

LEGISLATIVE DEVELOPMENTS AND THE
TOP 20 CASES OF 2013-2014

47TH ANNUAL CANADIAN EMPLOYEE BENEFITS CONFERENCE
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KOSKIE MINSKY LLP
20 Queen Street West
Suite 900, Box 52
Toronto, ON M5H 3R3

Prepared by:
Mark Zigler and James Harnum

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LEGISLATIVE DEVELOPMENTS AND COURTS AND TRIBUNALS

LEGISLATIVE DEVELOPMENTS

2013-2014 saw numerous minor changes to pension legislation across Canada. In the Federal sphere, Bill C-4 simplifies the process by which pension plan administrators can seek refunds under the Income Tax for contributions made as a result of a “reasonable error”. Newfoundland passed a series of regulations granting solvency relief to certain public sector plans, as well as altering the process by which multi-employer pension plans (“MEPPs”) can elect to enjoy solvency relief. In Quebec, a new regulation came into force on December 31, 2013, which provides for the application of asset smoothing when asset values are determined on a solvency basis, as well as certain other solvency funding relief. Quebec also passed Bill 39, which creates a new type of retirement savings plan called a Voluntary Retirement Savings Plan.

Ontario likely had the most extensive changes to its legislative scheme involving pensions. Amendments have been proposed to the PBA to address the issue that arose as a result of the *Carrigan v Carrigan* decision. A new regime for asset transfers between plans was instituted which came into force on January 1, 2014 and which makes changes to numerous sections of the PBA. In last year’s paper we wrote that “Provincial Regulations for “target plans”...have yet to see the light of day”. Nine months later, the awaited target benefit plan regulations – which could affect most MEPPs – have still not been released. The 2014 Ontario Budget promises public consultation on the “target plan” regulatory framework.

Ontario’s 2014 Budget includes numerous technical amendments to the PBA. Its most important feature is likely the creation of a regime which will control the conversions of single-employer plans to jointly-sponsored plans (“JSPPs”). The proposed changes to the PBA, which are included in the budget implementation bill, will include a detailed regime concerning the conversion of public sector pension plans to JSPPs. The 2014 Budget also includes a proposed change to the *Insurance Act*, which would require that employers who provide long-term disability benefits will be required to insure those benefits rather than simply fund them on a pay-as-you-go basis. This reform is meant to ensure that recipients of LTD benefits do not have their benefits eliminated or reduced when their employer becomes insolvent.

Although these are significant changes, the most interesting development in Ontario does not involve occupational pensions at all. As a result of the Federal Government’s continuing refusal to expand the Canada Pension Plan, Ontario’s Liberal Government has proposed the Ontario Retirement Pension Plan (“ORPP”). When announcing the 2014 Budget, the Government announced that the ORPP would have the following features:

1. It will provide a predictable stream of income in retirement by pooling longevity and investment risk, and indexing benefits to inflation, similar to CPP’s retirement benefit.
2. Contributions will be shared between employers and employees, and will not exceed 1.9 per cent each on earnings up to a maximum annual earnings threshold of \$90,000.

3. The maximum earnings on which contributions must be paid will increase each year in accordance with increases to the CPP's maximum earnings threshold.
4. The ORPP will aim to provide a replacement rate of 15 per cent of an individual's earnings, up to a maximum annual earnings threshold of \$90,000.
5. It will be publicly administered at arm's length from government, will include a strong governance model, and will be responsible for managing investments associated with annual contributions of approximately \$3.5 billion.
6. Benefits would be earned as contributions are made to ensure that younger generations are not burdened with additional costs.
7. It would be an alternative to traditional occupational pensions, and those already participating in a comparable occupational pension plan would not be required to enroll in the ORPP.
8. As with the CPP, earnings below a certain threshold would be exempt from contributions, similar to the CPP.
9. The ORPP will be introduced in 2017 to coincide with the expected reductions in Employment Insurance premiums.
10. Enrollment of employers and employees into the ORPP would occur in stages, beginning with the largest employers.
11. Contribution rates would be phased in over two years.

The Ontario Government has also stated that it will work with other provinces to examine whether the ORPP could be expanded to include those living outside Ontario.

Perhaps the most controversial change occurred in New Brunswick, where on January 1, 2014, *An Act Respecting Pensions under the Public Service Superannuation Act* was passed. The Act repealed New Brunswick's *Public Service Superannuation Act*, and converted the pension plan under the PSSA to a shared risk plan in accordance with the New Brunswick *Pension Benefit Act*. The New Brunswick model is relatively unique, and controversial, because it does not merely alter the pension promise on a go-forward basis. Rather, former members of the public service who have already retired have also had their benefits converted to those provided under the Shared Risk model. A constitutional challenge, which alleges that the conversion of retirees' benefits is a breach of sections 7 and 15 of the *Charter* has recently been launched. Other provinces are also adopting a similar model to New Brunswick and seeking to convert their public service pension plans from traditional defined benefit plans. Public sector pension reform is well under way in P.E.I. and Alberta, and Ontario's amendments to the PBA which enable the conversion of public sector single-employer plans to JSPPs may be the beginning of such reform in Ontario.

COURTS AND TRIBUNALS

Since the last IF Conference in November of 2013, there have been many developments in pension jurisprudence. Central themes include the impact of the class procedure model on pension litigation and the interaction of pension benefits with other types of legal entitlements. In the insolvency area, fallout continues from the Supreme Court of Canada's decision in *Re Indalex*. As always, issues surrounding the duties of trustees and employers have continued to arise, with perhaps this year's most important development being in the area of the duty to enroll eligible employees.

As in 2012-2013, there were again three Supreme Court of Canada decisions on pensions. In *IBM Canada Ltd. v. Waterman*, the Supreme Court of Canada dealt with the deductibility of monthly pension benefits from damages for wrongful dismissal. Relying primarily on the underlying nature of a pension - a form of deferred compensation and a property right - a majority of the Court, led by Justice Cromwell, held that an employee's receipt of such payments does not relieve an employer of its obligation to pay damages in lieu of notice for wrongful dismissal over the same period.

In *Telecommunications Employees Association Inc v Manitoba Telecom Services*, the Supreme Court considered the impact of the privatization of Manitoba Telecom System. When the privatization occurred, approximately 7,000 employees and retirees had their pension rights transferred to a new pension plan. At the time of the transfer, the former plan had an actuarial surplus of approximately \$43 million. Justice Rothstein writing for a unanimous Court held that the *Reorganization Act* required that the surplus was to be used for the exclusive benefit of the plan members, and remitted the matter to the trial judge for a determination of how the \$43 million should be utilized for the benefit of plan members.

The final Supreme Court of Canada decision, *Vivendi Canada Inc. v Dell'Aniello*, concerned a class action that challenged unilateral changes that had been made by Seagram's to the health insurance plan that it offered its employees. The Supreme Court's decision did not deal with the merits of the case, however, and merely focused on the four criteria for authorization to institute a class action under Quebec's *Code of Civil Procedure*. Ultimately, the Supreme Court concluded that the threshold for determining common questions is a low one. The amendments to the Plan affected all the proposed class members, and as such the question of the validity and legality of the amendment is a common question for the entire class. In addition, the existence of subgroups within a class does not disqualify the larger group from class action authorization. The Court noted that judges can resolve material differences that emerge within the class at trial and it is not a consideration a motion judge should take into account at the earliest stages of the process.

Some of the themes in the Supreme Court of Canada decisions were also echoed in lower court decisions. As in *Waterman*, the decisions in *Timmins and District Hospital v Ontario Nurses Association*, *O'Farrell v Canada (Attorney General)*, and *Kerfoot v Weyerhaeuser Co.* all involved the interaction between pension (and other) benefits and other legal entitlements.

Timmings concerned whether the amount of LTD payments payable to an employee should be reduced by an amount equal to the amount the employee would receive from her retirement disability pension if she terminated her employment. An arbitrator found that the pension benefits were not “available” to the nurse, as she would have to terminate her employment and forfeit valuable extended medical coverage in order to receive her disability pension. The Ontario Divisional Court upheld this decision.

The *O’Farrell* decision involved a member of the RCMP who brought a civil claim for damages against the Attorney General of Canada, alleging that while a member of the RCMP her colleagues assaulted her, sexually assaulted her, and harassed her, and that the RCMP failed to take appropriate action when she complained about this alleged abuse. The Attorney General brought a motion to stay the proceedings until the plaintiff applied for a disability pension in respect of the same disabilities she claimed to suffer in her statement of claim. Justice Charbonneau stayed the plaintiff’s action, holding that to permit the plaintiff to bring a claim in respect of her disability without having to first apply for a disability pension under the *Pension Act*, thereby triggering the *Crown Liability and Proceedings Act*, would be to circumvent legislative intent that claims against the Crown should not give rise to double recovery

Finally, in *Kerfoot v. Weyerhaeuser*, the British Columbia Court of Appeal dealt with an appeal from a trial judge’s decision to award damages for Weyerhaeuser’s failure to provide reasonable notice of termination and damages assessed in an amount that reflected the employees’ loss of pension benefits during that notice period. Weyerhaeuser argued that the trial judge erred in awarding the plaintiffs damages for the lost value of the Weyerhaeuser pension, measured between the time of the plaintiffs’ termination and the end of the awarded notice period. It argued that the value of the long-term benefits available under the Domtar pension were more valuable than the benefits that the plaintiffs would have received from Weyerhaeuser during the notice period. Justice Saunders rejected this argument, as neither plaintiff was obligated to remain employed with Domtar past the notice period to obtain the superior long-term pension benefits from Domtar.

As in the *Vivendi* decision, there were several lower court decisions which dealt with the myriad of issues surrounding pension and benefit class actions. In *Kidd v Canada Life Assurance Co*, the plaintiffs of a class proceeding succeeded in a motion for approval of a third revised settlement agreement with the defendant, after the first two settlements had fallen through. Justice Perell of the Ontario Superior Court approved the third revised settlement, holding that the revision delivered substantial value to the class members without further exposure to uncertain litigation and the potential for additional economic or actuarial factors diminishing recovery.

In *Toronto Transit Commission v Signorile*, Justice Conway approved a settlement relating to the sharing of demutualization proceeds. She held that the allocation of proceeds in the settlement was fair in light of the fact that litigation would be costly and would deplete the demutualization proceeds. There was also no assurance that the plaintiff class would succeed in their claim. Additionally, the parties were diligent in locating class members and managed to locate 95% of them. The proposal to use a portion of the proceeds to cover legal fees was an essential term of the settlement and it was reasonable given the costs of implementing the settlement.

