LEGISLATIVE DEVELOPMENTS AND THE TOP 20 CASES OF 2010 - 2011

44th ANNUAL CANADIAN EMPLOYEE BENEFITS CONFERENCE

September 11 - 14, 2011

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LEGISLATIVE DEVELOPMENTS AND COURTS AND TRIBUNALS

INTRODUCTION 2010 – 2011

The latter half of 2010 and first half of 2011 yielded further significant reform to pension legislation. Much of the legislative developments for pensions are still reacting to solvency funding problems.

Certain governments have looked beyond solvency funding issues to begin more serious pension reform. The Ontario government released the long awaited draft regulations related to the division of pensions on marriage breakdown. The Ontario government also gave royal assent to the second of two steps in their quest to reform pensions in response to the 2009 report by the Ontario Expert Commission on Pensions. At this time, however, we are still waiting for the regulations, as many of the proposed reforms are to be prescribed by regulation. It is not known when they will be released, only that it will not be before the fall 2011 election.

This was a slightly less demanding year on the courts, following last year's decisions in *Burke v. Hudson's Bay*. However, the upcoming year may see pension insolvency issues before the Supreme Court of Canada, if leave is granted in the *Re Indalex* case. The jurisprudence has seen an increasing amount of cases focused on issues of family property division, discrimination and details related to plan administration, such as the proper use of prescribed forms.

LEGISLATIVE HIGHLIGHTS

The primary legislative highlights across Canada have again focused on general pension reform. The most extensive legislative changes belong to Bill 120, *Securing Pension Benefits Now and for the Future Act, 2010*, which received royal assent in the late fall. While some provisions have been proclaimed, others are still awaiting proclamation, as many of the details concerning the reforms proposed by Bill 120 are to be prescribed by regulation, which have not been released.

Bill 120 amends the Ontario *Pension Benefits Act* with respect to funding requirements, types of pension plans and benefits, surplus entitlements, plan administration, and regulatory oversight and enforcement. Although not yet proclaimed, certain employers will be permitted to use letters of credit that do not exceed 15% of the plan's liabilities instead of making payments in respect of a solvency deficiency, provided that they meet specified requirements. Jointly sponsored pension plans that existed on August 24, 2010, may now amend their plan documents such that employers and members will no longer be required to make contributions in respect of solvency deficiencies. Plan administrators may now pay "reasonable" plan administration expenses incurred by from the plan fund unless such payment is prohibited or the payment of expenses "is otherwise provided for, under the documents that create and support" the plan or the fund.

Bill 120 provides for the creation of a new category of benefits called "target benefits". The proposed legislation will permit single employer and multi-employer pension plans (MEPPs) to offer "target benefits" provided that the statutory conditions for target benefits are satisfied. The conditions include that benefits must not be defined contribution benefits and the obligation of the employer to contribute to the pension fund must be limited to a fixed amount set out in one or more collective agreements. A further condition is that the administrator's authority to reduce benefits, deferred pensions and regular pensions is not restricted (by the pension plan and fund

documents, by collective agreement, or by applicable pension legislation) while the pension plan is ongoing or upon wind up.

With respect to surplus withdrawals, Bill 120 attempts to clarify Bill 236 amendments on the subject of wind up surpluses. A windup surplus may be paid to an employer if it has reached an agreement with the union, or if there is no union, two-thirds of the plan members, former members and other entitled persons that the Superintendent considers appropriate. A new arbitration provision can be triggered if the Superintendent does not consent to the payment of surplus to the employer within a prescribed period of time after the plan wind-up. An arbitration award prevails over the documents that create and support the pension plan and pension fund.

Under Bill 120, FSCO will gain certain new powers when new provisions are proclaimed, including a general authority to appoint a plan administrator or to act as administrator, in prescribed circumstances. Currently FSCO can only do so in the case of a plan wind-up. FSCO will also gain the power to extend the deadline for filing documents if the Superintendent is satisfied that there are reasonable grounds for doing so.

In March 2011, the Ontario government released draft regulations related to the division of pensions on marriage breakdown, required in order to implement the pension division regime introduced in Bill 133, the *Family Statute Amendment Act, 2009*, which received Royal Assent in May 2009. The draft regulations outline the pension valuation methodology for calculating both the “preliminary value” of the member’s pension - the total value of the pension up to the family law valuation date - and the “imputed value” of the member’s pension - the portion of the preliminary value attributable to the period of marriage.

The Ontario government also released two proposed regulations with respect to funding relief for certain single employer, defined benefit or hybrid plans within the broader public sector, including Ontario university pension plans. In exchange for the relief, plan sponsors would be expected to adopt plan changes that would make their plans more sustainable in the long term. Details of the relief measures will be outlined in an amendment to the regulations. The first Jointly Sponsored Pension Plan (JSPP) established after August 24, 2010 that received an exemption from solvency funding was the TTC Pension Society Plan.

Other legislative highlights include changes to the federal *Pensions Benefits Standards Act* (PBSA). The PBSA was amended effective December 15, 2010, to add a definition of a “negotiated contribution plan,” and to permit such plans to make amendments to reduce benefits despite the terms of the plan. The PBSA was amended effective April 1, 2011, to require plans to fully fund their obligations with respect to pension benefits following a plan termination (with the exception of negotiated contribution plans) by lump sum payment or equal annual payments sufficient to liquidate the solvency deficiency over a period of five years from plan termination. Similar to the Ontario *Pension Benefit Act*, the PBSA was amended effective April 1, 2011, to allow an employer to obtain a qualifying letter of credit instead of making solvency special payments, subject to certain requirements. The amendments also implement “Distressed Plan Workout Rules” for employers with financial difficulties under federal jurisdiction. In addition, the Office of the Superintendent of Financial Institutions (OSFI) has issued an updated *Guide to Intervention for Federally Regulated Pension Plans,* which rates plans on a five-point scale reflecting the assessed level of risk to members’ benefits, as well as outlining possible action from OSFI at each risk level.

Manitoba proclaimed Bill 10, the *Pension Benefits Amendment Act*, which received Royal Assent on April 19, 2005. With the exception of the change in portability rights, these changes came into effect on May 31, 2010. The changes are sweeping, concerning, among other things, mandatory pension committees, contribution holidays, surplus payments, the timing of employer contributions, document retention, filing of audited financial statements, and certain minimum standards, such as joint and survivor pensions, early retirement, pre-retirement death benefits and spousal entitlements.

On May 20, 2011, it was announced that the Ontario and Quebec governments have signed the Agreement Respecting Multi-jurisdictional Pension Plans (MJPPA). The MJPPA will come into effect July 1, 2011, for those pension plans registered in Ontario or Quebec with both Ontario and Quebec members.

The Régie des Rentes du Québec released a newsletter regarding conversion of defined benefit pension plan provisions into defined contribution provisions. The newsletter clarifies what constitutes a conversion and requires regulatory authorization, as well as addressing a number of other issues including consent requirements for plan members, information required to be provided to plan members, minimum credits to members' accounts, allocation of surplus assets on the conversion date, requirements where plan assets are insufficient to meet liabilities, and requirements with respect to actuarial valuations.

COURTS AND TRIBUNALS

The leading decision from 2011 was the unanimous decision by the Ontario Court of Appeal, in *Indalex Ltd. (Re).* The decision considered the application of the deemed trust provisions in the Ontario *Pension Benefits Act* for unpaid contributions and pension shortfalls of two pension plans where the company is undergoing *Companies' Creditors Arrangement Act* (CCAA) proceedings. The Court of Appeal in *Indalex* ordered the court-appointed Monitor of an insolvent company to pay from the reserve fund amounts sufficient to satisfy the deficiencies in its two underfunded pension plans. The Court found that Indalex breached its fiduciary duties as administrator of the pension plans, and the remedy for the breach was to impose a constructive trust over a portion of the reserve fund equal to the deficiencies in the Plans. The Court determined that the Plan administrator must be aware of its fiduciary duty when it unilaterally makes decisions that have the potential to affect the Plans' beneficiaries' rights.

