regarding "changes the current, relative priorities of the claims against Nortel, no party is precluded by this Settlement Agreement from arguing the applicability" of that amendment to the claims ceded in this Agreement. He agreed with the Noteholders and other interested parties in their assertion that the No Preclusion Clause caused the Settlement Agreement to not be a "settlement" in the true and proper sense of that term due to a lack of certainty and finality. The No Preclusion Clause had the effect of undercutting the essential compromises of the Settlement Agreement in imposing an unfair risk on the non-employee creditors, after substantial consideration has been paid to the employees.

The Court concluded that the inclusion of the No Preclusion Clause "creates, rather than eliminates, uncertainty. It creates the potential for a fundamental alteration of the Settlement Agreement." For that reason, the Court did not approve the Settlement Agreement in the first motion.

In the subsequent decision *Nortel Networks Corp. (Re),*[20] Justice Morawetz heard the motion to approve the Amended and Restated Settlement Agreement, dated March 30, 2010, entered into by the Settlement Parties. The Amended and Restated Settlement Agreement was identical to the Settlement Agreement, except that No Preclusion Clause was deleted and the schedules to the Settlement Agreement have been updated to account for the deletion of No Preclusion Clause.

The Opposing LTD Employees challenged the Amended and Restated Settlement Agreement, requesting the continuation of benefits for 60 days, and court-ordered mediation, or alternatively, that the Amended and Restated Settlement Agreement not be approved. Justice Morawetz concluded that absent approval of the Amended and Restated Settlement Agreement, the Former

[20] [2010] O.J. No. 1408, 2010 ONSC 1977.

and LTD Employees face cessation of benefits, or at best, uncertainty. He stated that the very existence of the Amended and Restated Settlement Agreement indicated that effective remediation had occurred and that although the Amended and Restated Settlement Agreement is not perfect, under the circumstances, "it balances competing interests of all stakeholders and represents a fair and reasonable compromise, and accordingly, it is appropriate to approve same."

The Opposing LTD Employees appealed this decision and were denied leave by the Ontario Court of Appeal on June 3, 2010. The Court of Appeal wrote that the Opposing LTD Employees did not demonstrate that they were subjected to any procedural unfairness nor were they able to demonstrate that there was any substantive unfairness in the settlement. The settlement was found to be reasonable.

12. *Professional Institute of the Public Service of Canada et al v. Attorney General for Canada*

The Ontario Court of Appeal decision in *Professional Institute of the Public Service of Canada et al v. Attorney General for Canada*[21] concerns the federal government's role as an employer providing pensions for its employees through several statutes – the *Public Service Superannuation Act* (PSSA), the *Canadian Forces Superannuation Act* (CFSA), and the *Royal Canadian Mounted Police Superannuation Act* (RCMPSA). The Plan set out by the PSSA is a defined benefit pension plan, and participation in the Plan is mandatory for all eligible employees.

Amounts collected for the Plans were required to be deposited into the Consolidated Revenue Fund (CRF), with the amount of those contributions reflected as a credit in the appropriate Superannuation Account. In the 1990's, there was an actuarial surplus in the Superannuation Accounts. In 2000, the *Public Sector Pension Investment Board Act* (Bill C-78) came into force, which made significant changes to the PSSA and the Plans themselves. The legislation included a provision that required the Minister to "debit any amount that exceeds 110 per cent of the amount estimated to be required to meet the cost of benefits payable." Between 2001 and 2004, the Government removed over $28 billion from the Superannuation Accounts in accordance with Bill C-78. The appellants contended that these funds were improperly withdrawn from the Plan, and brought an action to have them returned to the Plan. The action was dismissed at trial.

The Court considered five distinct issues, all related to the over-arching issue of whether the Government, in its role as an employer, may withdraw surplus funds from the pension plans it provides for its employees. The appellants alleged that the trial judge erred in five ways, by determining that:

1. there were no assets in the Superannuation Accounts;

2. the PSSA constitutes a complete code;

3. the plan members' interest in the Superannuation Accounts was not protected by a fiduciary duty;

[21] 2010 ONCA 657 (C.A.).

4. the plan members' interest in the Superannuation Accounts was not protected by a constructive trust; and

5. Bill C-78 extinguished the plan members' interest in the surplus.

The first issue that the Court considered was whether the Superannuation Accounts contained assets. The appellants raised this issue on the grounds that the funds held were, "if fact, borrowed by the Government," as a means of proving their entitlement to the funds. The Court determined that that the answer to that question was no, on the grounds that the Superannuation Accounts were, "in essence… legislated legers" that were only for information or bookkeeping purposes. Further, the monies in the CRF were found to be "public monies to be used by the Government for public purposes."

The second issue to be decided was whether the PSSA formed a complete code. The trial judge held that it was, and this issue was disputed by the appellants. The Court of Appeal disagreed with the trial judge, stating that prior to the enactment of Bill C-78 in 2000, the PSSA was not a complete code on account of the fact that it did not deal with the parties' rights and obligations with respect to the actuarial surplus. As a consequence of the PSSA not being a complete code, the appellants contended that their equitable rights should prevail with respect to the surplus. The Court of Appeal disputed this, questioning whether the appellants even had equitable rights in that respect, stating "there is nothing in the PSSA to suggest that the plan members are entitled to anything more than their promised pension benefits." The Court concluded its analysis of this issue by noting that if the plan members had any rights to the surplus, they did not flow from the PSSA, nor from the employment relationship; they would have to flow from the Government's role as plan administrator.