Holley v Northern Trust Co Canada was a class proceeding against The Royal Trust Company and The Northern Trust Company, who were trustees of a health and welfare trust providing long-term and short-term disability benefits and pension benefits to employees of Nortel Networks Corporation. Nortel was an applicant in ongoing proceedings under the *Companies' Creditors Arrangement Act*. Justice Perell of the Ontario Superior Court of Justice found that the plaintiffs' claim did disclose a cause of action, but that the cause of action was precluded by the release obtained by the defendants in the settlement agreement arising out of the CCAA proceedings. In a subsequent decision, Justice Perell awarded costs to the defendants on a partial indemnity scale. *Chapman v. Benefit Plan Administrators* also involved a cost award in a class action proceeding, with Justice Conway awarding \$175,000 in costs against the defendants who had been unsuccessful in defeating a certification motion in a class action alleging that maladministration of a pension plan had led to significant losses for the plan members.

Another important theme in 2013-2014 involves the duty on plan administrators to enroll eligible employees in their pension plan. *Molson Coors Breweries and CUBGW* was an Ontario labour arbitration decision regarding the eligibility of casual employees for participation in Molson Breweries' employee pension plan. *Ontario Secondary School Teachers' Federation v Brant Haldimand Norfolk Catholic District School Board* involved a complaint that an employee should have been enrolled in the OMERS pension plan.

Jurisprudential fallout from the *Indalex* decision continued in 2013-2014. In *Re Aveos Fleet Performance Inc*, Justice Schragger of the the Quebec Superior Court held that the deemed trust under the Federal *Pension Benefits Standards Act* was not given express statutory protection in either the CCAA or PBA, and thus, could not be given priority over the interest of certain secured lenders. In *Re Timminco Ltee.*, Justice Mongeon came to the opposite conclusion about the deemed trust provided by Quebec's *Supplemental Pension Plans Act*, holding that it trumped the interests of the secured claim of Investissement Quebec. Finally, the *Indalex* proceeding itself created another notable decision, in which a settlement of the remaining issues between the creditors of the insolvency was reached and approved by the Ontario Superior Court. In the same decision, the court determined that the broad jurisdiction granted to a supervising CCAA Judge is sufficient to allow for the amendment to a pension plan without the normal route under the PBA being followed.

Beyond the themes discussed above, there were several cases which do not easily fit into a specific category.

IBEW Local 353 v. Shojaei appears to be the first case where a Canadian court ordered set-off against future pension benefits as a result of fraud. In that case, a union member faked his own death, and his wife used forged documents to claim the death benefit from the pension plan. In a novel decision, the court held that the Trustees of the IBEW Local 353 Funds are not required to pay any further benefits to the defendants from the plans, unless the defendants' indebtedness is repaid to the Trustees first, and that in the alternative, the Trustees may set off the defendant's indebtedness against any money owing from the plans.

In *Olszewska v Ontario (Superintendent of Financial Services)*, a former employee of the University of Toronto brought a case before the Financial Services Tribunal concerning entitlements to a special early retirement pension, arguing that even though she had missed the window to apply for the early retirement pension, errors by the union and the employer should

allow her to access to this benefit. In denying her the relief she requested, the tribunal noted that even if the employer and union had made misrepresentations, it has no authority to remedy unfairness where such remedy would be contrary to the terms of the plan.

In *Hunte v Ontario (Superintendent of Financial Services)*, the Financial Services Tribunal decided that an applicant did not have a claim for a pension from the pension plan for Crown Life Insurance employees for any part of his service from September 1970 to October 1982. The case illustrates the difficulty in establishing historical entitlement to pension benefits.

In *Insurance Corp of British Columbia v Canadian Office and Professional Employees Union, Local 378*, the British Columbia Court of Appeal upheld a lower court decision concluding that a pension plan joint board of trustees does not have a duty to apply for a waiver of maximum employee contributions pursuant to section 8503(5) of the *Income Tax Regulations* where an actuarial report discloses a solvency deficiency.

In *Lacey v Weyerhaeuser Co*, the British Columbia Court of Appeal heard an appeal from a trial judge decision that found that Weyerhaeuser was not contractually permitted to unilaterally freeze its contributions to retirement health benefits that it promised to fund for its retired employees. The trial judge found a breach of contract when Weyerhaeuser froze its contributions, and ordered continuing payment to the health benefits fund, continuing provision of health benefits to retirees, and payment of damages in the amount of premiums paid to the fund. On appeal, Justice Low affirmed the trial judge's decision respecting breach of contract but varied the trial judge's remedial order.

SUPREME COURT OF CANADA DECISIONS

1. *IBM Canada Ltd v Waterman*, 2013 SCC 70

In 2013, the Supreme Court of Canada released *IBM Canada Ltd v Waterman*,¹ a decision concerning the deductibility of monthly pension benefits from damages for wrongful dismissal. Relying primarily on the underlying nature of a pension—a form of deferred compensation and a property right—a majority of the Court, led by Justice Cromwell, held that such payments do not relieve an employer of its obligation to pay damages in lieu of notice for wrongful dismissal over the same period.

The plaintiff was dismissed without cause by IBM at the age of 65. During his employment, he contributed to IBM's defined benefit pension plan. At the time of the dismissal, the plaintiff was eligible for an immediate pension. He was advised by IBM that he would be treated as a retiree and would begin receiving monthly benefits. It was not possible for the plaintiff to retire, receive a full pension, and continue to work and draw a salary from IBM. There was nothing, however, in the plan or otherwise that prohibited the plaintiff from drawing his pension and receiving employment income from a different employer or receiving his pension and damages in lieu of notice from IBM for the same required period.

¹ 2013 SCC 70.

Following his termination, the plaintiff sued IBM for wrongful dismissal. The general rule applied in breach of contract cases, including breach of employment contracts, is that a plaintiff is entitled to a sum of damages to put him or her in the economic position he or she would have been had the contract been performed.² The trial judge awarded the plaintiff damages in lieu of reasonable notice of the termination of his employment of 20 months of salary. The plaintiff also received his monthly pension of \$2,124 over that same 20-month period.

At trial and then before the British Columbia Court of Appeal, IBM unsuccessfully argued that under the general rule of contract damages, the pension benefits should be deducted from the salary and benefits otherwise payable during this period. IBM argued before the Supreme Court of Canada that the plaintiff was being overcompensated for the dismissal. Because he received a monthly pension and was awarded damages for the same period, IBM argued he was better off as a result of the dismissal.

Justice Cromwell approached the issue by asking whether a “collateral benefit” or “compensating advantage” received by a plaintiff should reduce the damages otherwise payable by a defendant. That is, he asked whether this case falls within an exception to the compensation principle that a plaintiff should recover his or her economic loss, no more, no less.³

Justice Cromwell described a collateral benefit as a source of payment which arises because of a breach of contract by a defendant and which ameliorates the plaintiff’s loss. An example of a collateral benefit is employment insurance. To constitute a collateral benefit and give rise to a collateral benefit problem, the benefit must have been one that would not have accrued to the plaintiff but for the defendant’s breach or was intended to indemnify the plaintiff for the sort of loss resulting from it.⁴

Justice Cromwell held that the compensation principle should not be applied strictly. Considerations of justice, fairness, and public policy help to identify when a compensating advantage or collateral benefit should not be deducted from damages.⁵ He stated that charitable gifts and private insurance are exceptions to the compensation principle because neither is deductible from a plaintiff’s damages even though the gifts or insurance payments are made as a result of and in response to injury caused by the defendant.⁶

Justice Cromwell emphasized that the nature of pensions and the intent of the parties support the conclusion that they should fall within the private insurance exception and not be deducted from contract damages. The intrinsic nature of pension benefits is different from wages and similar to private insurance. Parties do not intend a pension to replace income in the event of termination. Pension benefits are not an indemnity for loss of income due to inability to work.⁷ In the present

² *Ibid* at para 2.

³ *Ibid* at paras 15-16.

⁴ *Ibid* at para 22.

⁵ *Ibid* at para 70.

⁶ *Ibid* at paras 39, 41.

⁷ *Ibid* at para 69.

case, the plaintiff's pension was intended to provide "periodic pension payments to eligible employees ... after retirement ... in respect of their service as employees."⁸

The following conclusions were extracted from the jurisprudence:⁹

- i There is no single marker to sort which benefits fall within the private insurance exception.
- i One widely accepted factor relates to the nature and purpose of the benefit. The more closely the benefit is, in nature and purpose, an indemnity against the type of loss caused by the defendant's breach, the stronger the case for deduction. The converse is also true.
- i Whether the plaintiff has contributed to the benefit remains a relevant consideration, although the basis for this is debatable.
- i In general, a benefit will not be deducted if it is not an indemnity for the loss caused by the breach and the plaintiff has contributed in order to obtain entitlement to it.
- i There is room in the analysis of the deduction issue for broader policy considerations such as the desirability of equal treatment of those in similar situations, the possibility of providing incentives for socially desirable conduct, and the need for clear rules that are easy to apply.

Justice Cromwell then applied these general principles to the present case. He concluded that the plaintiff's pension fell within the private insurance exception to the compensation principle and, as such, payments ought not to be deducted from his damages for wrongful dismissal.¹⁰ In reaching this conclusion, he reiterated the view that "pensions bear many of the hallmarks of a property right."¹¹

Justice Rothstein, writing in dissent with Chief Justice McLachlin, held that not deducting the pension benefits from the plaintiff's damages for wrongful dismissal gave the plaintiff a windfall, and no private insurance exception to the compensation principle arose in the case.

Justice Rothstein relied on the fact that the plaintiff's pension was derived from a defined benefit plan which promised the plaintiff a fixed level of payments on retirement for life. This contrasted with a defined benefit contribution plan, which is a finite lump sum amount that would be depleted by pension payments during the reasonable notice period. Deducting the plaintiff's pension payments from his damages would not have taken away any benefits that he would have received had he not been terminated.¹²

⁸ *Ibid* at para 70.

⁹ *Ibid* at para 76.

¹⁰ *Ibid* at paras 66, 78.

¹¹ *Ibid* at para 83.

¹² *Ibid* at paras 122-24.

Justice Rothstein's dissenting reasons also stated that the private insurance exception has no application in the context of a "single contract."¹³ In the present case, the plaintiff's cause of action and entitlement to a benefit arose under the same contract—his employment contract; if the contract allowed him to have both pension and damages for the same period, there would have been no need to appeal to the private insurance exception to the compensation principle.¹⁴

2. *Telecommunications Employees Association of Manitoba Inc v Manitoba Telecom Services Inc, 2014 SCC 11*

In *Telecommunications Employees Association Inc v Manitoba Telecom Services*,¹⁵ the Manitoba Telecom System ("Crown MTS"), a Crown Corporation, was privatized and became Manitoba Telecom Services and MTS Allstream Inc. ("MTS"). Approximately 7,000 employees and retirees of Crown MTS (the "Plan Members") had their pension rights transferred to a new pension plan.