The Court of Appeal elaborated on the "two hats" theory, noting that when wearing its "administrator hat," the employer must act in the best interests of the plan members, but when wearing its "sponsor hat," it may focus on the needs of the business. Simply because the initial decision to commence CCAA proceedings is solely a corporate one that does not mean that all subsequent decisions made during the proceedings are also solely corporate ones. Companies cannot simply ignore their obligations as the Plans' administrator once it has decided to seek CCAA protection, particularly because these decisions have the potential to affect the Plans beneficiaries' rights. The Court noted that in these circumstances, the vulnerability of pension plan beneficiaries was even greater than in the ordinary course because they were given no notice of the CCAA proceedings, had no real knowledge of what was transpiring and had no power to ensure that their interests were even considered, much less protected, during the DIP negotiations.

The leave application to *Indalex* is now before the Supreme Court of Canada. The implications of this decision are far-reaching. Insolvent companies may consider seeking to have an independent administrator appointed for the pension plan in order to avoid fiduciary duty issues. In Ontario, this would likely require the approval of the Superintendent of Financial Services. Parties will have to ensure that proper procedures are followed; in particular, notice to plan members of the CCAA proceedings cannot be overlooked. Indalex's actions and affidavit evidence were the key factors noted by the Court in the determination that there was a breach of fiduciary duty and that a constructive trust should be applied to give plan members priority over the DIP lenders.

Another decision from the Ontario Court of Appeal considered an entitlement to a survivor pension despite the claimant having signed a form prepared by the plan administrator where the plaintiff purportedly waived her survivor entitlement. In *Smith v. Casco*, the issue before the Court of Appeal was the substance and validity of the form. The Court compared the form to the prescribed form and found deviations, rendering the form invalid and providing survivor benefits under the default joint and survivor pension. Plan administrators should be aware that what appears to be a relatively minor deviation from a prescribed form could invalidate that form, resulting in significant cost implications.

In the human rights field, the Supreme Court of Canada considered an equality *Charter* challenge in *Withler v. Canada*. The appellants in this class action were widows whose federal supplementary death benefits were reduced because of their husbands' ages. At issue was whether a reduced payout from a death benefit fund, which was part of a statutory death benefit scheme for certain federal government employees, violated section 15 of the *Charter*.

Although the Supreme Court dismissed the widows' appeal, it determined that the widows had standing on the basis that, as surviving spouses, they suffered the alleged discriminatory effect. In a unanimous decision, the Supreme Court determined that when examining an allegation of discrimination, they will not isolate portions of a pension and benefit plan away from the larger whole. The court examined whether the entire plan available to the plaintiffs acted, or was intended to act, in a manner discriminatory to the beneficiaries. The Supreme Court used a contextual analysis of the existence of substantive discrimination in assessing whether a legislative scheme was discriminatory. The court explicitly rejected the dissenting opinion from the British Columbia Court of Appeal, claiming that the narrower analysis did not consider the impugned benefit reductions within the context of the entire package of available benefits.

A detailed summary of leading cases in 2010 - 2011 follows this introduction.

SUPREME COURT OF CANADA DECISIONS

1. *Withler v. Canada*

Federal civil servants and members of the Canadian Forces, and their families, receive work-related benefits through the *Public Service Superannuation Act* (*PSSA*) and the *Canadian Forces Superannuation Act* (*CFSA*). Each plan includes a survivor death benefit ("SDB") payable on the passing of the plan member. Although some of the purposes of SDBs were disputed in the case, it was agreed that, at a minimum, they were provided to cover the expenses arising from a participant's last illness and death.

In dispute was whether SDBs have additional purposes that may change over the lifetime of a member. SDBs provided under the *PSSA* and the *CFSA* are subject to a "Reduction Provision" that operates to decrease the SDB by 10% for every year the plan member exceeds the age of 65 (for civil servants) or 60 (for members of the armed forces).

Two widows of civil servants brought a $2.5 billion class action against the government on behalf of all surviving spouses of plan members that had their SDBs reduced by the Reduction Provisions. They alleged that the Reduction Provisions discriminated against those survivors subject to the SDBs based on their age and were in violation of section 15(1) of the *Charter of Rights and Freedoms*.

In a unanimous decision, the Supreme Court held that, when examining an allegation of discrimination, they will not isolate portions of a pension and benefit plan away from the larger whole. The court examined whether the entire plan available to the plaintiffs (what the court calls the "suite of benefits") acted, or was intended to act, in a manner discriminatory to the beneficiaries. The court goes a step further in allowing that, in the case of pension benefits, the "ameliorative effect" of the provisions on others and the "multiplicity of interests" at play in a pension scheme affect whether the plan is found to be discriminatory.

The widows had argued that SDBs were provided in order to help a grieving family cover the medical costs of the last illness and the funeral costs of the plan member. The court found that while this may have been one of the purposes of the SDB, it was not the only, or the most important, reason for providing an SDB. Rather, SDBs contribute an income stream to younger spouses coping with an unexpected death. It is only when the member is older that the SDB is provided solely for medical and funeral costs. For older members, the income stream is no longer provided through SDB, but through the other benefits available from the plans.

As the older members had access to other benefits as part of the 'suite of benefits', the reduction of the SDB was not discriminatory and therefore did not violate section 15(1) of the *Charter*.

Withler v. Canada, 2011 SCC 12

NOVA SCOTIA DECISIONS

2. *Cashin v. Cashin*

Barbara and Terrance Cashin married in June 1973, and filed for divorce in March 2007. Mr. Cashin took early retirement from his position at a pulp and paper mill in November 2004, and received a bridging benefit. Bridging benefits are an enhancement available upon early retirement, integrating an employment pension with a government-sponsored pension. They operate so that the total pension payment remains approximately the same before and after the commencement of payment of government benefits.

The value of the bridging benefit at Mr. Cashin's workplace was determined by the number of years of service an employee had with the employer, and thus entitled long term workers to a greater bridging amount than workers who had worked for the company for shorter periods of time. Mr. Cashin testified that the amount of his bridging benefit was between $800 and $900 per month in addition to his other pension income.

The issue before the Nova Scotia Supreme Court was whether the bridging benefit was a matrimonial asset that could be divided in the same manner as other pension benefits. The court held that "the bridging supplement is a matrimonial asset similar in nature to the pension earned by Mr. Cashin." The court stated that the bridging supplement is analogous to a pension asset in that it is an earned benefit, and it is an aspect of one of the retirement options available to employees of the pulp and paper mill. As such, the bridging benefit is a matrimonial asset and is divisible on the same basis as other pension assets.

With respect to the method of dividing the pension, the court cited the earlier Nova Scotia Supreme Court case *Yaschuk v. Logan*, which stated that matrimonial pension assets must be divided as their gross sum, not their net value after deductions, and that each former spouse will "bear liability for taxes in accordance with the beneficial receipt by each."

Cashin v. Cashin, 2009 NSSC 302 (Family Division)

NEW BRUNSWICK DECISIONS

3. *Bowater Maritimes Inc. v. Communications, Paperworkers Union, Locals 117, 146, 164 and 263*

In November 2007, Bowater informed its employees that the mill operating in Dalhousie, New Brunswick, would be closed, and that the closure would terminate their employment. Certain senior employees who were close to reaching early retirement age would be deprived of their eventual ability to receive an unreduced pension. These employees brought a grievance asserting that their age and credited service should not stop with the mill closure, but rather, should continue to accumulate during the period for which they had recall rights under the collective agreement. The arbitrator found that the employees were entitled "to gain the benefit of age and continuous service for pension plan purposes." Bowater sought judicial review of the arbitrator's decision, claiming that the decision was incorrect and unreasonable.