The third issue raised by the Court was whether the Plan members' interests were protected by a fiduciary duty. The Court first examined the law of equity requirements for a fiduciary relationship, and concluded that the first requirement, the "scope for the exercise of power or discretion over the property of another" was not present. Although the Government had the ability to exercise discretion over the funds, through their decision to amortize the surplus, they did not control the contributions, which were the property of the plan members, due to the fact that the contributions were deposited into the CRF and became public funds. In addition, the Court noted that "there is nothing in the language of the [PSSA]… that requires the Government to act solely for the benefit, or in the best interest, of the members of the Plans."

The Court of Appeal considered whether a constructive trust was available. The appellants submitted that a constructive trust should be ordered either on the grounds of good conscience or because the Government was unjustly enriched by its use of the surplus assets. The Court failed to accept either of these arguments, determining that the government was not under an equitable obligation to the plan members, and was acting in accordance with the requirements of Bill C-78 when it withdrew the surplus.

The decision concluded by asking whether Bill C-78 extinguished the plan members' interest in the surplus. The appellants submitted that the trial judge failed to properly apply the presumption that "the legislature does not intend to expropriate property interests, without compensation, except where the legislation uses express statutory language disclosing such an intent," and that C-78 does not explicitly disclose that intent. The Court of Appeal disagreed, noting that "the purpose and intent of enacting changes… through Bill C-78 was to authorize the

Government to debit amounts from the Superannuation Accounts that were in excess of its liabilities under the Plans."

Based on the above, the Court dismissed the appeals, having concluded that the Government did not improperly withdraw the surplus from the Plans.

13. *R. v. Christophe*

In a recent decision, an Ontario Provincial Court Judge, *R. v. Christophe,*[22] considered 15 alleged violations of the Federal Investment Rules (FIRs) and the Ontario *Pension Benefits Act* (PBA) by a joint labour management Board of Trustees and its Investment Committee. The Trustees are administrators of the Canadian Commercial Workers Industry Pension Plan Trust Fund (Plan), a multi-employer defined benefit pension plan with assets of $1.1 billion. The Financial Services Commission of Ontario (FSCO) conducted a review of the Plan and as a result, chose to prosecute on alleged non-compliance with the PBA.

The Court considered the following alleged charges by the Trustees:

1. The requirement that the pension plan administrator prudently invest and administer the pension plan funds in respect of a specific private equity or mortgage investments;

2. The obligation of the administrator not to advance or invest funds contrary to the quantitative limits rule contained in the PBA; and

3. The duty to properly supervise the members of the Investment Committee.

The accused were acquitted of all counts relating to the prudent person standard, including the requirement to supervise prudent investment decisions due to a lack of expert evidence; however, the Committee was found guilty of the quantitative limits offence. Specifically, the Court found that the Trustees had breached the "10% Rule" limiting the investment of 10% of the total book value of the plan's assets in (a) any one person; (b) two or more associated persons; or (c) two or more affiliated corporations. The Trustees were found guilty for failing to supervise their own Investment Committee with respect to the quantitative limits requirements.

The first set of alleged charges relates to the requirement in section 22(1) of the PBA that a pension plan administrator prudently invest and administer the pension plan funds; these charges were ultimately dismissed. The Court considered whether the Crown had presented enough evidence to determine whether the defendants had breached the standard of care of a prudent person in four specific transactions. The investments all involved loans on private equity mortgages which were in default, and the actions of the trustees in attempting to deal with those investments after the defaults occurred. The Crown relied only on its interpretation of documents that were put into evidence by agreement of the parties. No witnesses were called to testify about the investments by either party at the trial.

The Court concluded that an expert would have assisted in determining the conduct of a prudent fiduciary in particular situations. Due to the complex and industry-specific concepts involved,

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[22] 2009 ONCJ 586.

the Court also found that expert evidence was required to explain many of the issues and terms of art that appeared in the materials filed with the Court, and to provide to the Court information on current pension industry standards regarding investments of pension funds in various business enterprises. Accordingly, the Crown failed to prove, beyond a reasonable doubt, that the investments were imprudent and contrary to section 22. All but 2 of the 15 charges were dismissed.

The second group of charges considered the strict liability offences which require the prosecution to prove that the accused person is responsible for the action that caused the offence, and there is no need to prove any improper intent. Once the prosecution has proved that the accused is the responsible party, the accused has the opportunity to raise a defence of due diligence.

The Crown was required to prove beyond a reasonable doubt that funds were invested in amounts in excess of the 10% limit set out in Schedule III of the *Federal Investment Regulations*. The Court held that the administrator, for the purposes of the quantitative limits offence, was the same person in law as the administrator who made the decisions with respect to loans and investments for the pension plans. In this case, the Investment Committee held the delegated authority to make such decisions. The investments in question involved extending levels of loans in excess of the 10% limits to support certain commercial and hotel investments in the Caribbean. The Court also dismissed a defence based on exemptions in the FIRs for restricting cases, based on failure to obtain court approval to restructure.

The Crown contended that the Court should consider the investments at the level of the actual company, rather than at the level of the investment corporations in determining whether the quantitative limits were exceeded. The Court found that although loans were made to several property companies wholly owned by the Plan and deemed to be "investment corporations", the property companies all made loans to a single holding company. The Court accepted that as the purpose of the rule was to ensure adequate overall diversification, the 10% rule should apply at the level of the holding company. The Court concluded that the Investment Committee was unable to rely on a defence of due diligence because, although the defendants had hired an auditor to audit certain statements, there was no evidence that the auditors had been retained to monitor compliance with the quantitative limits rule, or that any of the steps taken by the defendants to divest or reduce the amount loaned or invested in the property companies were aimed at compliance with the rule.