Prior to the privatization, the Plan Members were members of a contributory defined benefit plan. They were required to contribute a percentage of their pensionable earnings to the plan fund. However, the government as employer did not contribute to the fund. Rather, it paid its share of the benefits by paying half of the benefits owed to retirees at the time they became due. Thus, the old plan's pension fund contained only employee contributions and interest. At the time of privatization, the old plan fund had an actuarial surplus of \$43.346 million (the "Initial Surplus").

During the privatization process, the Plan Members received several assurances from Crown MTS and the government that any surplus that existed in the old plan would not be used to reduce MTS' costs of and share of contributions in the new pension plan. Pursuant to the statute that governed the privatization of Crown MTS, the *Manitoba Telephone System Reorganization and Consequential Amendments Act* (the "*Reorganization Act*"), all of the old plan's assets attributable to the plan members, including the Initial Surplus, were transferred to the new pension plan. Section 15(2)(a) of the *Reorganization Act* stated that MTS was required to establish "a new plan which shall provide for benefits which on the implementation date are equivalent in value to the pension benefits to which employees have or may be entitled to under [the old plan]."

The provisions of the new plan made it virtually impossible for the Plan Members to ever receive any benefit funded by the Initial Surplus. Instead, MTS was able to use the Initial Surplus to take contribution holidays, which allowed it to offset contributions it would otherwise be required to make to the pension fund. The issue before the Supreme Court of Canada was whether these outcomes breached the *Reorganization Act* by failing to ensure that the new plan provided pension benefits which were "equivalent in value" to the benefits that the plan members were entitled to under the old plan.

Writing for the Court, Justice Rothstein observed that section 15(2)(a) of the *Reorganization Act* required the new plan to provide for "benefits" that were "equivalent in value" to the "pension

¹³ *Ibid* at paras 38-39.

¹⁴ *Ibid* at para 140.

¹⁵ 2014 SCC 11.

benefits” to which the Plan Members were entitled under the old plan. He held that any interpretation of “equivalent in value” must encompass both the benefits provided by the plans and the means by which those benefits are funded. He stated:

The inclusion of the word “value” in “equivalent in value” suggests that the phrase should be interpreted as capturing both the benefits paid to plan members and the funding mechanism used to produce those benefits. A simple way of viewing the equivalency in value requirement is to ask whether a reasonable person would prefer to receive benefits under the Old Plan or the New Plan. It is plain to see that a reasonable person would take into account how much they are expected to pay to receive those benefits. All other things being equal, a reasonable person choosing between a contributory pension plan in which employees must make some contributions, versus a non-contributory plan where the employer is the sole contributor would undoubtedly choose the latter plan.¹⁶

This approach was further supported by the legislative history of the *Reorganization Act*. When a standing committee considered the statute in the Legislative Assembly of Manitoba, The Honourable Glen Findley, who was the Minister responsible for Crown MTS, stated that “we get up on to 15(2), we talk about equivalent, we mean equivalent in value in the broadest sense.” For Justice Rothstein, this suggested that “equivalent in value” meant more than a simple numerical comparison of the superannuation allowances provide under each plan.¹⁷

Justice Rothstein then considered whether the new plan’s pension benefits were equivalent in value at its implementation date to the benefits of the old plan. The old plan had an actuarial surplus of \$43.364 million. This Initial Surplus was generated exclusively by the plan members’ contributions and was to be credited exclusively to them. However, benefits flowing from the plan were equally funded by plan members and the government, given that the government paid on a pay-as-you-go basis.

On the implementation date of the new plan, the plan members’ initial contribution to the new plan fund was \$43.364 million, an amount solely attributable to the Plan Members. This contribution was not matched by the MTS on the implementation date. Rather, MTS was able to use the Initial Surplus to take contribution holidays and thus reduce its contributions to the new plan. Only MTS benefitted from the plan members’ unequal funding of the new plan. Justice Rothstein stated, “The New Plan can only be held to comply with the requirements of s. 15(2)(a) if the Initial Surplus is used for the exclusive benefit of the plan members, or if plan members received some other compensatory benefits of equivalent value.”¹⁸ Therefore, the outcome of the privatization of Crown MTS was found to violate section 15(2)(a) of the *Reorganization Act*.

3. *Vivendi Canada v Dell’Aniello*, 2014 SCC 1

*Vivendi Canada Inc. v Dell’Aniello*¹⁹ was a class actions case emerging from changes to the health insurance plan (the “Plan”) that Seagram Ltd. had offered its employees. While the plan

¹⁶ *Ibid* at para 65.

¹⁷ *Ibid* at para 72.

¹⁸ *Ibid* at para 80.

¹⁹ 2014 SCC 1 [*Vivendi*].

had existed for decades, in the mid-1980s Seagram added a unilateral amendment clause to the Plan document giving it the “right to modify or suspend the Plan at any time.” In 2000, Vivendi purchased Seagram and became the successor Plan sponsor. By 2008, Vivendi no longer had operations in Canada and as a result the only Plan members were retirees and surviving spouses. In 2009, Vivendi announced that it was making changes to the Plan which would reduce coverage for its beneficiaries.

Michel Dell’Aniello challenged Vivendi’s adverse amendments to the Plan, including the amendment giving Vivendi the right to unilaterally amend the Plan, and brought a motion to the Quebec Superior Court for authorization to institute a class action and for him to be deemed the representative for the Plan’s beneficiaries. The motion proposed six questions of law or fact that Dell’Aniello asserted were common to all the members of the proposed class and that the class action would seek to answer.

Quebec’s *Code of Civil Procedure* (the “Code”) sets out four criteria for authorization of a class action, and gives the court significant discretion in determining whether the criteria are met. In this case, the criterion that became a matter of dispute was that “the recourses of the members raise identical, similar or related questions of law or fact”.

In his decision, the Superior Court judge divided the proposed class into five subgroups, each group characterized by when its members retired. The judge determined that members of each group would have received different documents and different communications relating to the plan upon retirement. Furthermore, the documents and communications may have been unique to each individual within a particular group. This would require the court to perform an individual analysis within each subgroup. Since the harm done could only be determined on an individual basis, the court did not believe that it was an appropriate case to authorize a class action. That the proposed class members had worked in six different provinces, some subject to common law and others to the civil law, further buttressed the court’s findings.

The Quebec Court of Appeal overturned the lower court’s decision. It clarified that the Superior Court’s sole role at the authorization stage of a class action was to determine whether the 2009 amendments to the Plan were “identical, similar or related” for all members of the class. By focusing on the individualized issues that could emerge, the lower court had ruled on the merits of the case and had overstepped its role. The Court of Appeal concluded that the main question concerned the validity and legality of the 2009 amendments and that this question applied to all members of the class.

The Supreme Court agreed with the Court of Appeal and stressed that the motion judge’s function at the authorization stage of a class action was solely to determine whether there was a *prima facie* case and not to examine the merits of a matter. A *prima facie* case is made out when the applicant shows that the four criteria set out in the *Code* are met. The Court’s decision specifically focused on the “commonality requirement” that “the recourses of the members raise identical, similar or related questions of law or fact.” In rejecting the lower court’s assertion that this factor was not met, the decision reiterated the principles the Supreme Court had laid out in *Western Canadian Shopping Centres Inc v Dutton*,²⁰ and *Rumley v British Columbia*.²¹ It

²⁰ 2001 SCC 46.

²¹ 2001 SCC 69.

reiterated that the purpose of the commonality requirement was to determine “whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis.”²² The decision also took pains to emphasize that a common question did not necessarily produce identical answers for each member of the class, noting that “the commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the members.”²³

The Court did caution that although Quebec courts had recognized the principles set out in *Dutton* and *Rumley*, judges should be sensitive to the Quebec procedural rules when applying these common law decisions. That said, the decision determined that the wording in the *Code* was actually less stringent than similar legislation in other provinces. Firstly, the provision only required that a class action have ‘questions’ in common, nowhere requiring common ‘answers’ to achieve authorization.²⁴ Secondly, the Court also noted that in contrast to the concordant Ontario statute, which required not only similar or related questions but also “common issues,” the Quebec legislation’s use of the words “identical, similar or related” was broader and more flexible. The decision illustrated how the Quebec courts’ interpretation of the statute followed suit from this broader wording, allowing for certification of class actions even when circumstances differentiated among group members, as long as some of the questions were common.²⁵ The Court also rejected the contention that the different residencies of the proposed group members precluded authorization of the class action, affirming that a court could accept “proof of the law applicable in the common law provinces or take judicial notice of that law” when coming to its determination.²⁶

The Court’s decision also addressed Vivendi’s arguments that an interpretation of the *Code* that “encourages a multiplicity of substantive analysis” was contrary to principles of proportionality.²⁷ This principle is set out in another section of the *Code*, requiring parties to choose proceedings that are “proportionate, in terms of the costs and time required, to the nature and ultimate purpose of the action or application and to the complexity of the dispute.” In rejecting the appellant’s reasoning, the Court noted that unlike other provinces, the Quebec legislation did not require a class action to be the ‘preferable’ course, but rather only required a judge to decide whether the four criteria are met. While the principle of proportionality must be present when considering these criteria, it does not act as a fifth criteria for which a judge may refuse authorization.²⁸

Ultimately, the Supreme Court concluded that the threshold for determining common questions is a low one. In this case, the 2009 amendments to the Plan affected all the proposed class members, and as such the question of the validity and legality of the amendment is a common

²² *Vivendi*, *supra* note 19 at para 41.

²³ *Ibid* at para 46.

²⁴ *Ibid* at para 51.

²⁵ *Ibid* at para 57.

²⁶ *Ibid* at para 63.

²⁷ *Ibid* at para 65.

²⁸ *Ibid* at para 66.

question for the entire class. In addition, the existence of subgroups within a class does not disqualify the larger group from class action authorization. The Court noted that judges can resolve material differences that emerge within the class at trial and it is not a consideration a motion judge should take into account at the earliest stages of the process.

ONTARIO DECISIONS

4. *Timmins and District Hospital v Ontario Nurses Association, 2013 ONSC 6002*

In *Timmins and District Hospital v Ontario Nurses Association*,²⁹ the Ontario Superior Court of Justice – Divisional Court upheld the decision of a labour arbitrator settling the amount of long-term disability (“LTD”) benefits that a nurse was due to receive under a hospital’s disability insurance plan.