Both the union and Bowater agreed that the standard applicable to the arbitrator's interpretation of the collective agreement is reasonableness. However, the parties disagreed with respect to the standard applicable to the arbitrator's interpretation of the Plan.

The court reviewed the applicable case law, looking to *Bisaillon v. Concordia University,* where the Supreme Court of Canada confirmed that when a pension plan is incorporated into a collective agreement, the arbitrator has exclusive jurisdiction. The court concluded that the interpretation of the terms of the Plan did not lie within the arbitrator's expertise and for that reason the standard of review in relation to the interpretation of the Plan is correctness.

Bowater argued that persons working at the Dalhousie plant when it was closed could no longer satisfy the definition of "employee" under the Plan. Those who were laid off as a result of the permanent closure of the mill were, for the purposes of the Plan, not on "lay-off" but were terminated. Terminated employees are no longer "temporarily not receiving remuneration" but rather, are "permanently not receiving remuneration."

Turning to the facts in this case, the court found that although "logic may favour the interpretation advocated by Bowater, the terms of the Pension Plan do not." The Plan is silent on the question of what happens to "members" when a plant is closed. Both the collective agreement and the Plan contain wording which protects the employees "service" under the Plan in the case of layoffs for up to 36 months. The court concluded that the Plan text was missing a provision considering a permanent closure of the mill, and how that would affect members' service accrual; there was also no provision to override the deemed service in the event of a plant closure. Therefore, the court affirmed the arbitrator's conclusion that the Collective Agreement operates to extend employees service after the plant closure.

Bowater Maritimes Inc. v. Communications, Paperworkers Union, Locals 117, 146, 164 and 263, [2010] N.B.J. No. 121 (QL); aff'd [2011] N.B.J. No. 69 (NBCA)

4. *Quinn v. New Brunswick*

A Pension Committee (the "Committee") under a Pension Plan (the "Plan") requested the opinion of the New Brunswick Court of Queen's Bench on whether the Committee had the authority under the Plan to remove the indexation protection provisions ("COLA") from the Plan and/or increase employee contributions to the Plan.

The Plan was established by the province of New Brunswick for the benefit of union members, and the terms of the Plan were determined through collective bargaining. As of 2008, the Plan had a large deficit. The Committee raised concerns about the deficit position of the Plan to the unions and the province and made recommendations to ensure the long-term stability of the Plan.

The province advised the Committee that they were not in a position to increase contributions to the Plan. In order to maintain the solvency of the Plan, the Committee recommended that the COLA provision be removed and that employee contributions increase.

The court found that it had jurisdiction to provide an opinion on the administration of the Plan, as the Plan met the three certainties of a trust. Further, the members had no other recourse for their referral than the courts.

When the court interpreted the terms of the Plan, it found that the terms set out an equal sharing of the contributions between the province and the employees. Therefore, the Committee could not amend the Plan to require its active members to pay contributions at a level greater than fifty percent. The court also found that the Committee could not retroactively reduce benefits earned by a member. This meant that the Committee's proposal to remove COLA indexation could not apply to retired members of the Plan, as the benefit vested in the members upon retirement.

Nonetheless, the Committee could make adjustments to the COLA benefit for members in whom the benefit had not yet vested. The court found that before a triggering event the member is simply accumulating pensionable service. It is only when a triggering event occurs that the right to COLA becomes vested.

Quinn v. New Brunswick, 2011 NBQB 182

5. *Tower Estate v. Tower Estate*

The deceased was an employee of Correctional Services Canada, and had accrued benefits pursuant to the Act. In 1977 and 1978, he had designated his then spouse as the beneficiary of benefits owing under the *Public Service Superannuation Act* (the "Act"). The couple separated in 1992, divorced in 1995, and had five children. At the time of separation, the couple had entered into a separation agreement that contained terms purporting to settle all issues between them, and pursuant to which the former spouse released all interest in any pension plans, CPP, RRSPs or GICs of the deceased. The separation agreement became a judgment of the court in the divorce proceeding. The deceased did not change the designation of his beneficiary following the divorce, and it remained on record at the time of his passing.

The deceased died intestate in 2004, and was living alone and unmarried at the time of his death. Following the payment of benefits owing under the Act to his former spouse, the sons of the deceased, on behalf of the estate, commenced an action against the former spouse, claiming that the payment of benefits under the Act had been revoked by operation of the Separation Agreement.

In reaching its decision, the New Brunswick Court of Queen's Bench reviewed the provisions of the Act addressing the revocation of beneficiaries, and held that, consistent with prior case law, the Act constituted a complete code, and that this code displaced the common law approach of giving effect to revocations of prior designations by will or agreement.

The court also rejected the alternative submission of the plaintiffs that the benefits were held by the former spouse under a constructive trust for the benefit of the estate on the basis of unjust enrichment. In order for the estate to rely on the doctrine of unjust enrichment, it was necessary that the estate establish that there was no "juristic reason" for the enrichment of the former spouse. In this case, the court found that the operation of the Act and the prior designation of the former spouse constituted a sufficient reason to permit the payment of benefits to the former spouse.

Accordingly, the court upheld the principle that, where the revocation of beneficiary designations is specifically addressed in a statute, a party wishing to revoke a prior beneficiary designation must comply with the terms of the statute to give effect to this intent, even if there is some evidence of a contrary intention in a separation agreement or other document.

Tower Estate v. Tower Estate, [2010] N.B.J. No. 395

ONTARIO DECISIONS

6. *Ault v. Canada (Attorney General)*

The plaintiffs had been approached by Sylvain Parent, the principal actuary of Welton Parent Inc. ("WBP"). Mr. Parent proposed that employees of the Attorney General of Canada ("AGC") resign from their employment with the public service, become employees with his new company ("Loba"), and transfer their pension monies from their government pension plan to the new company pension plan (the "Loba Plan"). The employees would remain with Loba only as long as it took to have their pension monies transferred, then quit Loba and transfer their monies out of the Loba Plan, which was structured to permit cash payouts. Including the plaintiffs, 120 public servants joined Loba to take advantage of the scheme.

The Treasury Board Secretariat ("TBS") became suspicious and put a hold on transfers to the Loba Plan. TBS officials communicated their suspicions to the Canada Revenue Agency ("CRA"). The CRA wrote to the TBS setting out their concerns and sent a second similar letter to Loba and WBP. The CRA intended that both letters be distributed to all those interested in transfers to the Loba Plan. This did not happen

After the plaintiffs had quit the public service and commenced employment with Loba, they learned that transfers to the Loba Plan had been suspended, that the RCMP was investigating Loba and Mr. Parent, and that the CRA was investigating the Loba Plan. In 2003, the CRA filed a Notice of Intent to Revoke the Loba Plan. As a result of the revocation, the plaintiffs' pension monies were not transferred to the Loba Plan.

The plaintiffs brought this action to recover the difference between the benefits they would have received had they not joined Loba and the benefits they actually did receive, alleging negligent misrepresentation and breach of fiduciary duty. The AGC, in turn, brought third party actions against Loba, Mr. Parent, and WBP (collectively, the "Loba Parties").

The trial court found that the AGC had been negligent in failing to properly inform the employees of the portability of the plan, the key misrepresentation being the failure to distribute the CRA letter. The court further found that the Loba Parties were also negligent and owed a duty of care to the plaintiffs. The trial judge apportioned the liability at 80% for the AGC and 20% for the Loba parties.