Subsection 22(7) of the PBA requires an administrator of a pension plan who employs an agent to be prudent and reasonable in its supervision of such agents. The Court found that the Trustees must monitor and supervise their agents and that this responsibility exists even if the delegates are also Trustees. The Court found that individual members of the Board of Trustees can be personally charged for breach of the section 22(7) PBA duty and under the general offence provision of section 109 of the PBA, making applicable the penalties provisions in section 110, which can result in significant fines upon a finding of guilt.

The Court noted at that the overall duty to supervise pursuant to section 22(7) of the PBA encompasses both prudence of decision-making and compliance with quantitative limits requirements: "The duty to supervise in relation to the duty to make prudent investment decisions pursuant to section 22(1) of the *Pensions Benefits Act* is separate and apart from the

additional duty to supervise in relation to compliance with the quantitative limits requirements for the pension plan."

The Court stated at that "[i]n essence the administrator has a duty to personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed." The Court did not find fault with the selection of the members of the Investment Committee.

Trustees were found to have "the authority to delegate the authority to make decisions regarding investments" and did delegate that authority, but were required to carry out supervision of the agent "as is prudent and reasonable". The Court outlined the requirement for the supervision as "prudent and reasonable" which it said clearly imports a factual context for the Court's consideration:

> …Presumably, the degree of supervision could potentially vary with the knowledge of the members of the Board of Trustees as it would relate to the skill, education and experience of the persons who were members of the Investment Committee. For instance, to the extent that less experienced persons were delegated that authority, arguably more supervision would be required. … This court finds that at least a basic level of supervision is required, given the high fiduciary duty operating to protect the interests of the pension plan members. …. it would be speculation for the court to find that simply because a person serves on a committee or board for a long time that they were particularly knowledgeable or had special expertise for that function.

The Court specified that the duty to supervise in relation to the specific 10% limit requirement could be addressed by systems that tracked the funds, and could easily be put into a financial statement.

In alleging that the Trustees failed to adequately supervise the Investment Committee, the Crown relied on "minutes which reflect the degree of reporting, or information to support decision making", arguing that the information was "by and large inadequate, and after the fact." The Court agreed with the Crown that the Investment Committee could have been required to keep records and make presentations to keep the Trustees advised and informed more frequently. In addition, there was no evidence that the Board of Trustees had requested such information from the Investment Committee. Further, the Board of Trustees did not ask the auditor to comment on the quantitative investment limits despite having retained an auditor for the Plan.

The Court held that the only inference that could be drawn from the evidence was that the Board "failed to supervise [the Investment Committee] with respect to the quantitative limits." Each Trustee was found guilty for the breach of supervisory duties contained in section 22(7) of the PBA.

The Court subsequently fined the trustees a total of $202,500. The nine Trustees received penalties of $18,000 each plus victim surcharges of $4,500 each for breaching the Act.

14. *Re Indalex Ltd.*

In its February 2010 release of *Re Indalex Ltd.,*[23] the Ontario Superior Court of Justice addressed the application of Ontario's *Pension Benefits Act* (PBA) deemed trust provisions in the context of a company's insolvency proceedings under the *Companies' Creditors Arrangement Act* (CCAA).

Indalex Ltd., along with several of its related Canadian entities, (Indalex) was granted protection from its creditors under the CCAA on April 3, 2009. Several months later, in July 2009, the company was before the Court for an approval of the sale of Indalex's assets. Some important issues surrounding the company's various registered pension plans were raised at the motion for approval of the sale transaction due to the fact that the purchaser did not acquire the obligations of the company's registered pension plans. This fact was a cause of concern for some of the company's employees and retirees.

At the July 2009 motion, two employee groups, the Former Executives and the United Steel Workers' Union (USW) asserted their positions with respect to the deemed trust provisions of the PBA. The effect of a successful deemed trust assertion would be to provide these employee groups with certain priority over other creditors for amounts representing the underfunded pension liabilities of the company's registered pension plans.

In its approval of the asset sale transaction, the Court directed the court-appointed Monitor to retain a reserve amount, and in particular, directed that this reserve be sufficient to cover the estimated $6.75 million combined deficiency in the pension plans, pending the resolution of the pension-related issues. The motion to deal with the deemed trust pension issues was scheduled to be heard on an expedited basis.

At the deemed trust motion, the company took the position that there were no amounts currently due or owing to the Executive Plan. The company introduced evidence which indicated that the company had made all required contributions, both current service and special payments, at the date of the sale. Indalex had made special payments into the Executive Plan of approximately $897,000 in 2008 and there were no further payments that were due to be made into the plan until 2011.

With respect to the Salaried Plan, the company took the position all pension payments required under obligation to Indalex employees, both statutory and contractual, were met. While the company still had the obligation to make special payments in the future, those that had become due had been made.

The Executive Plan was significantly underfunded. As at the last actuarial valuation date, January 1, 2008, it was estimated that the Executive Plan had a deficit in excess of $2.9 million on a wind up basis. As equity markets had recently deteriorated, it was possible that the fund may have further depleted since the last valuation. No pensions had accrued since the effective wind up date of December 31, 2006. Indalex had been making its required special payments into the Salaried Plan. As of December 31, 2008, the Salaried Plan was still in deficit, with the last scheduled special payment to be made on December 31, 2009.

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[23] 2010 ONSC 1114.