The hospital brought an application for judicial review of the arbitral decision, arguing that the amount of LTD payments to an employee should be reduced by an amount equal to the amount the nurse would receive from her retirement disability pension if she terminated her employment. The arbitrator found that the pension benefits were not “available” to the nurse, as she would have to terminate her employment and forfeit valuable extended medical coverage in order to receive her disability pension.

The Divisional Court upheld the arbitrator’s decision, finding that it was reasonable, consistent with the jurisprudence, and reasonably applied principles of contractual interpretation.

The nurse at issue in the case, Tarja Bouchard, worked at Timmins and District Hospital when she went on long-term disability in February 2009 following an operation for a brain tumor. She continued to need chemotherapy and regular medication to treat the tumor.

Bouchard received LTD payments under the Hospitals of Ontario Disability Insurance Plan, 1980, which provided that other amounts that are “available” to the employee, such as workers’ compensation and *Canada Pension Plan* (“CPP”) payments or payments from the employer’s pension plans, would be deducted from LTD payments. Bouchard also had the opportunity to receive a disability pension. Under the Healthcare of Ontario Pension Plan, a disabled employee had two options: (1) elect to remain an employee, which would mean that both employee and employer contributions to the pension plan are waived and service continues to accrue under the plan, but a pension is not payable until the employee retires; or (2) terminate employment and commence a disability pension, without any further accrual under the pension plan.

Importantly, if Bouchard opted to remain an employee, she would continue to have access to extended health care benefits like drug coverage. If she took a disability pension, however, she would lose access to those benefits.

Bouchard elected to remain an employee and receive coverage for \$4,000 in monthly chemotherapy expenses and \$1,700 in medication costs every three months.

²⁹ 2013 ONSC 6002 [*Timmins*].

In 2011, the employer's LTD benefit provider demanded that Bouchard apply for her disability pension and advised that if she failed to do so, a benefit amount equivalent to her disability pension would be deducted from her LTD benefit because the disability pension was "available" to her.

The Ontario Nurses' Association filed a grievance on Bouchard's behalf.

In considering the positions of the parties, the arbitrator referred to the decision in *Re Cambridge Memorial Hospital Ltd and Ontario Nurses' Association*,³⁰ which considered the same collective agreement, with the same LTD provisions and the same issue as in the case of Bouchard. In *Re Cambridge*, the arbitrator found that having a "payment available" did not refer to payments that the employee can only receive under a plan if some other substantial right or entitlement under the plan is surrendered.

The arbitrator applied the interpretation of "available" in *Re Cambridge* and held that Bouchard's disability pension was not "available" in the same manner as *CPP* or workers' compensation benefits were since it required Bouchard to terminate her health benefits. In addition, Bouchard was not enjoying double recovery as she did not receive more than 70% of her income and the *CPP* disability pension (which was being deducted), as provided in the collective agreement.

When the hospital applied for judicial review of the arbitrator's decision, the Divisional Court found that the arbitrator's decision was logically justified and consistent with the jurisprudence. Moreover, the arbitrator reasonably applied principles of contractual interpretation.³¹

5. *Kidd v Canada Life Assurance Co*, 2014 ONSC 457

In *Kidd v Canada Life Assurance Co*,³² the plaintiffs in a class proceeding brought a motion for approval of a third revised settlement agreement with the defendant. The class proceeding related to the distribution of what had been actuarially estimated to be a \$93 million surplus in the Canada Life Canadian Employees' Pension Plan. The class proceeding also related to allegations of improper charging of expenses to the plan.

An initial \$49 million settlement was approved in February 2012. It was never implemented due to unexpected economic circumstances that resulted in Canada Life's actuaries stating that the estimated amount of the surplus had dramatically decreased. In response, the parties negotiated a revised settlement. The motion for approval of the revised settlement was dismissed in March 2013. A third revised settlement agreement was reached for \$33 million with new distribution terms. These included a waiver of \$1 million in legal fees by class counsel and a waiver by Canada Life of a portion of its settlement expenses.

Justice Perell of the Ontario Superior Court approved the third revised settlement. The revision delivered substantial value to the class members without further exposure to uncertain litigation and the potential for additional economic or actuarial factors diminishing recovery. Canada Life

³⁰ [2011] 108 CLAS 246.

³¹ *Timmins*, *supra* note 29 at paras 7, 9-14.

³² 2014 ONSC 457.

had made a substantial contribution and the revisions went a significant distance in ameliorating the disappointed expectations of the class members arising out of prior incorrect estimates of the plan's surplus.³³ The settlement was also superior to all other alternatives to settlement, including the first approved settlement and the second rejected revision.³⁴ It was unlike the rejected revision because of "circumstantial unfairness" in the revision whereby Canada Life "did not do more to assuage the disappointment that its actuaries had caused."³⁵ The settlement was in the financial best interests of the plaintiff class and was substantively, procedurally, institutionally, and circumstantially fair.³⁶

6. *Toronto Transit Commission v Signorile*, 2013 ONSC 6377

In *Toronto Transit Commission v Signorile*,³⁷ Justice Conway of the Ontario Superior Court of Justice was asked to approve of a settlement of a class proceeding between the Toronto Transit Commission (the "TTC") and its current and former employees. The TTC made group life insurance coverage available to its employees and retirees. It was the holder of three group life insurance policies. Its insurer converted from a mutual insurance company to a corporation with share capital. As a policyholder, TTC acquired shares in the insurer in exchange for the loss of its ownership interest. TTC sold its shares and invested the proceeds, the value of which was just over \$5.6 million.

Both TTC and its employees claimed they were entitled to these demutualization proceeds. The parties held negotiations about the distribution of the proceeds and entered into a memorandum of understanding. According to the memorandum, the proceeds would be shared, with 62% distributed to the employees and 38% to TTC. Further, the TTC would deduct the costs of distribution and an amount paid into a contingency fund used to cover each party's legal fees. The TTC would then allocate the demutualization proceeds to employees in a manner proportionate to the levels of insurance coverage the employees had at the time of the demutualization, with adjustments for employees who were hired or who retired during the class eligibility period.

Justice Conway approved the settlement. The allocation of proceeds in the settlement was fair in light of the fact that litigation would be costly and would deplete the demutualization proceeds. There was also no assurance that the plaintiff class would succeed in their claim. Additionally, the parties were diligent in locating class members and managed to locate 95% of them. The proposal to use a portion of the proceeds to cover legal fees was an essential term of the settlement and it was reasonable given the costs of implementing the settlement.³⁸

³³ *Ibid* at para 57.

³⁴ *Ibid* at para 63.

³⁵ *Ibid* at para 68.

³⁶ *Ibid* at para 77.

³⁷ 2013 ONSC 6377.

³⁸ *Ibid* at paras 16-31.

7. *O'Farrell v Canada (Attorney General)*, 2013 ONSC 6987

In *O'Farrell v Canada (Attorney General)*,³⁹ the plaintiff was a member of the RCMP. She brought a civil claim for damages against the Attorney General of Canada. She claimed that while a member of the RCMP her colleagues assaulted her, sexually assaulted her, and harassed her, and that the RCMP failed to take appropriate action when she complained about this alleged abuse. She alleged that she developed post-traumatic stress disorder and suffered from psychological distress.

The Attorney General brought a motion to stay the proceedings until the plaintiff applied for a disability pension in respect of the same disabilities she claimed to suffer in her statement of claim. The Attorney General claimed that such a stay was explicitly required by provisions governing proceedings against the Crown under section 111 of the federal *Pension Act*. It also pointed out that section 9 of the federal *Crown Liability and Proceedings Act* prohibited proceedings against the Crown from being brought in respect of a claim if a pension has been paid out of the Consolidated Revenue Fund in respect of the disability in respect of which that claim is made.

Justice Charbonneau of the Ontario Superior Court of Justice adopted the Supreme Court of Canada's opinion on section 9 of the *Crown Liability and Proceedings Act*, as it was articulated in *Sarvanis v Canada*.⁴⁰ In *Sarvanis*, the Supreme Court held that section 9's purpose is to prevent double recovery for the same claim against the Crown by prohibiting a plaintiff from recovering both a disability pension and damages when the claims for recovery from these separate sources arise out of identical factual circumstances.⁴¹

Justice Charbonneau stayed the plaintiff's action. To permit the plaintiff to bring a claim in respect of her disability without having to first apply for a disability pension under the *Pension Act*, thereby triggering the *Crown Liability and Proceedings Act*, would be to circumvent legislative intent that claims against the Crown should not give rise to double recovery.⁴²

8. *Hunte v Ontario (Superintendent of Financial Services)*, 2013 ONFST 11

In *Hunte v Ontario (Superintendent of Financial Services)*,⁴³ the Financial Services Tribunal decided that an applicant did not have a claim for a pension from the pension plan for Crown Life Insurance employees for any part of his service from September 1970 to October 1982. After the plan administrator denied his initial application on the basis that its records did not establish his entitlement, the applicant sought an order from the Financial Services Commission of Ontario requiring the plan to provide him with a pension. The Superintendent issued a Notice of Intended Decision which indicated that in his view the applicant had his entitlements paid from the plan when his employment ended. The applicant challenged the Notice of Intended Decision at the tribunal.

³⁹ 2013 ONSC 6987 [*O'Farrell*].

⁴⁰ [2002] 1 SCR 921.

⁴¹ *O'Farrell*, *supra* note 39 at para 20.

⁴² *Ibid* at para 32.

⁴³ 2013 ONFST 11.

The applicant's version of events was that he was employed by Crown life from 1970 to 1982, with a short break in service in 1975. He went to another employer but returned to the company within a few weeks. The applicant contended that he was a member of the plan from 1970 to 1975, and that when he returned he was told he would be treated for pension purposes as if he had been continuously in the plan from 1970 on. He further contended that when his employment with Crown Life ended in 1982, he left with an entitlement to a deferred pension that did not receive any of his contributions back. Unfortunately, the applicant had no documentary evidence to substantiate these facts.

Canada Life, supported by the Superintendent, argued before the tribunal that the applicant was only a member of the plan from 1975 to 1982 and that when he terminated employment, he received a cash refund benefit, and this left him with no other entitlement under the plan. The tribunal noted that Canada Life also did not have much documentary evidence, but the evidence which it did proffer was consistent with its version of events and inconsistent with the position of the applicant.

The applicant tried to establish that he made pension contributions throughout his entire work history with Crown Life, but he did not provide the tribunal with evidence of his pension payments. He claimed that when he left the company in 1975, he was told that his pension contributions were simply forfeited. Apparently he accepted this position.