On appeal to the Ontario Court of Appeal, the trial judge's finding of negligent misrepresentation on behalf of all defendants was upheld. However, the court varied the apportionment of liability, finding that the trial judge's analysis of the fiduciary duty owed by the Loba Parties was flawed. Where the trial judge held that the fiduciary duty did not arise until the plaintiffs had become

employees of Loba, the Court of Appeal held that the duty arose much earlier, when the Loba Parties had made representations to the plaintiffs regarding the advantages of the Loba Plan. In coming to this conclusion, the court relied on Mr. Parent's status as an actuary, finding that he owed a fiduciary duty to those he gave advice. As a result, the court reassessed the liability between the parties as 60% for the AGC and 40% for the Loba Parties.

Ault v. Canada (Attorney General), 2011 ONCA 147

7. *Carrigan v. Quinn*

Ronald Carrigan (the "Member") died in 2008 before commencing receipt of a pension from his company pension plan (the "Plan"). At the time of his passing, the Member was legally married to Mary Carrigan. Mrs. Carrigan was named as Estate Trustee and residual beneficiary of the Member's estate. The Member and Mrs. Carrigan had previously separated in 1996, but Mrs. Carrigan continued to live in the jointly owned matrimonial home, and all her living expenses were paid by the Member.

In the late 1990s, the Member met Jennifer Quinn and cohabited with her from at least 2000 until his death in 2008, in a condominium jointly owned by the Member and Mrs. Carrigan.

In 2006 the Member designated Mrs. Carrigan and his two daughters as beneficiaries of any death benefits payable under the Plan. Following the Member's passing, a dispute arose concerning entitlement to the death benefit payable under the Plan.

Entitlement to a pre-retirement death benefit is governed by section 48 of the PBA, which prioritizes the right of a "spouse" over a designated beneficiary, subject to the requirement that the member is not living separate and apart from the spouse on the date of death. Both Mrs. Carrigan and Ms. Quinn asserted entitlement to the death benefit as an eligible spouse.

The court noted that the definition of "spouse" in the section 1 of the PBA captures both Mrs. Carrigan and Ms. Quinn because it contemplates married persons as well as cohabiting persons. The court went on to reason that only "[t]he person who meets one of the requirements in the section 1 definition of spouse as well as the requirement found in section 48(3) that the spouse and the member cannot be living separate and apart on the day of the member's death" meets the requirements of section 48. That person was Ms. Quinn. Mrs. Carrigan was indeed "living separate and apart" from the member at the time of his death, disentitling her to any benefit under the Plan, notwithstanding her designation as a beneficiary.

In the result, the court declared that Ms. Quinn is the spouse entitled to claim the death benefit in in accordance with section 48 of the PBA; and declared that the designation of Mrs. Carrigan and the daughters of the Member as beneficiaries of his pension are of no force and effect.

Carrigan v. Quinn, 2011 ONSC 585

8. *Clarke v. Ontario Teachers' Pension Plan Board & Andrews v. Ontario Teachers' Pension Plan Board*

James Clarke and Benjamin Andrews are both retired teachers. Each is in receipt of their Ontario Teachers' Pension Plan (the "Plan") pension. Since their retirement, each of the applicants has sought to work part-time as a teacher in Ontario.

The Plan contains provisions governing pensioners who become re-employed as teachers while in receipt of a pension. These rules permit a limited period of re-employment while receiving pension benefits. Re-employment in excess of these limited periods results in the pensioner becoming ineligible to continue his or her pension until he or she ceases employment, or only employed in accordance with the limits in the Plan.

Clarke brought an application asserting that the limit to post-retirement employment is a discriminatory distinction based on age. Clarke compared his situation as a retired teacher to other part-time teachers, non-retired part-time teachers, and recently-certified teachers without full time positions. Neither of these groups had limits on the number of days they could be employed part-time.

Adjudicator Sheehan found that retired teachers in receipt of pensions are treated differently than other teachers, and retired teachers may be in receipt of pensions. However, Sheehan found that the differential treatment was based on employment status only, and not age. Sheehan held that distinctions based on employment status are not a protected ground under the Ontario *Human Rights Code*.

In the Andrews case, the Tribunal noted that there were no material factual differences from the Clarke decision, and no reason not to apply the reasoning in Clarke. One fact emphasized by Andrews was a letter to Andrews from the President of the Ontario Teachers Federation that sought to explain the purpose and function of a pension plan. The letter stated in part that "…a pension is part benefit, part social engineering, the purpose of which is to allow an individual to cease working with dignity and to allow for the renewal of the workforce." The applicant Andrews argued that this was evidence that the pension plan as whole gave preference to younger teachers and discriminates on the basis age.

The Tribunal noted that this argument was weak. If followed, it would imply the entire Plan was contrary to the Ontario *Human Rights Code*. This was not an argument the applicant sought to make. The Tribunal also noted that age-based distinctions in bona fide pension plans are consistent with the Ontario *Human Rights Code* where the plan is otherwise compliant with minimum standards legislation.

Clarke v. Ontario Teachers' Pension Plan Board (2010), HRTO 1123 (Ont. Human Rights Trib.); (2011) 87 C.C.P.B. 139.

Andrews v. Ontario Teachers' Pension Plan Board (2011), HRTO 56 (Ont. Human Rights Trib.); (2011) 87 C.C.P.B. 154.

9. *King v. King*

Mr. King and Mrs. Raines were married on December 28, 1983. Mr. King retired on January 31, 1992. Mr. King and Mrs. Raines separated on July 16, 1992, and entered into a Separation Agreement dated November 24, 1992.

Mr. King remarried and wrote to OMERS to appoint his new wife as his beneficiary and to seek confirmation that the survivor's pension would be paid to his new wife. OMERS replied by letter indicating that the Separation Agreement "does not clearly state that each party, or particularly a former spouse, relinquishes their entitlement to survivor benefits as eligible spouse that took effect when the pension first commenced." The OMERS letter went on to indicate that if their form had been completed by Mrs. Raines and returned to OMERS, they would accept that as sufficient evidence that she had relinquished her right to a survivor benefit. Mrs. Raines refused to sign such form.

Mr. King brought an action to the Ontario Superior Court of Justice arguing that the general pension release in the Separation Agreement was sufficient to constitute a waiver of Mrs. Raines' entitlement to a survivor pension.

The court noted that any waiver of survivor's pension must conform to the strict requirements of the form approved by the Superintendent in order to take advantage of the exception created in the PBA. Looking to *Smith v. Casco Inc.*, the court found that although the forms of the waivers were quite similar and covered the same subject matter, the court in *Smith* found that the *Casco* form was "substantially different" from the form approved by the Superintendent.

Following the *Casco* reasoning, the court found that the Separation Agreement did not did not constitute a valid waiver of entitlement, and the prescribed form must be used. The court commented that Mr. King found himself "in the unfortunate position of being caught in a trap for the unwary."

King v. King, 2010 ONSC 6271

10. *Indalex Ltd. (Re)*

Indalex was the administrator of two underfunded pension plans, a Salaried Pension Plan and an Executive Pension Plan (the "Plan" and the "Executive Plan", together the "Plans"). In March 2009, Indalex's U.S. parent company sought bankruptcy protection, and one month later Indalex obtained protection from creditors in Canada under the *Companies' Creditors Arrangement Act* ("CCAA").

A court order authorized Indalex to borrow funds pursuant to a debtor-in-possession (DIP) credit agreement. The order created a "super-priority" charge in favour of the DIP lenders. Indalex U.S. guaranteed Indalex's obligation to repay the DIP lenders. Following the sale of Indalex's assets, the sale proceeds were insufficient to repay the DIP lenders, and Indalex U.S. covered the shortfall, in accordance with its obligations under the guarantee.