The main issue before the Court was the proper application of sections 57 and 75 of the PBA, along with some underlying Regulations, which are the provisions that apply in Ontario in a wind up scenario. In this case, the Court was required to determine whether the amounts being asserted as the subject of deemed trusts were appropriately within the realm of amounts offered such protection by the pension legislation.

With respect to the Executive Plan, the Court's finding was straightforward. As of July 20, 2009, the date of sale of Indalex assets, the Executive Plan had not been wound up and the Court held that there were no deficiencies in payments required by law under the Executive Plan. As the plan was not yet wound up, section 57(4) of the PBA was not applicable, and there were no amounts due under section 57(3). Therefore, there was no basis for a deemed trust of any amount in respect of the Executive Plan.

After an examination of the facts underlying the Salaried Plan deemed trust assertion, the Court arrived at the same conclusion: there was no deemed trust. As of the date of the closing and transfer of assets there were no amounts that were "due" or "accruing due", as all amounts due in accordance with the PBA and its Regulations had been remitted on time. The next annual payment that would have become payable was for December 31, 2009. It was held that Indalex had no obligation under the PBA or the Regulations to pay any amount into the Salaried Plan and as such, no deemed trust arose.

On May 20, 2010, the Ontario Court of Appeal granted leave to appeal the Court's decision in Indalex, which is scheduled to be heard this fall.

15. *Residential Painting Contractors Association v. Superintendent of Financial Services*

Residential Painting Contractors Association v. Superintendent of Financial Services et al.,[24] involved a preliminary motion regarding the jurisdiction of the Ontario Financial Services Tribunal (Tribunal) to hear an application commenced by a party aggrieved by the registration of an amendment to a trust agreement. The moving parties sought an order of the Tribunal declining jurisdiction to hear the matter, as the amendment in question related to a trust agreement, and not to a pension plan. The Tribunal dismissed the motion, holding that, on a functional approach to the *Pension Benefits Act* (PBA), the term "pension plan" should be given a broad interpretation, which should include a trust agreement supporting a multi-employer pension plan (MEPP).

In a Notice of Proposal issued on May 26 2008, the Superintendent proposed to deregister the International Union of Painters and Allied Trades, Province of Ontario Pension Plan for failing to comply with the provisions of section 8(1)(e) of the PBA, which requires the Board of Trustees of a MEPP to consist of at least one-half of representatives of Plan members. In response, the Administrator amended the trust agreement to reconstitute the Board of Trustees in accordance with the PBA. The amendment gave all parties to the original trust agreement the right to appoint a specified number of trustees, with the exception of the Residential Painting Contractors' Association (RPCA), a sponsor of the Plan and the applicant in this matter.

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[24] February 25, 2010, Tribunal File No. P0411-2009.

On November 25, 2008, the Administrator filed an application for registration of a pension plan amendment in respect of the foregoing amending resolution. On May 20, 2009, the Superintendent issued a Notice of Registration accepting the amendment. The RPCA subsequently filed a Request for Hearing in respect of the registration of the amendment. In response, the Plan Administrator brought its preliminary jurisdictional motion arguing that the Tribunal does not have the authority to adjudicate issues related to trust agreements.

The position of the Administrator was that in order for a right to a hearing before Tribunal to be triggered, the decision being appealed by the Superintendent must have been within the Superintendent's authority to make at first instance. The Administrator argued that notwithstanding the application for registration of the amendment to the Superintendent in this case, the Superintendent is not required, and in fact has no authority, to register an amendment to a trust agreement under section 12(1) of the PBA. This argument was premised on the distinctions throughout the PBA between the use of the term "trust agreement," on the one hand, and "pension plan" on the other. Although amendments to a trust agreement and other documents supporting a pension plan or pension fund must be *filed* with the Superintendent pursuant to subsection 12(3) of the PBA, *registration* of amendments to a *trust agreement* are not contemplated in section 12(1) of the PBA (which requires amendments to a *pension plan* to be registered with the Superintendent). Given that the registration was in effect a nullity, the Administrator asserted, the Tribunal should not have authority to hear the matter.

The motion was opposed by the RPCA, the Superintendent, and the Architectural Glass and Metal Contractors' Association (AGMCA). The Superintendent argued that the interpretation of the term "pension plan" suggested by the Board of Trustees was overly narrow, and that a functional and substantive approach to the meaning of the term "pension plan" under the PBA was warranted. Applying such an approach to the definition of the term "pension plan," according to the Superintendent, would permit the Tribunal to find that the term included trust agreements supporting a pension plan.

The Tribunal rejected the Administrator's motion on two grounds. First, because the amendment was *de facto* registered as an amendment to a pension plan, RCPA had a *prima facie* right to challenge the registration. Second, the Tribunal held that an amendment to the trust agreement constituted an amendment to a "pension plan," as that term is defined under the PBA. In so holding, the Tribunal endorsed a functional approach in interpreting the definition "pension plan" in the PBA. Under such an approach, the focus of the analysis is "not on the name of the document, but on the function it performs as part of a 'plan. . . .'"

The Tribunal also held that the requirement under section 9 of the PBA that an administrator file a large number of documents with the Superintendent at the time the plan is initially registered (including trust agreements) should be read consistently with section 12(1), and that "[t]here would be little logic to making the requirement to register amendments any narrower than the original requirement to register the 'pension plan.'" Accordingly, the Tribunal held that the term "pension plan" includes, at least in the case of a MEPP, the trust agreement pursuant to which the plan is established.