The applicant's testimony was that when he returned to the company, he was told that he would be "grandfathered" in the plan. He also claimed that he was told that he would be making double contributions for a period in order to make up for the period of absence from the plan. The tribunal described his evidence on these matters as "troublingly vague."⁴⁴ The tribunal was also critical of his testimony on what occurred when he ultimately left the company in 1982, and he was not able to produce any evidence backing up his version of events.⁴⁵

The applicant called seven witnesses who gave evidence about standard company practices, such as the fact that new employees were given an application to the pension plan to sign as part of the hiring process and that no one was advised that plan membership was voluntary. However, the tribunal noted that none of these witnesses "directly corroborated the Applicant's testimony about his personal pension situation."⁴⁶ Conversely, Canada Life's chief witness's testimony "confirmed that the company and Plan records revealed nothing whatsoever to indicate that the Applicant had an entitlement to a deferred pension from the plan."⁴⁷

The first issue dealt with by the tribunal was who should bear the burden of proof. The applicant argued that Canada Life should have the burden of proof. The tribunal rejected this submission, noting that the "fundamental burden of proof that an applicant has an entitlement from a pension

⁴⁴ *Ibid* at para 16.

⁴⁵ *Ibid* at para 60.

⁴⁶ *Ibid* at para 27.

⁴⁷ *Ibid* at para 47.

plan is on that applicant,” and that the applicant had not made out a prima facie case that the employer had to answer.⁴⁸

On the factual issue of whether the applicant took a cash refund benefit when he finally left his employment in 1982, the tribunal found that he did take such a benefit. The applicant acknowledged that he had received a cheque when he left, but his evidence was that this was the return of his additional voluntary contributions (“AVC”s). The tribunal disagreed:

To accept his evidence on this issue, we would have to accept that the company transferred his AVCs to the Group RRSP without his knowledge or consent, subsequently withdrew them from the Group RRSP without his knowledge or consent, and then compounded its unauthorized cash-out by failing to give the Applicant the cash, even though it documented the withdrawal to CRA. All of this is highly improbable. In the absence of a plausible alternative explanation, we accept the accuracy of the documentary record which confirms that by 1982 the Applicant had no AVCs in the Plan.⁴⁹

The applicant made an alternative argument, seeking to establish that he could not have been given a cash refund benefit because his funds were locked under the plan. He based his argument on what the tribunal described as an “ingenious” interpretation of the locking-in provision. However, based on the legislative scheme at the time, the tribunal held that the plan required that the member reach the age of 45 before his benefits would vest.⁵⁰

The applicant also argued that he should have some entitlement to a pension on the basis of breaches of fiduciary duty by the company. He largely based his argument on the failure of the company to give him proper advice when his termination occurred, but the tribunal held that “the Applicant’s uncorroborated recollections, now thirty years old, are simply not sufficient to impose an evidentiary onus on the company to prove exactly what steps it took to inform him of his pension options in 1982.”⁵¹

The tribunal rejected the applicant’s claim to a pension and directed the Superintendent to carry out his Notice of Intended Decision. However, the tribunal did state that if it were necessary for it to make a determination of whether the applicant was in the pension plan prior to 1975, it would have found, on a balance of probabilities, that he was, in fact, a member.⁵²

9. *Olszewska v Ontario (Superintendent of Financial Services)*, 2013 ONFST 6

In *Olszewska v Ontario (Superintendent of Financial Services)*,⁵³ a former employee of the University of Toronto brought a case before the Financial Services Tribunal concerning entitlements to a special early retirement pension. She was hired by the university in 1983, and her employment was covered by the terms of a collective agreement with her representative union. She participated in the University of Toronto Pension Plan.

⁴⁸ *Ibid* at para 60.

⁴⁹ *Ibid* at para 69.

⁵⁰ *Ibid* at para 81.

⁵¹ *Ibid* at para 93.

⁵² *Ibid* at para 97.

⁵³ 2013 ONFST 6.

At the end of April 2008, the applicant was provided with a termination letter giving her two options: She could elect to be placed on the “redeployment list” for up to 24 months; or she could choose to cease her employment immediately and receive enhanced severance pay. If she failed to make a choice, the letter advised, she would default to the latter option. The applicant did not choose and was deemed to elect immediate termination.

At the time of the termination, the plan provided for a special, temporary early retirement window. Plan members belonging to certain employee categories, who were over 55, and whose age plus service equaled at least 75 could retire with an unreduced pension and enhanced bridge benefits. This plan provision was bargained by the university and the union and had been extended a number of times after its introduction in 1996. But the provision was not renewed in the 2008-2011 collective agreement because of the plan’s underfunding and cost constraints. All plan members were advised of this opportunity by letter and were required to communicate their intention to retire by no later than June 27, 2008 if they wished to take advantage of the window. The applicant met the eligibility criteria for the window.

On May 28, 2008, the union filed a grievance on the applicant’s behalf regarding her termination. During the grievance process, and prior to the June 27, 2008 deadline, the union advised the applicant that she could not pursue her grievance and retire under the window at the same time. The union also reminded her of the deadline within which to take advantage of the window. The applicant pursued her grievance until December 2008, at which time the union decided not to proceed with it further. There were at least two offers to resolve the grievance with the university prior to December 2008, which included an offer to retire under the window, but these offers were not accepted by the applicant.

The applicant received a pension option package in December 2008, which included an early retirement option effective November 24, 2008 under the normal plan rules but not under the window with enhanced benefits, which had since been closed.

The applicant contacted the Financial Services Commission of Ontario in 2012 seeking an order extending the window beyond its expiry date to permit her to receive the augmented benefits, effective retroactively to July 1, 2008. The Deputy Superintendent of Financial Services issued a notice of refusal to make an order to amend the plan to extend the early retirement window beyond its expiry date to permit the applicant to receive a pension.

The university, the union, and the Superintendent of Pensions all took the position that the applicant did not give notice of an intention to retire under the window prior to June 27, 2008 and therefore did not qualify for it.

The applicant took the position that she ought to have been able to retire under the window and pursue her grievance against the university simultaneously, but that she was either prevented from doing so, or in the alternative, she verbally advised the university that she intended to retire under the window. In addition, the applicant asserted that the window did not “close” on June 30, 2008 because the new collective agreement between the union and university was not ratified until September 2008.

The tribunal reviewed the terms of the plan and noted that the closing date for the window was unequivocal and found that the applicant did not provide written or verbal evidence at any time prior to June 30, 2008 or afterward of her intention to take advantage of the window.⁵⁴ Moreover, the tribunal rejected the applicant's theory that the window's elimination from the 2008-2011 collective agreement was directed at her.⁵⁵

Although there was some conflicting evidence from the university, the tribunal held that the applicant's date of termination of employment was July 21, 2008 in accordance with the letter sent to her.⁵⁶

The tribunal noted that both the university and the union erred in telling the applicant that she must pursue either her retirement or her grievance, but not both.⁵⁷ In theory, if she had elected retirement and gone ahead with her grievance, the grievance could have been dismissed due to her retirement. Alternatively, she might have been reinstated and her pension stopped. In this case, the advice of the union and university was faulty, but it did not actually prevent the applicant from choosing to retire, seeking external advice or simply alerting the university that this was her intention. In any event, even if the applicant relied on the misinformation of the union and the university, the tribunal noted that it has no authority to remedy an unfairness that is contrary to the terms of the plan.⁵⁸

10. *Trustees of the International Brotherhood of Electrical Workers, Local 353 Trust Funds v. Shojaei et al*, 2014 ONSC 3656.

The *Shojaei* decision⁵⁹ involved a number of novel court-ordered declarations in the context of pension benefits litigation and fraud. It appears to be the only reported case in Canada where a judge granted a set-off order against pension and health benefits that would be payable in the future.

The case involved a fraudulent pension benefit death claim and health benefit claim, in which a union member faked his own death and his wife obtained the pension plan's death benefit by submitting forged government death certificates. The defendant, Alireza Shojaei, was a member of Local 353 for approximately 9 years, and participated in the pension plan, the health and welfare plan, and was a beneficiary of a life insurance policy from Great West Life. His wife was also a defendant, and on December 11, 2008, she advised the Trustees that her husband had passed away on August 6, 2008, while in Iran, at the age of 39 years. She submitted a Pension Plan Benefit Application and Payment Authorization Form, as well as several forged documents, one of which stated that the defendant member had died of heart failure on August 6, 2008. She also made claims to life insurance and health and welfare benefits.

⁵⁴ *Ibid* at paras 20-21.

⁵⁵ *Ibid* at para 20.

⁵⁶ *Ibid* at para 28.

⁵⁷ *Ibid* at para 19.

⁵⁸ *Ibid*.

⁵⁹ 2014 ONSC 3656.

As a result, a pre-retirement death benefit of \$30,924.67 was paid in January of 2009 and, over the next five years, \$16,911.03 of H&W benefits were paid.

It was eventually discovered that the purportedly deceased union member was, with his wife and sons, living in California. The defendants were arrested, extradited back to Canada, charged with fraud. In the criminal trial, both defendants pled guilty. They were each sentenced to five years in prison.

In the civil matter brought by the Trustees, the Judge found the Defendants liable for fraud, deceit and fraudulent misrepresentation, as well as for conspiracy, conversion and unjust enrichment. She ordered that the Defendants pay the Trustees:

1. \$47,835.70 regarding pension death benefits and health benefits claimed;
2. \$100,000, for punitive and exemplary damages; and
3. \$24,294.58 in substantial indemnity costs;

The judge also made the following novel declarations:

1. That the Trustees are not required to pay any further benefits to the defendants from the plans, including but not limited to pension benefits or health and welfare benefits, unless the defendants' indebtedness is repaid to the Trustees; and
2. Alternatively, that the plaintiff may set off or apply the awards granted herein from any benefits payable, now or in the future to the defendants, out of the plans.

11. *Holley v Northern Trust Co Canada, 2014 ONSC 889*

In *Holley v Northern Trust Co Canada*,⁶⁰ a class proceeding was initiated against The Royal Trust Company and The Northern Trust Company, who were trustees of a health and welfare trust providing long-term and short-term disability benefits and pension benefits to employees of Nortel Networks Corporation, the employer of the class members. Nortel was an applicant in ongoing proceedings under the *Companies' Creditors Arrangement Act* (the "CCAA"). The representative plaintiff was an employee on long-term disability for over 12 years and it was unlikely that she would ever be able to return to work. Given Nortel's insolvency and the CCAA proceedings, the plaintiff and other class members would no longer receive disability benefits, although they would receive something modest from the winding up of the trust.