The Monitor retained $6.75 million of the sale proceeds in a reserve fund (the "Reserve Fund"). Indalex U.S. asserted that it had a super priority entitlement to the amount of the shortfall in sale proceeds that it paid to the DIP lenders, and that this claim defeated any claims by beneficiaries under the pension plans.

The Union and the Executives claimed that the Reserve Fund was subject to deemed trusts arising under Ontario's *Pension Benefits Act* ("PBA") in favour of the Plans' beneficiaries and should be paid into the Plans in priority to Indalex U.S. The Union and the Executives also claimed that Indalex breached its fiduciary obligations to the Plans' beneficiaries.

The CCAA motion judge dismissed the Union and the Executives' motions on the basis that, at the date of sale, no deemed trust under the PBA had arisen in respect of either Plan.

1. <u>The PBA Deemed Trust: All of a Plan's Liabilities Accrue on the Date of Wind-Up</u>

A central issue before the Court of Appeal was whether the motions judge erred in interpreting section 57(4) of the PBA, which is the "deemed trust rule" on a pension plan wind-up.

The motions judge held that there was no deemed trust in this case because Indalex had made all required going-concern and special payments required as at the closing date, and no payments were therefore "due" on that date.

The Court of Appeal held that no additional liability could accrue following a plan wind-up because all events crystallize on the wind-up date - all pension benefit accruals by members cease and all amounts that an employer is required to pay into a pension plan are calculated as of the wind-up date. The court reasoned that even though the PBA Regulations grant an employer up to five years in which to make all of the required contributions, the liabilities have still accrued by the wind-up date.

2. <u>Indalex's Fiduciary Obligation: Wearing Two Hats Simultaneously</u>

The Union and the Executives asserted that, as plan administrator, Indalex owed a fiduciary duty to the Plans' beneficiaries, which was breached by a number of actions that Indalex took or failed to take during the CCAA proceedings. They argued that the appropriate remedy for those breaches was an order requiring the Reserve Fund to be paid into the Plans. In response, the Monitor and Indalex argued that any breach of fiduciary duty would only give rise to an unsecured claim outside of the ambit of the deemed trusts created by the PBA.

Indalex relied on the "two hats" analogy, which acknowledges that a company may wear more than one hat vis-à-vis pension plan members — one as employer where it is entitled to act in its own best interest, and the other as administrator where it owes a number of obligations to the plan members. Indalex claimed that it wore only its "employer hat" during the CCAA proceedings. The court found this argument to be premised on the incorrect notion that an employer will wear its corporate hat or its administrator's hat, but never both.

The court found that Indalex had the right to commence CCAA proceedings "wearing solely its corporate hat" as that decision "is not part of the administration of the pension plan or fund nor does it necessarily engage the rights of the beneficiaries of the pension plan." However, all subsequent decisions made during the CCAA are not necessarily solely corporate decisions:

"Indalex could not simply ignore its obligations as the Plans' administrator once it decided to seek CCAA protection."

The Court of Appeal noted that it was "significant" that key representatives of Indalex were unclear about the company's role as administrator in the CCAA proceeding. The court determined that Indalex could not ignore its role as administrator or divest itself of its obligations without taking formal steps to transfer that role to a suitable person, such as the Superintendent. Indalex took no steps to protect the rights of the Plans' beneficiaries to continue to receive their full pension entitlements, which was in breach of its fiduciary obligations as a pension plan administrator. The court also noted that Indalex was in a conflict of interest position, in contravention of the PBA, because it knowingly permitted its corporate interests to conflict with its powers and duties as the Plans' administrator.

3. Distributing the Reserve Fund to the Pension Plans

As the Court of Appeal concluded that a deemed trust exists with respect to the deficiency in the Salaried Plan, an additional question was whether the Monitor should be ordered to pay the amount from the Reserve Fund. In order to determine whether the super-priority charge overrides the deemed trust, the court examined the doctrine of paramountcy, as the PBA is provincial legislation and the CCAA is federal legislation. Provincial laws continue to apply in federally regulated bankruptcy and insolvency proceedings unless there is an express finding of federal paramountcy. The court provided guidance to counsel about how and when to assert the doctrine of paramountcy when a CCAA Initial Order (federal) purports to affect priorities established by provincial legislation. If a company is going to disrupt provincially established priority schemes through an initial order, it must do so explicitly and with a sufficient evidentiary base to support its case, which did not exist here.

As the Executive Pension Plan had not been wound up as of the date of sale, it was not clear that a deemed trust arose in respect of the underfunded amounts. However, because Indalex breached its fiduciary duty, the court concluded that the Monitor should be directed to pay the deficiency from the Reserve Fund to the Executive Plan in priority to those entitled under the super-priority charge.

The decision is currently being appealed for leave to Supreme Court of Canada.

Indalex Ltd. (Re), [2011] O.J. No. 1621

11. *Fraser Papers (Re)*

Fraser Papers Inc. and a number of its subsidiaries entered proceedings under the *Companies' Creditors Arrangement Act* ("CCAA"). After being granted creditor protection under the CCAA, the Company started restructuring efforts that would enable it to emerge as a going concern business. The Company ultimately established a claims process to adjudicate creditors' claims and appointed a Claims Officer to resolve disputed claims.

During the course of its CCAA restructuring Fraser Papers terminated various retiree medical benefit programs, commonly referred to as "Other Post-Employment Benefits" ("OPEBs"). Affected retirees filed claims against the Company for the value of the OPEBs that had been lost

as a result of the Company's termination of benefits. The Monitor disallowed the retirees' claims which resulted in an appeal that was heard by the Claims Officer. The main issue before the Claims Officer was whether or not the OPEBs "vested" on retirement, a determination which would in turn decide whether the retirees had valid claims as unsecured creditors in the Company's CCAA claims process.

Determining whether the OPEBs in this case had vested on retirement required a review and interpretation of the contracts between the retirees and the Company which varied based on date of retirement, place of employment, and whether there was a "Voluntary Early Retirement Program Agreement" ("VERP").

The Claims Officer concluded that the retiree benefits plan texts available made it clear that it was never Fraser Papers' intention that the rights to OPEBs vest on retirement. Having arrived at that conclusion, the Claims officer looked to the VERPs to determine whether they changed this intention.

For the majority of retirees, the VERPs did not provide a special benefit, and there was no vesting of OPEBs as at the dates of their retirement. Only where a VERP contained an agreement by Fraser Papers to provide a specific benefit at a specific age or date did the entitlement vest. Only certain retirees had a valid claim for loss of benefits against the insolvent Company.

The Claims Officer further noted that although all parties "hoped and expected that the plans would continue indefinitely", the Company reserved the right to terminate the plans if something unexpected occurred, which unfortunately did transpire.

Re Fraser Papers, CV-09-8241-00CL, released January 3, 2011

12. *Robinson v. University of Guelph*

The spouse of a deceased pensioner brought a court application against her late husband's pension plan administrator, the University of Guelph (the "University"). The husband (the "Member") retired in 1995, at which time he was legally married to a different spouse. The former wife pre-deceased the Member, and the Member remarried Ms. Robinson in July 2008. He died less than 3 months after being remarried to Ms. Robinson.

The Pension Plan of the University of Guelph (the "Plan") permits the "spouse" or "successor spouse" to receive a 2/3 pension for life following the death of a member. The Plan goes beyond the minimum pension standards of the PBA and provides a benefit to surviving spouses (where they are not the same spouse as at the date of a member's retirement) in certain circumstances.