1. *Sutherland v. Hudson's Bay Co.*

In *Sutherland v. Hudson's Bay Co.,*[25] Justice Cullity of the Ontario Superior Court of Justice held that, pursuant to Rules 10.01(3) and 10.01(4) of the *Rules of Civil Procedure* (*Rules*), an agreement between pension plan members and an employer in settlement of a claim for breach of the employer's fiduciary duties could bind other interested persons notwithstanding that they were not parties to the agreement. Justice Cullity reached this determination after considering, *inter alia*, whether the proposed settlement could be said to be for the benefit of the interested non-parties. He further held that as all potentially interested parties were considered bound by the settlement agreement, any objection to the proposed use of plan assets to satisfy the employer's liability was deemed to have been waived.

The plaintiff plan members brought a class proceeding to invalidate amendments of their employer's pension plan. The Plan (now known as the Dumai Pension Plan) had originally been established as a defined benefit pension plan for employees of Simpsons Limited. The plaintiffs argued that amendments to the plan were invalid to the extent that they permitted employees of Zellers Ltd. and K-Mart Ltd. to participate in it on a defined contribution basis. The plaintiffs further argued that the defined benefit component of the Plan was impressed with a trust for the class members and that the employer, Hudson's Bay Company (HBC), committed a breach of trust in utilising surplus of the Plan to satisfy its funding obligations with respect to the Zellers and K-Mart employees. The class members claimed $76 million of damages that they argued should be paid to class members.

These arguments were rejected at trial. The parties reached a settlement agreement which provided for HBC to provide $8.5 million of the assets of the Dumai Plan to be distributed for the benefit of class members and their estates after payment of legal fees, disbursements, taxes, and the levy to the Law Foundation of Ontario. The appeals were adjourned *sine die* pending approval of the settlement pursuant to section 29 of the *Class Proceedings Act*.

In approving the settlement, Justice Cullity applied the established and recognized test for determining settlement approval. The Court found that the settlement was reasonable despite the difference between the amount of the original damages claim and the settlement amount. Specifically, there was a real risk that the plaintiffs' appeal would not succeed – there did not appear to be any errors of law or other palpable and overriding errors in the trial judge's judgment, and recent Supreme Court and Ontario Court of Appeal decisions rendered after the trial lent further support to the employer's position.

While ultimately finding that the proposed settlement satisfied the test, the Court raised two principal concerns. The first concerned the fact that the settlement was only binding as between the parties to the agreement – the class members, the employer and two trust companies – despite a number of other interested persons; namely, the Zellers and K-Mart plan participants. The second related to the use of Plan funds to settle a claim against the employer.

Persons interested in the Dumai Plan other than the class members were added to the proceeding as individual defendants. Yet the individual defendants who represented Zellers, K-Mart and

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[25] 2009 CarswellOnt 4936.

Hudson's Bay Participants (other than the class members) pursuant to representation orders under Rule 10.01(1) were not named as parties to the settlement and so would not be bound by it. According to Justice Cullity, any one of such persons would be entitled, subsequent to settlement approval, to object to the payment of funds to the class members. A settlement that did not bind the individual defendants could not be "fair, reasonable and in the interests of the class."

Pursuant to Rules 10.01(3) and 10.01(4), however, the settlement could be made binding on the other interested parties provided that (a) their representatives assented to the proposed settlement and (b) the interested persons benefited from it.

While no request for such an order was made by the parties to the settlement, Justice Cullity applied the relevant test and determined that both requirements had been satisfied. First, as communicated through their counsel, the Zellers, K-Mart and Hudson's Bay Participants assented to the settlement. Second, the settlement would remove any uncertainty with respect to the status of the represented persons as Plan beneficiaries and their entitlement to have Plan surplus distributed when the Plan was wound-up or used to secure further funding obligations while the Plan was ongoing. The Supreme Court's decision in *Nolan v. Kerry*[26] which was handed down after request for approval of the settlement was made was held not to alter either factor. The decision, while helpful to the defendants' position, did not alter it enough to justify a withdrawal of the assents, or a finding that the settlement was not for the benefit of the represented persons. Rather, the settlement continued to constitute "a reasonable *quid pro quo*" for the preservation of the findings of the trial judge in favour of the represented persons.

Justice Cullity's second concern related the use of Plan funds to settle the plaintiffs' claims against HBC for its alleged breach of fiduciary duty. A plan administrator cannot, without breaching its fiduciary duties, divert trust funds to satisfy a personal liability. The use of pension trust assets to purchase a release of claims for damages was held to be equally improper.

Counsel for the plaintiffs and HBC submitted that amending the terms of the Plan to give effect to the settlement was indistinguishable from any other case in which an employer obtained "collateral" advantages by enhancing benefits. This submission was rejected on the basis that there was a "significant distinction" between incidental benefits such as attracting and retaining employees or providing increased compensation without increasing wages, and the benefit obtained from a release of claims for damages in respect of the employer's wrongful conduct. Instead, the issue was resolved on the basis that, as the settlement was held to have been made on behalf of all potentially interested parties, any objection to the proposed use of the plan assets had, in effect, been waived.

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[26] 2009 SCC 39.

SASKATCHEWAN DECISIONS

2. *McNaughton v. Saskatchewan Government and General Employees' Union*

The Saskatchewan Court of Queen's Bench recently granted an interim injunction enjoining a pension plan administrator from increasing the rate of member contributions to a Retirement Benefit Plan from 19.6% to 54.25%.

In *McNaughton* v. *Saskatchewan Government and General Employees' Union,*[27] the Saskatchewan Government and General Employees' Union (SGEU) proposed a contribution rate increase to address a solvency deficiency revealed by a December 31, 2008 actuarial valuation. This increase was proposed in the context of a union staff plan that the union is was seeking consent of members to terminate. Members opposed the termination of their plan, and the proposed contribution increase was introduced.