In the class proceeding, the plaintiffs alleged that the defendants committed fraudulent breach of trust by helping Nortel unlawfully use trust funds for purposes unauthorized by the trust agreement, in order to protect Nortel's business interest before Nortel became insolvent. These unlawful uses of funds included withdrawing \$32 million from the fund's reserve to pay for benefits under different benefit plans, knowing that Nortel was obligated to pay for these other

⁶⁰ 2014 ONSC 889.

plans from its own funds. The result was that, contrary to the trust agreement, the fund was not funded on a sound actuarial basis. The plaintiffs alleged that the defendants were reckless or willfully blind with respect to this result and that the defendants breached a fiduciary duty by accepting an unsecured IOU from Nortel when Nortel withdrew from the fund's reserve. Furthermore, they alleged that the defendants concealed their fraudulent breaches of trust from the fund's beneficiaries and the monitor appointed under the *CCAA* proceedings, in part by securing a settlement agreement during those proceedings that released Nortel from liability arising out of the administration of the fund.

The defendant trustees brought a motion to strike the plaintiffs' amended statement of claim as disclosing no reasonable cause of action under Rule 21 of the Ontario *Rules of Civil Procedure*. Justice Perell of the Ontario Superior Court of Justice found that the plaintiffs' claim did disclose a cause of action, but that the cause of action was precluded by the release obtained by the defendants in the settlement agreement arising out of the *CCAA* proceedings.

Justice Perell held that the plaintiffs' claim that the defendants acted wrongfully in the administration of the Nortel health and welfare trust fund had a chance of success. There was a real legal question to be answered about whether it was appropriate for the defendants to use the fund – which was intended to distribute benefits to certain beneficiaries that included the plaintiffs – to distribute benefits to different beneficiaries that did not include the plaintiffs. This was so even if it could be shown that the separate benefit plan that the defendants funded using the \$32 million that the defendants withdrew from Nortel's health and welfare trust fund was identical to Nortel's health and welfare trust fund. In addition, it was arguable that the defendants' acceptance of an IOU from Nortel for this withdrawal was wrongful.⁶¹

Justice Perell noted that fraud involves dishonesty and moral turpitude: “The elements of common law fraud are that the defendant has an intent to deceive and makes a false statement that he or she knows is false or the defendant makes a false statement that he or she is indifferent to its truth value.”⁶² Equitable or constructive fraud “refers to conduct falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained by his or her conduct.”⁶³ According to Justice Perell, the release under the *CCAA* proceedings in the present case barred constructive fraud claims, but not the common law torts of fraud, deceit or fraudulent misrepresentation.⁶⁴

Justice Perell found that the plaintiffs' claim for constructive fraud was not obviously without merit. However, the claim was caught by the *CCAA* proceeding release.⁶⁵ Justice Perell then found that the plaintiffs' claim for fraud could not succeed. There was no evidence of intentional dishonesty or moral turpitude in the defendants' acts of allowing Nortel to withdraw from the health and welfare fund to finance a different benefit plan, or accepting Nortel's IOU for this

⁶¹ *Ibid* at paras 101-107.

⁶² *Ibid* at para 130.

⁶³ *Ibid* at para 123.

⁶⁴ *Ibid* at para 138.

⁶⁵ *Ibid* at paras 140-43.

withdraw.⁶⁶ Justice Perell concluded that the defendant trustees' Rule 21 motion to dismiss should be granted.

In a subsequent decision,⁶⁷ Justice Perell addressed the matter of costs between the parties. The defendant trustees each argued for substantial indemnity costs, while the plaintiffs argued for a lower costs scale given that there was a strong public interest component to their claim. Justice Perell rejected the plaintiffs' arguments but awarded costs to the defendants on a lower, partial indemnity scale in the amount of \$110,000. He held that the plaintiffs' cause of action for alleged wrongdoing was unproven. Therefore, the cause of action could not justify moving the court to exercise its discretion to award no costs on the basis of it having been brought in the public interest:

All efforts to obtain access to justice are in the public interest, and this action would also be interesting to the public and to the legal community, but those factors do not necessarily make an action in the public interest in the requisite sense that a court should be moved to exercise its discretion to award no costs or only modest costs.⁶⁸

Justice Perell did not, however, choose to award substantial indemnity costs, noting that "neither party had been vindicated by the outcome of the motions on the technical defences."⁶⁹

12. *Molson Coors Breweries and CUBGW (Pension Plan Enrollment), Re, 2013 CLAS 132*

*Molson Coors Breweries and CUBGW*⁷⁰ was an Ontario labour arbitration decision by Arbitrator Davie that addressed the eligibility of casual employees for participation in Molson Breweries' employee pension plan ("the Plan").

The Canadian Union of Brewery and General Workers, Component 325 of the National Union of Public and General Employees, brought a policy grievance on behalf of three employees who argued they should be eligible to enroll in the defined benefit part of the Plan offered by their employer, Molson Breweries. The employer took the position that the employees were only eligible to participate in the defined contribution part of the employer's Plan.

The disagreement stemmed from language in the collective agreement that made it clear that employees who participated in the defined benefit part of the Plan prior to January 1, 2010 could continue to do so, while employees who started to participate in the Plan after that date could only participate in the defined contribution part of the Plan. The question facing the arbitrator was whether the employees *should* have been enrolled in the Plan prior to January 1, 2010. The answer was based on the amount of time the employees had worked prior to that date, and how that time should be interpreted under the relevant statute.

⁶⁶ *Ibid* at para 148.

⁶⁷ 2014 ONSC 3057.

⁶⁸ *Ibid* at para 17.

⁶⁹ *Ibid* at para 15.

⁷⁰ 2013 CLAS 132.

The three employees in question had all been casual employees at the Etobicoke plant prior to January 1, 2010, although by the time the case was heard, they had all become full-time employees. The parties did not dispute the employment histories of the individual employees.

There were two provisions of the Plan that were at issue in determining when the employees should have been enrolled in the Plan. Article 3.02 of the Plan allowed an employee to become a member of the Plan once the employee had completed 132 days of work in any twelve month period. However, article 2.16 clearly excluded “any individual employed for casual, seasonal or temporary work” from the definition of employee.

Section 31(3) of the *Pension Benefits Act* (the “*PBA*”), which deals with how long a plan may require a part-time employee to work before allowing him or her to become eligible for plan participation, proved to be important. Section 31(3) states:

31 (3) A pension plan may require not more than twenty-four months of less than full-time continuous employment with the Employer, with the lesser of,

(a) earnings of not less than 35 per cent of the Year’s Maximum Pensionable Earnings; or

(b) 700 hours of employment with the Employer, in each of two consecutive calendar years immediately prior to membership in the pension plan...as a condition precedent to membership in the pension plan.

The union made three main arguments as to why the employees should have been enrolled in the Plan prior to January 1, 2010. First, it argued that under the Plan’s own rules, each employee should have been enrolled in the Plan after completing 132 days of work in a twelve month period in 2008. The union argued that if the Plan excluded the employees because they were “employed for casual, seasonal or temporary work”, this exclusion was inconsistent with the *PBA*. The *PBA* provides in section 5 that no provision of the *PBA* limits pension plans that provide benefits more advantageous than those required by the *PBA*. Properly interpreted, the union argued, the Plan provided a greater benefit by recognizing that each employee had worked significant hours, even though they were not officially “full-time employees”.

The employer disagreed, arguing that the *PBA* could not be applied in such a way as to ignore the explicit definition of employee included in the Plan.

Arbitrator Davie agreed with the employer, stating that the definition of employee in the Plan could not be inconsistent with the *PBA* because the *PBA* does not define the work status of an employee (*i.e.*, part or full-time). In addition, Arbitrator Davie adopted the employer’s submission that the *PBA* only sets minimum standards and does not require employers to offer a pension plan to casual employees.

The union offered a second argument. It argued that these three employees were eligible to be enrolled in the Plan under section 31(3) of the *PBA*. They were each part-time employees who had more than 24 months continuous employment and more than 700 hours of employment in the two years prior to January 1, 2010. The union interpreted the section to mean that the employees need not wait until the completion of the second calendar year in which they achieved 700 hours in order to be enrolled in the Plan.

The employer objected to this interpretation. Molson Breweries claimed that two of the employees, Matthew Heptich and Randall Lloyd, were hired in 2008 and therefore did not meet the criteria of “24 months of less than full-time continuous employment” required by section 31(3) of the *PBA* until after January 1, 2010. The fact that they had worked 700 hours in both 2008 and 2009 was irrelevant.

Arbitrator Davie again rejected the union’s argument. Although she agreed that section 31(3) of the *PBA* applied to all three employees, Mr. Heptich’s 24 months of continuous employment were completed on February 3, 2010 and Mr. Lloyd’s were not completed until May 11, 2010. As both of these dates fell after January 1, 2010, neither employee was entitled to participate in the defined benefit part of the Plan.

Thus, only the union’s third argument succeeded. It argued that the third employee, Ed Vilorio, clearly satisfied the criteria set out in section 31(3) as he completed 24 months of continuous employment and 700 hours in each of the two years prior to December 31, 2009.

The arbitrator did not accept the employer’s objection that Mr. Vilorio only became eligible on January 1, 2010, the official end of the second calendar year in which he completed 700 hours. In her view, the reference in section 31(3) to “each of two consecutive calendar years” must refer to the rolling 24 months of continuous employment mentioned in the same section, not the January to December year. Mr. Vilorio had worked for 700 hours in each of two consecutive twelve month periods of time prior to December 31, 2009, regardless of whether they coincided with the official calendar years. He was thus eligible for membership in the Plan in 2009 and therefore should have been enrolled in the defined benefit part of the Plan.

In summary, the grievance was allowed in part. The two employees who had not completed 24 months of continuous employment prior to the deadline date were not eligible for the defined benefit part of the Plan. However, on a contextual interpretation of “calendar year” in section 31(3) of the *PBA*, Arbitrator Davie found that the third employee had worked the requisite period and was eligible for the defined benefit part of the Plan.

13. *Chapman v Benefit Plan Administrators Ltd*, 2014 ONSC 537

*Chapman v Benefit Plan Administrators Ltd*⁷¹ was a case concerning costs for a certification motion in a class proceeding. The class proceeding related to payment of early retirement benefits by trustees of the Eastern Canada Car Carriers Pension Plan. The plaintiffs claimed that payment of early retirement benefits during the class period contributed to the plan’s solvency deficiency and ultimate reductions in benefits and services to the plaintiff class of plan members. The plaintiffs sued the trustees, administrative agents, and actuaries for negligence. The class proceeding was certified.