The Ontario Superior Court of Justice concluded that the relevant date for determination is the date of the Member's retirement for two reasons. First, the "successor spouse" provision would have no meaning whatsoever if every spouse on the date of death was a qualifying "spouse." Second, it is consistent with the scheme of the PBA that the conferring of the status of "spouse" only takes place once, at the earliest of the date of retirement, termination, or death. In this case, the Member was not married to Mrs. Robinson at the time of his retirement.

The University also argued that it is entitled to judicial deference in the exercise of its discretion in interpreting its Plan text. Although not relevant to the court's reasoning on the merits of the application, Justice Hourigan made some strong comments regarding deference to Plan administrators.

In the result, Ms. Robinson did not qualify for any benefits under the Plan.

Robinson v. University of Guelph, 2010 ONSC 6150

13. ***Smith v. Casco Inc.***

In its recent decision in *Smith v. Casco Inc.*, the Ontario Court of Appeal held that a spouse was not bound by a waiver that she executed disclaiming her statutory right to receive a survivor pension should she outlive her husband.

In *Casco*, the plaintiff's spouse had accepted an early retirement package from his employer after 39 years of service. At the time of his retirement, the member chose an unreduced pension in a non-joint and survivor form, and had his spouse execute a spousal waiver form.

Following her husband's death in 2003, the plaintiff learned that her husband had chosen a single life pension which would expire in June, 2005, with no further pension payable thereafter. The plaintiff commenced a court action based in negligent misrepresentation against her spouse's former employer in respect of the information that had been provided to her and her husband concerning her husband's pension options.

At trial, the Court found in favour of the Plaintiff, and its decision was upheld on appeal to the Divisional Court. At the Divisional Court level, the Court found that the spousal waiver was invalid, as it was not in the prescribed form approved by the Superintendent of Financial Services.

On appeal to the Court of Appeal, the decision was upheld. Reviewing section 46(1) of the *Pension Benefits Act* ("PBA"), pursuant to which persons entitled to a joint and survivor pension benefit may waive their entitlement, the Court highlighted that such a waiver can only be effected by two means: 1) a Superintendent approved waiver, or 2) a domestic contract. Only the first of these two methods of affecting a waiver was at issue on this appeal.

In reviewing the waiver executed by the Plaintiff, the Court noted that the form of waiver drafted by the employer deviated from the standard form waiver approved by the Superintendent in five critical ways:

1. Rather than advising the spouse at the first paragraph of the waiver that, in executing the waiver, the spouse was foregoing his or her right to a joint and survivor pension pursuant to section 44 of the PBA, the waiver drafted by the company contained this caution at the third paragraph of the waiver;

2. While the title to the Superintendent approved waiver states "Waiver of Joint and Survivor Pension," the waiver drafted by the company was simply named "Pension Plan

for Salaried Employees of Canada Starch Operating Company Inc., Post-retirement Spousal Survivor Benefit Waiver Form;"

3. The Superintendent approved waiver states that in signing the waiver, the person is losing all entitlement to a joint and survivor pension under s. 44 of the PBA, in bold type; by contrast, this caution was not indicated in bold type in the company drafted waiver form;

4. In the Superintendent approved waiver, the caution that the spouse may wish to obtain independent legal advice was found immediately under the signature line in bold type; in the company drafted waiver, this caution was within the main text of the waiver and given no prominence; and,

5. The Superintendent approved form indicates that the waiver is not effective unless delivered to a certain person within a certain period of time; there was no equivalent statement in the company drafted form.

Because these distinctions were found to be "substantive" by the Court of Appeal, the waiver was held to be invalid. Justice Gillese penned the unanimous written reasons for the Court, stating:

> Because the purpose of the waiver is to give up all entitlement to a joint and survivor pension, this is a deviation of substance from the Superintendent approved waiver. The deviation impairs the substance of the waiver in the sense that the waiver does not meet the purpose for which it was required - to advise that by signing the form, a person waives all of his or her entitlement to a joint and survivor pension.

Although the Court did not decide, for the purposes of the appeal, whether or not a spousal waiver in a form other than that prescribed by the Superintendent could be effective for the purposes of section 46 of the PBA, pension plan administrators would be well advised only to accept spousal waivers executed on Form 3, prepared by the Superintendent of Financial Services of Ontario, and available through the Financial Services Commission of Ontario website.

Smith v. Casco 2011 ONCA 306

14. *Teibas Ltd. v. Maintenance Construction & Skilled Trades Council*

The applicant was seeking instructions on the administration of the International Brotherhood of Electrical Workers, Local 353 ("IBEW") Trust Funds (the "Fund"). The applicant ("TEIBAS") is the third party administrator of the Fund, which provides pension, health and welfare, and other benefits to members of the IBEW, and is governed by a Trust Agreement. The respondent was the Toronto District School Board ("TDSB"), who remitted contributions to the Fund on behalf of its employees that were members of the IBEW. Another party to the application was the Maintenance Construction and Skilled Trades Council ("MCSTC"), a council of trade unions which includes the IBEW, and acts as a bargaining agent on behalf of maintenance and construction employees, which included the IBEW employees in question. The MCSTC is also a party to a Council Collective Agreement that provides for the TDSB to make contributions to the Fund.

In his reasons, Justice Chapnik noted that the parties shared the same objective that the Fund accept contributions from the TDSB on behalf of its IBEW members, but disagreed about whether a Participation Agreement was necessary to accomplish this. Justice Chapnick concluded that the Council Collective Agreement between MCSTC and the TDSB was not a collective agreement within the meaning of the Trust Agreement. In coming to this decision, the court recognized that the MCSTC is a separate bargaining agent from the IBEW and the Trustees of the Fund. Since the Council Collective Agreement was not a collective agreement within the meaning of the Trust Agreement, the TDSB was not an employer as defined by the Trust Agreement, and was not formally obligated to remit contributions to the Fund according to the text of the Trust Agreement. As a result, the court directed the TDSB formalize its relationship with the Fund Trustees by becoming a party to the Participation Agreement.

The court noted that the Trust Agreement is a commercial contract, and the interpretation of its words must be in accordance with sound commercial principles and good business sense. Although the TDSB had implicitly accepted the terms and conditions of the Trust Agreement by being a party to the Council Collective Agreement, the law of contract and responsible business principles dictated that the TDSB should enter a Participation Agreement in order to validate its participation in the Fund, and its obligations under the Trust Agreement. In addition, without a formal relationship between the Fund and the TDSB, an allegation could be made against the Trustees that they were failing to treat all members of the Fund equally. Consequently, Justice Chapnik directed the TDSB and the Fund to formalize their relationship and explicitly enter into the Participation Agreement.

At the Ontario Court of Appeal, the court disagreed with Justice Chapnik's conclusion that the MCSTC is a separate bargaining agent and that the Council Collective Agreement does not meet the definition of a collective agreement within the meaning of the Trust documents. The court stated that "the definition of 'Collective Agreement' extends to any collective agreement that meets the prerequisites as set out in the definition in the Trust Agreement to which [the IBEW] 'is bound'." In focusing on the phrase "is bound," the court recognized that the IBEW is bound by the collective agreement between the MCSTC and the TDSB. The collective agreement fixes the terms and conditions of employment between the IBEW and the TDSB, including the payments to be made into the Trust.

By this account, the Council Collective Agreement between the MCSTC and the TDSB is a "Collective Agreement" for the purposes of the Trust Agreement. Accordingly, the parties did not have to enter into a Participation Agreement as they were already liable under the Trust Agreement.

Teibas Ltd. v. Maintenance Construction & Skilled Trades Council, 2010 ONSC 3773, rev'd 2011 ONCA 19

15. *Toronto Dress & Sportswear Manufacturers' Guild Inc. v. Unite Here Ontario Council*

This arbitration decision considered the distribution of the residual assets remaining from the windup of the Toronto Dress and Sportswear Industry Retirement Fund (the "Fund"), which occurred in April 1996.