Thirty-five employees and active members of the Plan opposed the increase on the basis that it had not been, and almost certainly would not be, approved by the Saskatchewan Pension Division and the Canada Revenue Agency (CRA) as required by the Plan text and the *Income Tax Act*. The Plan members brought an application for interim injunction to prevent the increase unless and until the SGEU obtained the written approval of the CRA or satisfactorily demonstrated that it was reasonable to expect such approval would be obtained.

In determining whether to grant the application for interim injunction, the Court applied a more onerous version of the three part test established in *RJR-MacDonald Inc*. v. *Canada (Attorney General*):[28]

(1) Has the applicant demonstrated a strong prima facie case?

(2) Will the applicant suffer irreparable harm that cannot be compensated by money damages if the applicant succeeds at trial and if the injunction does not issue?

(3) Does the balance of convenience favour granting the injunction?

The applicants satisfied all three elements of the test. First, given that the rate increases had not been approved by the CRA and were not likely to be approved in the future, the applicants had established a "strong *prima facie* case" that the Plan had not been administered in accordance with the Plan text. The Plan text provided that rate increases were subject to CRA approval. While section 147.1(15) of the *Income Tax Act* contemplated that increases could be implemented prior to approval being received, the exact wording of the provision provided that this could only be done where it was "reasonable to expect the Minister to accept the amendment." It was clearly not reasonable to expect the Minister to approve the increase. In an affidavit sworn in a related proceeding, the SGEU itself acknowledged that the contribution rate was "unrealistic" and "unsustainable". Further, on December 23, 2009, the CRA informed a lawyer in the firm representing the SGEU that it was not likely to approve the increased contributions.

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[27] Q.B.G. No. 1943/2009; 2010 SKQB 5 (Q.B.).
[28] [1995] 3 S.C.R. 199.

Second, the "impossible financial situations" that Plan members would be placed in if the Court failed to grant the injunction satisfied the "irreparable harm" requirement. A significant number of Plan members would not be able to afford increased salary deductions and would be forced to resign and seek employment elsewhere. In fact, the evidence suggested that this was an intended consequence of the rate increase. Specifically, in an attempt to force Plan members to terminate the Plan, the SGEU chose to file its actuarial report on December 31, 2008 – the lowest point of a historic downturn in financial markets – and then insisted that the resulting solvency deficiency be addressed immediately by special payments. This left Plan members with three options: (1) accept increased member contributions of 54.25%; (2) quit their employment; or (3) agree to terminate the Plan. The "irreparable harm" to the Plan members was exacerbated because unless and until the increased contributions were approved by the CRA no amount over 17.3% could be deducted in computing the income of the Participants.

Finally, the applicants established that the harm to individual Plan members caused by a potential increase in contribution rates for an indefinite period of time would far exceed the inconvenience to the SGEU if it were required to wait for a decision to be made by the CRA. While counsel for the SGEU submitted that the time frame for receiving a decision from the CRA was uncertain, other evidence suggested that the CRA had considered the increased contributions and was expected to make a decision sometime in late January or February 2010. The balance of convenience thus favoured the Plan members.

ALBERTA DECISIONS

3. *Halliburton Group Canada Inc. v. Alberta*

In *Halliburton Group Canada Inc. v. Alberta,*[29] the Court of Queen's Bench of Alberta considered an application for review of the decision by the Alberta Superintendent of Pensions. In upholding the Superintendent's decision, the Court found that the appropriate standard of review was reasonableness and that the Superintendent's decision should be treated with deference. The Court's decision indicates that an employer dealing with a plan conversion cannot retroactively reduce a member's benefit by excluding earnings for services accrued after a conversion.

In 1999, the Halliburton Group Canada Inc. (Halliburton) began sponsoring and administering the Halliburton Group Canada Inc. Retirement Income Plan. Through an amendment to the Plan in 1998, a defined contribution component was included that only applied to a limited group of members. Amendment 6 was intended "to preserve benefits that had accrued under the [defined benefit] provisions of the Plan prior to Amendment 6 while at the same time freezing the earnings and service of [defined benefit] Plan members at the time they transferred to the [defined contribution] provisions of the Plan for the purposes of calculating a final [defined benefit] pension amount at retirement."

In 2001, Amendment 7 required all active defined benefit Plan members to join the defined contribution portion of the Plan. As of January 1, 2002, both Halliburton and 17 members stopped remitting contributions to the defined benefit portion of the plan. However, these 17

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[29] 2009 ABQB 420 (Q.B.).

members (Affected Members) were specifically not subject to the freeze provisions of Amendment 6.

In 2004, a draft of a third amendment to the Plan, referred to as Amendment 9, was submitted to Alberta Finance and Enterprise. In March 2005, Alberta Finance rejected the draft amendment based on one paragraph (paragraph 17) of the amendment. It argued that this paragraph constituted a retroactive reduction of benefits, which contravenes section 81 of the Alberta *Employment Pension Plans Act* (EPPA). This is the case since paragraph 17 redefined "Best Average Compensation" to include the highest 36 months of compensation while under the defined benefit portion of the Plan, while excluding any benefits accrued during the defined contribution portion of the Plan. According to the Superintendent, paragraph 17 would, in effect, apply the freeze provisions from Amendment 6 to the Affected Members who were previously not subject to that Amendment.