The plaintiffs sought costs in the amount of \$210,264, payable by the defendants on a joint and several basis. The defendants submitted that the costs claimed were excessive and unexplained in part, that joint and several liability was inappropriate, and that 30% of the costs award should be “payable in the cause,” meaning that the costs of this interlocutory proceeding should be at least

⁷¹ 2014 ONSC 537.

partially determined by the final result of the case. They submitted that partial indemnity scale costs should be \$130,000.

Justice Conway of the Ontario Superior Court of Justice issued a cost award of \$175,000. She found that the plaintiffs expended considerable resources facing the challenge of four defendants that each challenged all the components of the plaintiff's certification motion. She also found that fact that the plaintiffs had to have the motion adjourned to make an undertaking to amend their statement of claim should not discount the costs award.

However, the award was discounted by Justice Conway because the plaintiff provided no explanation for seeking over \$20,000 partial indemnity costs for a senior counsel it retained; there was no evidence of work performed by this counsel.

When the certification motion was adjourned, the plaintiffs undertook to amend their claim and limit it against each defendant to its several share of liability. Justice Conway found that a costs award of joint and several liability was inconsistent with this undertaking.

Finally, given the size of the costs award, Justice Conway refused to order that costs should be in any way determined by the eventual result of the case and ordered that the costs be paid within 30 days.⁷²

14. *Ontario Secondary School Teachers' Federation v Brant Haldimand Norfolk Catholic District School Board, 2014 ONSC 1657*

In *Brant Haldimand*,⁷³ Ernest Hayward was hired as a caretaker with the Brant Haldimand Norfolk Catholic District School Board in 1969. Hayward became a full-time employee no later than September 1991, and continued to the date of his retirement in 2007. Hayward was told after he left employment that he did not qualify for a pension.

The Ontario Secondary School Teachers' Federation was the bargaining agent for caretakers. Its collective agreement incorporated by reference the terms of the Ontario Municipal Employees Retirement System ("OMERS") stating "Participation in the OMERS program shall be in accordance with the applicable legislation." OMERS is a defined benefit, multi-employer pension plan in which participation is mandatory for most full-time employees of participating employers. Under OMERS, it is the responsibility of the employer to supervise and manage employee and employer compliance, including the obligation to enroll full time employees. An employee cannot waive mandatory enrolment.

Hayward believed that his employer was looking after all pension arrangements. He had no recollection of being given the opportunity to join OMERS and/or signing a waiver giving up the right to join OMERS. The Board stated that it was the general practice and procedure in employee benefit and pension administration to give employees the opportunity to waive participation in OMERS. No waiver signed by Hayward could be located.

⁷² *Ibid* at paras 9-19.

⁷³ 2014 ONSC 1657.

The panel hearing the grievance dismissed Hayward's claim to a pension, in part because they preferred the evidence of the Board's employees that Hayward likely waived his right to a pension, notwithstanding the lack of documentary evidence. The panel also held that it had no authority to deal with any period of time prior to those mentioned in the written grievance. Finally, it concluded that the doctrine of laches precluded the grievance, because there had been an unreasonable passage of time in Hayward asserting his pension rights and prejudice to the Board in responding.

The Ontario Court of Justice – Divisional Court criticized the jurisdictional, factual, and legal conclusions of the panel. First, it noted that the employer had an obligation to ensure that full-time employees joined OMERS as of the date that they were eligible. Thus, the panel wrongly concluded that it did not have jurisdiction with respect to the time period prior to the grievance.⁷⁴

With respect to the panel's factual conclusions, the Court noted that the following undisputed facts did not support the employer's position that Hayward's OMERS participation as a full-time employee was voluntary or subject to election: Hayward was full time for most of his employment; membership in OMERS was mandatory and a condition of employment; waiver of participation in OMERS for full-time employees was not possible; the Board had the obligation to ensure Hayward's enrollment and compliance with OMERS; and OMERS had to conform with and be subject to all governing legislation and regulations. The Divisional Court held that these facts were dispositive and that the majority of Board's factual finding that the grievor "must have in some way waived his entitlement [to an OMERS pension]..." was unreasonable. Since it was not possible for Hayward to waive entitlement to a pension, there were no findings of fact that could possibly lead to the conclusion that he did so.⁷⁵

The equitable doctrine of "laches" bars a claim where there has been unreasonable delay that has prejudiced the opposing party. Under this theory, it is considered unjust to grant a remedy where a claimant has "slept on his rights." This defense was raised by the Board in relation to the factual question of waiver because a key witness had passed away. The Divisional Court noted that the Board's earlier conclusion that waiver was not possible in the first place precluded application of the doctrine of laches. The Court commented on the Board's inconsistent position as follows:

Further, on the employer's evidence, it mistakenly misled the grievor concerning his rights to be enrolled in the pension plan. It would be unreasonable for the employer to mislead an employee about his or her rights under the collective agreement and then argue an equitable defence such as laches when the employee eventually discovers that they have been misled and seeks to enforce his or her rights.⁷⁶

The Divisional Court allowed the judicial review, quashed the underlying decision, and remitted it back to the panel to determine outstanding issues in accordance with its findings.

⁷⁴ *Ibid* at para 31.

⁷⁵ *Ibid* at paras 33-36, 43-45.

⁷⁶ *Ibid* at para 38.

BRITISH COLUMBIA DECISIONS

15. *Lacey v Weyerhaeuser Co*, 2013 BCCA 252

In *Lacey v Weyerhaeuser Co*,⁷⁷ the British Columbia Court of Appeal heard an appeal from a trial judge's decision that found that Weyerhaeuser was not contractually permitted to unilaterally freeze its contributions to retirement health benefits that it promised to its retired employees. The trial judge found a breach of contract when Weyerhaeuser froze its contributions, and ordered continuing payment to the health benefits fund, continuing provision of health benefits to retirees, and payment of damages in the amount of premiums paid to the fund. Justice Low, writing for the Court of Appeal, affirmed the trial judge's decision respecting breach of contract but varied the trial judge's remedial order.

Weyerhaeuser instituted its health benefit fund in order to better compete with other employers that provided full medical coverage at company cost to their retired salaried employees. The issue before Justice Low was whether Weyerhaeuser's promise to its retirees to provide health benefits gave rise to a contract that was enforceable by the retirees when Weyerhaeuser unilaterally ceased contributions and reduced the benefits. When it announced the institution of the fund, Weyerhaeuser stated in seminars, meetings, and information manuals that the fund was instituted "today," that the benefits were "a significant form of compensation to you," that it "pays the full cost" for the benefits, and that the benefits "will be provided for the lifetime of you and your spouse and the company will pay the premium." Despite these promises, there was never any written agreement respecting health benefits between Weyerhaeuser and its employees.

Justice Low found that there was an enforceable unilateral contract between Weyerhaeuser and its employees. Weyerhaeuser created its contractual obligation in order to be competitive. The obligation was an incentive it gave to its employees to stay with the company. The promise was that, by remaining with Weyerhaeuser until their retirement, each employee accepted the company's unilateral offer. When an employee performed his or her end of the deal by staying until retirement, this performance constituted the employee's consideration and acceptance of the company's unilateral offer.⁷⁸ Justice Low stated:

It was open to [Weyerhaeuser] to change the terms of employment arising out of the course of employment. However, in the circumstances, it could not change those terms after the fact, when the retired employee no longer had the option to seek more attractive employment within the salaried-labour market. Once the employee retired, a unilateral change in retirement benefits by [Weyerhaeuser] clearly was a breach of contract.⁷⁹

Justice Low concluded that the company's promise to fund and provide health benefits was akin to a promise to provide deferred compensation for the services that its employees rendered as consideration.⁸⁰ However, he struck the trial judge's order requiring Weyerhaeuser to continue to

⁷⁷ 2013 BCCA 252.

⁷⁸ *Ibid* at paras 50-52.

⁷⁹ *Ibid* at para 53.

⁸⁰ *Ibid* at para 54.

fund and provide health benefits to its employees, given that a class proceeding was being commenced on behalf of all the company's retirees to recover the lost benefits. Justice Low upheld only the trial judge's order for damages for breach of contract to the plaintiffs in the present case.⁸¹

16. *Kerfoot v Weyerhaeuser Co*, 2013 BCCA 330

In *Kerfoot v Weyerhaeuser Co*,⁸² Weyerhaeuser transferred a pulp mill to a new company, Domtar Inc. When the transaction was effected after Weyerhaeuser obtained regulator, shareholder, and court approval, the plaintiffs, employees of Weyerhaeuser, were terminated and became employed by Domtar. Furthermore, the pension benefits available to the plaintiffs while employed by Domtar were less than those available while employed by Weyerhaeuser. Weyerhaeuser appealed a trial judge's decision to award the plaintiffs damages for Weyerhaeuser's failure to provide reasonable notice of termination and damages assessed in an amount that reflected the employees' loss of pension benefits during that notice period.

Justice Saunders, writing for a unanimous British Columbia Court of Appeal, stated that the plaintiffs knew that they would be terminated upon the sale of the mill to Domtar, and were kept apprised of the progress of the sale; they were never informed of when the sale would complete. In fact, they were not told that the sale would complete even when the actual date of the sale came and went. This constituted a failure by Weyerhaeuser to provide reasonable notice of termination. Justice Saunders affirmed that notice is a "binary concept; there either is notice or there is not ... communication that is almost notice is not notice at all."⁸³ She added that "in order for a communication to constitute notice of termination, at the least, it must spell out clearly when the employment will end."⁸⁴

Justice Saunders also found that the seamless transfer of employment by the employees from Weyerhaeuser to Domtar should not reduce the length of notice required. She refused to depart from the view that the important factors to consider when assessing notice period damages include the responsibility of the employment function, age, length of service, and the availability of alternative employment.⁸⁵ Moreover, none of the other exceptional factors that could affect notice period damages, such as the existence of a weak labour market, were present in the present case.⁸⁶ However, Justice Saunders did find that the trial judge's use of a formula of awarding one month notice for each year of service was an error, since this approach was not in accordance with established legal principles.⁸⁷

Weyerhaeuser argued that the trial judge erred in awarding the plaintiffs damages for the lost value of the Weyerhaeuser pension, measured between the time of the plaintiffs' termination and the end of the awarded notice period. It argued that the long-term benefits available under the

⁸¹ *Ibid* at paras 82-84.

⁸² 2013 BCCA 330.

⁸³ *Ibid* at para 27.

⁸⁴ *Ibid* at para 34 [emphasis in original].

⁸⁵ *Ibid* at paras 40-41.

⁸⁶ *Ibid* at para 42.