At wind up, the Fund was severely underfunded such that plan assets were only sufficient to provide for about 41% of plan liabilities. Extensive efforts were made to contact all members and former members; however, there remained 249 missing, but identifiable members with just under $1 million in undistributed plan assets relating to their 41% share of pension liabilities. The Trustees wanted to complete the wind up distributions, but they could not agree on how the missing member assets should be treated. The union Trustees maintained the remaining assets belong to the missing but identifiable former members and that the funds must be set aside for them. The Trustees appointed by the Toronto Dress and Sportswear Manufacturers Guild Inc. disagreed, requesting that the funds be distributed as a bonus to current employees.

The union referred the arbitrator to the Ontario Superior Court decision, *Hawker Siddley Canada Inc. (Re),* decided under federal pension legislation, where residual funds relating to missing persons had been ordered paid into court. The union trustees requested the arbitrator order that the funds be transferred to an ongoing successor pension plan and continue to be held for the unlocated group.

The position of the Financial Services Commission of Ontario ("FSCO") was that the funds representing the liability for the missing former members must remain in the Fund or otherwise be maintained for possible distribution should all such members come forward to claim their benefit entitlements. FSCO suggested that each individual's allocation be transferred to a locked-in RRSP, a regular bank account, or an annuity contract, consistent with what would be done if the person claimed his or her benefit. FSCO was unwilling to approve a distribution of funds allocable to missing but identifiable participants to other participants who can be located or accept a "guarantee" from employers or the union, because there is no longer a trust assuring payment of the obligations to the missing but identifiable members.

The arbitrator noted that the *Pension Benefits Act* does not contain a direction regarding what is to be done with the residue from a wound-up pension fund. However, the Act does contain provisions, which make it clear that authority over the fund remains ultimately with the Superintendent of Financial Services, which imposes fiduciary obligations over the management of the funds.

The arbitrator concluded that it was appropriate that the left-over assets of the Fund remain in trust for the missing but identifiable members. The arbitrator also ordered that an application be brought to seek FSCO's approval of the transfer of the remaining plan assets to the successor plan, with the intent that the assets be held and accounted for separately, and maintained in the event any of the missing but identifiable members are located or come forward.

Toronto Dress & Sportswear Manufacturers' Guild Inc. v. Unite Here Ontario Council, 86 C.C.P.B. 241 (Ont. Arb.)

SASKATCHEWAN DECISIONS

16. *May v. Saskatchewan*

The Saskatchewan Court of Queen's Bench considered the merits of this class proceeding, following the successful certification under the Saskatchewan *Class Actions Act* in 2006. The plaintiffs brought a class action claiming damages for the Government's alleged breaches of contract, and fiduciary duty and unjust enrichment of the Government in relation to the Public Service Superannuation Plan ("PSSP"), and sought damages for alleged pension losses. The representative plaintiffs were three retired members of the PSSP, representing all individuals in receipt of, or entitled to receive, a pension from the PSSP.

The first legal issue that the court addressed was whether there was a contractual agreement between the government and the Plan members, either express or implied, with respect to the payment of their pensions. The court rejected the plaintiffs' argument that the government was under any contractual obligations outside of the written terms of the PSSP. The court concluded that the plaintiffs' higher expectations of the Government with respect to the PSSP reflected aspirations, but not legally based contractual entitlements.

The second legal issue the court analyzed was whether the government stands in a fiduciary relationship to the PSSP member with respect to administration of the Plan, and if so, what the nature and extent of the government's fiduciary obligations to PSSP members are. The court concluded that the principles of fiduciary law are not applicable to the government in this case, because there was no evidence that the government failed to fully comply with its obligations under the PSSP, a statutory pension plan, which in any event does not confer a great amount of discretion on the Government.

Despite this conclusion, the court analyzed the law of fiduciary duties, in case it was incorrect on the initial finding that no such relationship existed. Assuming the Government is a fiduciary, the court held that the nature and extent of the obligations owed to PSSP members does not include the legal obligation to provide full annual indexation of pensions equal to the Saskatchewan Consumer Price Index (CPI), as this was solely in the legislative discretion of the Government. The court succinctly stated: "What the plan provided - - the government delivered as it was legally obliged, by the law of contract or fiduciary duty – to do".

Finally, the plaintiffs claimed that the Government was unjustly enriched by PSSP member contributions in excess of $100 million, while only contributing $2.8 million to the Plan. There is a three-part test to establish a claim for unjust enrichment: the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason for the enrichment.

The court noted that although the Government received contributions to the Fund, and it was at liberty to employ those funds for any of its broader mandate, the Government also assumed liability to pay the promised benefits under the PSSP. There was no enrichment of the Government, but even if there was, the court found no corresponding deprivation of the plaintiffs, and did not consider whether there was a juristic reason for the enrichment.

In the result, the action was dismissed. The plaintiffs have filed a Notice of Appeal.

May v. Saskatchewan, 2010 SKQB 310

ALBERTA DECISIONS

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

Halliburton Group acquired Dresser Canada in 1999, and as a result of the acquisition also assumed sponsorship and administration of Dresser's pension plan (the "Plan"). The Plan was originally a defined benefit ("DB") plan. Pensions under the Plan were calculated on the basis of the highest five consecutive years out of the final ten years of credited service.

In 1998, Dresser decided to convert the Plan to a defined contribution ("DC") plan. The text of the Plan stated that amendments were permissible, provided that amendments did not "reduce the value of benefits vested in Participants."

In spring 2001, the Plan amendments to convert the Plan from DB to DC were filed with Alberta Finance. These amendments provided that benefits accrued under the DB structure were kept intact, but for the purpose of calculating a final defined benefit amount, accumulated salary and service were frozen as of January 1, 2002. Further amendments in 2005 attempted to make it clear that the freeze provisions introduced in 2002 were aimed at seventeen former employees of Dresser who chose not to transfer all of their benefits to the DC Plan, but rather leave their accumulated benefits under the DB Plan.

The amendment was rejected by the Superintendent on the grounds that the freeze interfered with Plan members' vested rights, as it constituted a retroactive reduction of benefits. This, the Superintendent stated, was contrary to both the text of the Plan as well as the *Employment Pension Plans Act*, ("*EPPA*").

Halliburton argued that the amendments only affected future benefits, which are not vested, and "the provision [s.81(1)(a) of *EPPA*] should be read to permit reduction of benefits that would otherwise have accrued after the amendment." The court disagreed with this, noting that the legislation is at best silent, and regardless, does not apply to projected benefits. The Plan text "makes clear that the Plan contemplates that projected earnings are to be taken into account in the determination of employee benefits." Thus, the court concluded that the effect of this is that at any time an individual becomes a participant in the Plan, "they are entitled to have their defined benefit calculated in accordance with the DB formula."

Halliburton also argued that the "prospective rights" of the employees affected by the amendment should be distinguished from "vested rights." The court also disagreed with this point. Halliburton noted that vested rights are capable of being measured, and in this case, based on the language of the Plan, the employees were granted a vested right based on a prospective calculation, i.e. the highest five years of their last ten years of employment. Just because the amount of the vested entitlement could not be quantified at the time did not, in the court's determination, mean that the right had not vested in the employees.

Therefore, the court determined that the Superintendent's decision should stand, stating of the affected employees, "Amendments that deprive them of that entitlement [the value of their pension calculated in accordance with the DB formula] contravene the Act and entitle the Superintendent to order deregistration of the amendments." Otherwise, the employees would receive a retroactive reduction of benefits, which is contrary to both *EPPA* and the text of the Plan itself.