Consequently, on June 2006, Amendment 9 was re-filed with the exclusion of paragraph 17. Alberta Finance registered Amendment 9 in January 2007, but also excluded paragraph 20, which attempted to freeze the dollar limit for the Plan at $1,722.22, rather than allow the plan to fluctuate in accordance with Revenue Rules.

The Superintendent issued an Initial Direction and a Revised Direction based on its finding that Halliburton contravened section 81 of the EPPA by implementing certain amendments to the Plan. Subsequently, Halliburton sought an Order requiring the Superintendent to register paragraph 17 and paragraph 20 of the registered Amendment 9, on the basis that these paragraphs do not contravene the EPPA. Further, Halliburton claimed it would suffer losses if forced to comply with the directions of the Superintendent.

The Court found that the appropriate standard of review for the Superintendent's decision was reasonableness and therefore, the Superintendent's decision should be treated with deference. Further, the Court found it reasonable to use letters from the Office of the Superintendent to assess the reasonableness of the Superintendent's decision.

Specifically, the Court relied on a letter dated November 27, 2006, where the Office of the Superintendent agreed with Halliburton that the length of service under the defined benefit portion of the plan was frozen as a result of Amendments 6 and 7 of the Plan. However, the letter also stated that it did "not agree that the salary attributable to the length of service was frozen." Essentially, the amendments only determined the length of service of the defined benefit Plan, but the attributed salary that is to be used in calculating the benefit was not frozen and it is, in fact, essential to include such earnings for the Plan's defined benefit formula. The defined benefit should be calculated on the basis of the highest salary for a consecutive 5 years out of their last 10 years of employment. The Court agreed with the Superintendents finding that to not do so would result in a retroactive reduction of benefits.

In response to whether the Superintendent has the authority to revoke all or a portion of a previously registered plan amendment after it has been duly registered, the Court concluded that the Superintendent has broad statutory powers with respect to the direction that can be issued.

BRITISH COLUMBIA DECISIONS

4. *Withler and Fitzsimonds v. Attorney General of Canada*

The Supreme Court of Canada has given leave to appeal in *Withler and Fitzsimonds v. Attorney General of Canada*,[30] a class proceeding that challenges the constitutionality of section 47(1) of the *Public Service Superannuation Act* (PSSA), and section 66(1) of the *Canadian Forces Superannuation Act* (CFSA), on the ground that those sections and their companion regulations constitute age discrimination under section 15 of the *Canadian Charter of Rights and Freedoms* (*Charter*).

Section 47(1) of the PSSA provides a supplementary death benefit payment of twice the salary of the participant upon his or her death, "subject to a reduction of ten per cent, to be made as of the time that the regulations prescribe, for every year of age in excess of sixty-five attained by the participant." A similar provision is included in section 60(1) of the CFSA, except that the reduction commences at age 60.

The purposes of the supplementary death benefit are to provide an income replacement to younger recipients, who have not yet sufficiently built up benefits under the plans, and to provide a subsidy to older recipients who may face late-in-life costs associated with, for example, the death of a spouse (but not necessarily to be income replacement at that time). Perhaps for that reason, the provisions in the impugned legislation stipulated a decreasing death benefit dependent upon the age of the participant in the plan at his or her death (Reduction Provisions). These Reduction Provisions were the subject of the constitutional challenge.

The constitutional challenge was based on section 15 of the *Charter* which provides for equality under the law. The appellants argued before the British Columbia Court of Appeal that the Reduction Provisions are discriminatory on the basis of age. The appellants are the surviving spouses of those entitled to a supplementary death benefit payment which was reduced on account of the age of their spouse at the time of death.

There were two primary issues at the trial level: whether the plaintiffs had standing to bring a claim, and whether there was a violation of section 15 of the *Charter*. The trial judge found that the portion of the legislation containing the Reduction Provisions was specifically targeted at the surviving spouses, and was intended to affect their rights. The trial judge went on to clarify that this was not a claim based on "association" but on a right of the plaintiff under the impugned legislation.

In addressing whether there was a violation of the *Charter*, the trial judge applied in *Law v. Canada (Minister of Employment and Immigration).*[31] The trial judge held that the plaintiffs failed to prove that the elderly suffer from stereotyping, prejudice, or vulnerability based on their reduced income. The trial judge concluded by funding that the Reduction Provisions are not discriminatory, as they "[do] not bear any of the hallmarks of discrimination as set out in the *Law v. Canada* analysis." The Court also found that it is "within the prerogative of Parliament to

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[30] 2008 BCCA 539, leave to appeal granted [2009] S.C.C.A. No. 68.
[31] [1999] 1 S.C.R. 497.

enact legislation that incorporated a plan of life insurance with the usual hallmarks of employee group insurance taking into account the competing interests of the various age groups and the public interest."

The Court of Appeal reversed the trial judge on certain issues. The Court of Appeal agreed with the finding on standing, but it disagreed with the "comparator group" and found the Reduction Provisions to be a breach of section 15 of the *Charter*. It held that the more precisely defined comparator group was "all civil servants and members of the armed forces who received a full supplementary death benefit, not reduced on the basis of age, and who are eligible for a survivor's pension." This would have the effect of capturing the dual purposes of the benefits, income replacement for younger recipients without survivor benefits, and payment of costs associated with death of the participant for older recipients with survivor benefits.

When the comparator group is changed, the analysis of the other elements also changes. The Court of Appeal concluded that the "legislative distinction violates the essential human dignity of surviving spouses whose supplementary death benefit has been reduced on the basis of the age of their spouses at death. This amounts to substantive discrimination." The biggest concern was with the fact that the Reduction Provisions are premised on the assumption that older surviving spouses can readily draw on their pensions with little or no consequence, but by requiring surviving spouses to use their pensions to compensate for receiving a reduced death benefit, the law exacerbates their income vulnerability, which is the very harm against which survivor's pensions are meant to protect.