Halliburton Group Canada Inc. v. Alberta, 2010 ABCA 254

18. *Holowa Estate*

James Holowa ("Holowa") was an employee of the City of Calgary for 38 years before his death in 2007. He paid into the Local Authorities Pension Plan ("LAPP") and upon his death there was a lump sum death benefit of approximately $729,000. The court was asked to determine how that pension benefit was to be distributed.

On December 29, 1998, Holowa married Judith Hanrahan ("Hanrahan"). On December 20, 2001, they entered into a contract entitled a "Marriage Agreement and Matrimonial Property Agreement" (the "Agreement") that properly complied with Section 37 of the *Matrimonial Property Act* (the "MPA"). In the Agreement, Holowa and Hanrahan agreed that any division of matrimonial property between them would exclude certain property, including the LAPP benefit.

After four years of marriage, the couple separated December 1, 2002. The couple reconciled in the spring of 2005 and lived together on and off until Holowa's death. In 2007, after being diagnosed with cancer, Holowa signed a form that designated his two children as his beneficiaries under the LAPP, and also instructed his lawyer to proceed with obtaining a divorce judgment. Holowa died in May, 2007 prior to the divorce being finalized.

Under the LAPP legislative scheme, a "pension partner" has priority over any designated beneficiary or a member's estate to the proceeds of a death benefit. A valid matrimonial property agreement is not recognized under the LAPP; only a court order may alter the priority scheme.

The question before the court was whether the death benefit should be distributed pursuant to the plain interpretation of the LAPP text to Hanrahan, or whether, pursuant to equitable principles, it should be impressed with a trust in favour of Holowa's estate.

Justice Nation examined the law of constructive trusts. Constructive trusts may be imposed when there is an unjust enrichment, in situations where property is unjustly acquired without a legal remedy. To find that a party has been unjustly enriched, three requirements must be met: the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason for the enrichment.

Applying the law to the facts of the case, the court considered whether Hanrahan's receipt of the LAPP benefit would constitute an unjust enrichment. The court found that Hanrahan would be enriched by the amount of the LAPP, while receiving nothing in exchange for his 38 years of pensionable service was a deprivation to Holowa's estate. Considering a juristic reason, the

judge rejected the operation of the LAPP regulations, stating that "this is not a pension or statutory scheme that does not allow interference because of matrimonial property rights." If the parties had obtained a matrimonial property order instead of entering into a matrimonial property agreement, the lump sum would have been paid to Holowa's estate without dispute. The parties, by entering into the 2001 Agreement and 2003 Amendment, displayed a clear intention to insure that Holowa's pension benefit would go to Holowa's children, and not Hanrahan. Thus, the elements of unjust enrichment were satisfied and as a result, any pension benefit received by Hanrahan was impressed with a trust in favour of Holowa.

In the result, the court ordered the LAPP to pay the benefit to Hanrahan, in accordance with its rules, but found the benefit to be impressed with a constructive trust in favour of the Holowa estate, and ordered it to be paid over to be dealt with by the Estate Administrator.

Holowa Estate, 2011 ABQB 23

BRITISH COLUMBIA DECISIONS

19. *Dawson v. Tolko Industries Ltd.*

In 1997, Tolko retained Towers Perrin, a firm of actuaries and pension consultants, to advise and assist on plan amendments. Towers prepared an amendment to Tolko's pension plan which gave salaried employees the one-time option (the "Offer") of leaving the existing Defined Benefit pension plan (the "DB plan") and joining a new Defined Contribution pension plan (the "DC plan").

The employees who accepted the Offer and relinquished their DB plan benefits allege that the value of their pension benefits under the DC plan is much less than it would have been under the DB plan. They claim against the Towers defendants for general damages and special costs.

Tolko terminated a number of employees between November 2004 and May 2008, and obtained releases in exchange for a lump sum settlement of many employees` claims against Tolko, including 17 of the plaintiffs named in the proceeding (the "Releasing Employees"). Although the title of proceedings names Tolko as a defendant, the Releasing Employees discontinued their claims against Tolko.

At issue in this pre-trial application was whether the Releases signed by the Releasing plaintiffs also served to release the claims against the Towers defendants. Although the Releases did not expressly include the Towers defendants or its employees, they did cover Tolko's "agents".

The court dismissed the application for summary dismissal, finding that the use of the term "agents" in the releases did not refer to agents of Tolko itself. Although this determination by the court was sufficient to dispose of the matter, the court further held that the doctrine of privity of contract prevented the consulting firm from obtaining the benefit of the Releases.

The court examined the construction of the Releases, and held that it was ambiguous as to whether the word "agents" referred to agents of Tolko, or to agents of the "officers, directors and employees" of Tolko and its affiliates, parents and subsidiary companies. Because Tolko had

drafted the Releases, the legal principle of *contra proferentum* mandated that any ambiguity be resolved by construing the Releases in favour of the interests of the employees. As such, "agents" was not to be construed as "agents" of Tolko, with the result that the Towers Defendants could not benefit from the protection provided by the Releases.

The court also considered whether the doctrine of 'privity of contract' prevented the Towers Defendants from obtaining the benefit of the releases. The doctrine of privity provides that a contract can neither confirm rights nor impose

Dawson v. Tolko Industries Ltd., 2010 BCSC 346

20. *Somerville v Catalyst Paper Corporation*

In an interlocutory judgment, the Supreme Court of British Columbia certified a pensions and benefits class action against Catalyst Paper Corporation ("Catalyst"). The Catalyst group of companies operates three mills in BC and one in Arizona, and is run out of Richmond, BC.

This action, brought by Darryl Somerville, seeks declaratory relief and damages, with claims grounded in breach of contract of employment. Somerville's claim arose as a result of changes to employee compensation at Catalyst, including pension and benefits plans. Citing a global slump in the paper industry and the decimation of its share price, the company sought to reduce its labour costs.

The changes, which affected non-unionized employees, capped overall vacation entitlements, eliminated other vacation-related benefits, and altered the company's medical coverage plan to require partial contributions from employees. It transferred all employees remaining in the defined benefit pension plan to the defined contribution plan, and reduced its contribution. Further, the company did not compensate employees for their 2009 performance under its short term incentive plan ("STIP"). Finally, the company announced that employees retiring after March 1, 2011 would not be able to collect post-retirement benefits after age 65.

The court certified three classes: (a) permanent, non-union employees who worked for the defendant in 2009 and were eligible to participate in the STIP; (b) permanent, non-union employees who held positions on January 1, 2010, and who lost benefits as a result of Catalyst's benefits changes; and, (c) non-union employees with defined benefit pension plans (*i.e.*, those hired before January 1, 1994) as of December 31, 2009. The plaintiff agreed to narrow the proposed classes to address the defendant's concern that these classes would encompass employees who had agreed to the impugned changes by settling or waiving their claims. Additionally, the definition of Class B was amended to address the fact that the exact point at which employees were notified of changes to benefits was uncertain.

The court certified the common issues for all classes as whether class members were employed by the defendant and whether the benefits at issue formed part of the contract of employment. For Class A, the other common issues set out to establish the exact nature of STIP; whether STIP payments were owed for 2009, and, if so, the amount owed; the amount of money available to pay out STIP awards; and how this amount should be divided among class members.

Somerville was held to be a suitable representative plaintiff. Kelleher, J. dismissed concerns that Somerville was in conflict with other class members because of differences between his benefits and theirs, holding that "not all employees are impacted in exactly the same way. That is insufficient to show that the plaintiff is in a conflict of interest of any kind."

After narrowing the subclasses and whittling down the common issues, Justice Kelleher held that all of the certification requirements set out in section 4 of BC's *Class Proceedings Act* were satisfied. The claims will be decided at a trial of the common issues.

Somerville v Catalyst Paper Corporation, 2011 BCSC 311