The Court of Appeal then considered whether section 1 of the *Charter* justified the contravention. The Court of Appeal concluded that the Reduction Provisions were not justified in the circumstances, noting in part that other alternatives were less harmful and that the limited resources of the Government "was in question" in light of a large accumulated surplus in the plans.

FEDERAL DECISIONS

5. *Vilven v. Air Canada*

Air Canada pilots have long been required to retire at age 60. This provision was challenged by two pilots, who succeeded before the Canadian Human Rights Tribunal (Tribunal). In *Vilven v. Air Canada,*[32] the complainant was a pilot forced to retire upon turning age 60. The complaint was initially dismissed by the Tribunal and subsequently judicially reviewed by the Federal Court. The Court held that the Tribunal erred in not finding exemptions in the *Canadian Human Rights Act* (CHRA) permitting mandatory retirement to be unconstitutional.

The issues before the Tribunal were whether section 1 of the *Canadian Charter of Rights and Freedoms* (*Charter*) justified retaining the exemption for mandatory retirement, and if not, whether the mandatory retirement provisions of the collective agreement were bona fide occupational requirements. Earlier case law had confirmed that mandatory retirement was still justified.

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[32] 2009 CHRT 24.

The question of whether legislative provisions permitting mandatory retirement are justifiable under section 1 of the *Charter* was considered 20 years ago by the Supreme Court of Canada in *McKinney v. University of Guelph*.[33] The Supreme Court held that a section of the Ontario *Human Rights Code*, which limited to protection to those between 18 and 65, violated section 15 of the *Charter*, but was saved under section 1. However, the Tribunal found that recent jurisprudence has indicated "that the social and economic context in which the *McKinney* decision was rendered has changed sufficiently to render the majority's decision with respect to section 1 of the *Charter* inapplicable to present day circumstances." As a result, a present-day contextual analysis was necessary for the Tribunal to make its determination with regard to whether 15(1)(c) was a reasonable limit on individuals' *Charter* rights.

A flaw noted by the Tribunal is that the CHRA assumes that the normal age of retirement will be the subject of negotiation. However, there is no requirement in the legislation that the arrangement be negotiated.

The Tribunal concluded that while section 15(1)(c) of the CHRA provides a powerful bargaining chip to unions and employees, the benefit is disproportionate to the harm done to individuals and to equality as it allows employers to discriminate on the basis of age so long as that discrimination is "pervasive in the industry." This discrimination is emphasized in an industry like the airlines where one employer is able to set the industry standard.

Having held that section 15(1)(c) is not a reasonable limit on equality rights and therefore not saved under section 1 of the *Charter,* the Tribunal had to consider whether the collective agreement in question is a "bona fide occupational requirement" under sections 15(1)(a) and 15(2) of the CHRA. The Tribunal clarified that in order for the retirement policy to be saved under sections 15(1)(a) and 15(2), Air Canada had to satisfy three criteria:

> First, that the mandatory retirement provision was adopted for a purpose that is rationally connected to the performance of the job. Secondly, this provision was adopted in the honest and good faith belief that it was necessary to the fulfillment of a legitimate work related purpose. And third, that the provision is reasonable necessary to the accomplishment of that legitimate work-related purpose. In this regard it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer or the union.

The Tribunal noted that the most contentious of the criteria was the third provision, as Air Canada argued that due to international aviation standards it would cause undue hardship not to have a mandatory retirement policy for pilots at 60 years of age. The Tribunal found that both the union and the employer failed to provide adequate evidence that accommodating the individuals would cause undue hardship. The Tribunal reviewed the submissions of expert witnesses of both Air Canada and the complainants, and appeared to prefer the complainants' expert witness. Air Canada argued primarily that accommodation would create significant internal restructuring, both displacing the rights of others and not easily being accommodated in the form and method of organizing their workforce. The Tribunal disagreed, and suggested pilots

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[33] [1990] 3 S.C.R. 229.

wishing to work past age 60 could be accommodated. The Tribunal suggested that pension benefits – which were also tied to age 60 as a normal retirement age – could accommodate those working past age 60 and still provide benefits to those who wish to retire at age 60 by the use of early retirement subsidies.

The Tribunal concluded that section 15(1)(C) of the CHRA could not be saved by section 1 of the *Charter* and that the Air Canada policy did not fall within the exception of the section 15(1)(a) and 15(2) of the CHRA.

There has been a tentative Memorandum of Agreement ("MOA") entered into which would see Mr. Vilven and the other pilot reinstated. However, in August 2010, a number of pilots who are members of the “Fly Past 60 Coalition” filed a lengthy complaint before the Canada Industrial Relations Board. The complaint alleges that Air Canada Pilots Association has engaged in a breach of its duty of fair representation to the complainants, by reason of failing to fairly represent them in their grievance with Air Canada in respect of their termination of employment. A decision is still pending.

LEGISLATIVE DEVELOPMENTS AND THE TOP 20 CASES OF 2008 - 2009

42nd ANNUAL CANADIAN EMPLOYEE BENEFITS CONFERENCE

November 23, 2009

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

Prepared by:
Mark Zigler and Michelle Landy-Shavim

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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.

Decision

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

Facts

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.

Facts

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.

Decision

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.

<u>Decision</u>

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

<u>Facts</u>

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.

<u>Decision</u>

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

Facts

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

Facts

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.