⁸⁷ *Ibid* at para 47.

Domtar pension were superior to the benefits that the plaintiffs would have received from Weyerhaeuser during the notice period. It also argued that one of the plaintiffs was given an option to choose between different types of pension arrangements when he was terminated, and that the option he chose caused his loss; if he had chosen the other option, he would have suffered no loss.

Justice Saunders rejected these arguments. Neither plaintiff was obligated to remain employed with Domtar past the notice period to obtain the superior long-term pension benefits from Domtar. Furthermore, regarding the plaintiff who was given a choice between pension arrangements when he was terminated, this choice could not work to mitigate the lost value of the Weyerhaeuser pension. If it did, the plaintiff would be deprived of a “right of choice of options the other employees enjoyed.”⁸⁸

For these reasons, Justice Saunders allowed Weyerhaeuser’s appeal only in part.

17. *Insurance Corporation of British Columbia v Canadian Office and Professional Employees Union, Local 378, 2013 BCCA 556*

In *Insurance Corp of British Columbia v Canadian Office and Professional Employees Union, Local 378*,⁸⁹ the British Columbia Court of Appeal upheld a lower court decision which held that the joint board of trustees of a pension plan does not have a duty to apply for a waiver of maximum employee contributions pursuant to section 8503(5) of the *Income Tax Regulations* where an actuarial report discloses a solvency deficiency.

The COPE 378/Insurance Corporation of British Columbia Pension Plan (the “Plan”) is a federally regulated, jointly trustee defined benefit pension plan provided by the Insurance Corporation of British Columbia (the “ICBC”) to its unionized employees. The plan is funded by equal contributions from ICBC and the employees.

When it was revealed by an actuarial valuation report that there would be a substantial funding shortfall in the Plan, ICBC sought a declaration that the plan’s trustees are obligated to apply to waive the 9% limit on employee contributions under section 8503(4)(a) of the *Income Tax Regulations*. Three trustees appointed by the union, Canadian Office and Professional Employees Union, Local 378, opposed the attempt to shift the funding burden from ICBC, and also filed a petition seeking direction on whether they have such a duty. These petitions were heard together and the British Columbia Supreme Court answered in the negative.

ICBC first established the plan for its unionized employees in 1999. An Agreement in Principle was executed in 2000, establishing joint trusteeship and management of the plan between ICBC and COPE. Under the Agreement and Declaration of Trust dated April 2, 2011 (Trust Agreement), a total of six trustees were appointed, three by COPE and three by ICBC. The Trust Agreement confers authority on these six trustees to administer the plan “in conformity with this Agreement, the Plan and Applicable Legislation”. Moreover, under the Trust Agreement, any decision to act must have the approval of at least five of the six trustees.

⁸⁸ *Ibid* at para 59.

⁸⁹ 2013 BCCA 556.

The plan is funded by contributions from both ICBC and employees of ICBC. An actuarial valuation of the plan's assets and liabilities as of December 31, 2011 revealed that greater contributions to the plan were necessary to meet the shortfall in funding. In particular, the actuaries projected that contribution rates would have to rise to 32.56% of pensionable earnings in order to remedy the deficiency in the plan's solvency position over a period of 5 years.

Under the *Income Tax Act*, employee pension contribution rates are ordinarily capped at 9% of their earnings. Where plan funding requirements require contributions beyond that cap, the terms of the plan require excess contributions to be made by the employer, ICBC. However, the Minister of National Revenue can waive the 9% employee contribution cap under section 8503(5) of the *Income Tax Regulations*.

ICBC argued that contributions must be equal as between it and the employees. As such, ICBC posited that plan trustees have a duty to make an application to the Minister for a waiver to increase employee contributions. The employees disagreed and argued that their contributions are not to exceed 9% of their earnings and any shortfall is the responsibility of ICBC.

The plan trustees met in May 2012 to consider two motions. The first was a proposal that the trustees submit an application of waiver to the Minister. The second sought authorization of an application to the Superintendent of Pensions under section 6 of the *Pension Benefits Standards Act* to extend the period for remedying the deficiency from 5 years to 15 years. With respect to the first motion, only the three trustees appointed by ICBC voted in its favour. The second motion, on the other hand, was passed.

Before the British Columbia Supreme Court, ICBC submitted that an application for waiver is necessary and that the trustees have a duty to apply. COPE disagreed with this position, submitting that the trustees are not obligated to apply for a waiver. The trustees appointed by COPE further contended that they have a duty *not* to apply for a waiver. The trustees appointed by ICBC did not take a position.

The British Columbia Supreme Court held that the trustees have no duty to apply to the Minister of National Revenue for a waiver pursuant to section 8503(5) of the *Income Tax Regulations*. In reaching this conclusion, they affirmed that a trustee is obligated to pursue only the interests of the beneficiaries of the trust. Moreover, the court held that in the absence of a requirement to apply for a waiver set out by the terms of the plan or applicable legislation, to impose such an obligation on the plan trustees would be inconsistent with the trustees' existing duty to act exclusively in the interests of the beneficiaries.⁹⁰

ICBC appealed the decision of the lower court. It argued that the history of the plan and the language of its constating documents indicate an overriding intention that contributions between employer and employee be equal. Therefore, the plan trustees must apply for a waiver to raise employee contributions in accordance with this intention.

ICBC relied on the language of the Agreement in Principle, which provides for equal sharing of plan costs "unless otherwise agreed by the parties." They contended that the Agreement in Principle is the "joint management agreement" referred to in section 4.1 of the *Insurance*

⁹⁰ *Ibid* at paras 18-19.

Corporation Act, and that, pursuant to section 4.1(5) of that statute, the plan “must be administered as provided by the agreement.” COPE, on the other hand, argued that the Agreement in Principle was a transitional document that has now been replaced by the Trust Agreement and the terms of the plan set out therein.

While the Agreement in Principle establishes that ICBC and employee contributions are generally intended to be equal, the court noted that the Agreement in Principle also permits parties to enter into an agreement that provides for unequal contributions. The court found that the terms of the plan constitute such an agreement.

Article 4.01(c)(iii) of the plan terms specifically stipulates that “the contribution by a Member shall not exceed the maximum contribution allowed under Applicable Legislation.” The principal issue before the court was interpreting the terms “maximum contribution allowed.” ICBC contended that sections 8503(4)(a) and 8503(5) of the *Income Tax Regulations* establish an initial threshold on employee contributions rather than a maximum contribution of 9%. The court disagreed with this interpretation of the legislation. It reasoned that the plain language of the terms of the plan, along with the provisions of the *Income Tax Regulations*, provide for unequal contribution to the plan by ICBC and its employees.

According to the court, the obligation to apply for a waiver was not supported by any language in the plan’s constating documents. Furthermore, the court was not persuaded that the circumstances in which the parties entered into a joint trusteeship would serve to imply such a duty.

On the issue of whether the trustees could make an application for a waiver, the court refrained from providing any opinion. Moreover, the court noted that the *Income Tax Regulations* are silent on the issue of who can apply for a waiver and whether the Minister can grant a waiver on her own accord.⁹¹

The British Columbia Court of Appeal in the end refused to impose a duty on trustees to apply to the Minister for a waiver of the 9% limit on employee contributions, even in the event of a deficiency in the plan’s solvency position.

INSOLVENCY DECISIONS

18. *Re Aveos Fleet Performance Inc*, 2013 QCCS 5762

In October 2006, certain non-unionized employees of Air Canada who participated in the Air Canada Pension Plan and the Pension Plan for Air Canada Management Employees Formerly Employed by Canadian Airlines Limited Air Canada Plans (“Air Canada Plans”) became employed by Aveos Fleet Performance Inc. The assets and liabilities of the Air Canada Plans were transferred to the Retirement Plan for Employees of Aveos (the “Plan”), a defined benefit pension plan. An actuarial report revealed that the Plan had an adjusted solvency deficiency of \$15,297,000. Annual special payments were required to be paid into the plan fund by Aveos in the amount of \$254,950.

⁹¹ *Ibid* at paras 30-36.

These facts gave rise to the decision in *Re Aveos Fleet Performance Inc.*⁹² In March 2012, Aveos made its last special payment into the Fund and shut down its operations. It applied to the Quebec Superior Court for an initial order under the federal *Companies' Creditors Arrangement Act* (the "CCAA") The court granted a stay of proceedings against Aveos' creditors and appointed a monitor. Thereafter, it appointed a chief restructuring officer and approved of a divestiture process. The Plan was terminated and wound up.

The amount of special payments owed to the Plan by Aveos at the time of the wind-up was \$2.8 million. Pursuant to sections 8 and 29 of the *Pension Benefit Standards Act* (the "PBSA"), a deemed trust attached to these amounts. The issue in *Aveos* was whether the amounts were payable to the Plan in priority to third party secured lenders. The Superintendent of Financial Institutions argued that the amounts were payable in priority, despite the fact that the amounts were encumbered with security prior to the deemed trust arising pursuant to the *PBSA*.

According to the Superintendent, nothing in the *CCAA* stated that the relevant provisions of the *PBSA* did not apply when the amounts held in trust and owed to a pension fund by an insolvent employer were encumbered with security prior to the trust arising. Indeed, the deemed trust exists independently of the date of perfection of the security held by the secured lenders. The secured lenders responded that their secured rights to Aveos' assets subordinated any deemed trust for the pension special payments precisely because the assets were encumbered by their security before the deemed trust came into existence.

Justice Schragger of the Quebec Superior Court reviewed the Supreme Court of Canada's decision in *Royal Bank v Sparrow Electric Corp.*,⁹³ where the Court dealt with a priority claim for a deemed trust over secured interests arising out of the federal *Income Tax Act*. According to Justice Iacobucci in *Sparrow*, a statutory deemed trust could not be effective unless there is some unencumbered asset out of which the trust can be deemed.⁹⁴ In response to *Sparrow*, Canada amended the *Income Tax Act*, the *Canada Pension Plan Act*, the *Employment Insurance Act*, and the *Excise Tax Act* to create a priority over secured interests for the deemed trusts established by these statutes. No similar amendment was made to the *PBSA*.⁹⁵

For Justice Schragger, this implied that the legislature had turned its mind to the *PBSA*'s deemed trust and decided not to give the trust priority over secured interests. In the *Aveos* case, the assets for which the Superintendent sought priority payment to the Plan were encumbered by fixed charges in favour of the secured lenders in 2010. The deemed trust arose at the earliest in 2011. Consequently, the lenders' security "was created before any deemed trust for the \$2.8 million could have existed," and, because the assets were already encumbered, "any deemed trust under section 8(2) of the P.B.S.A. is at best subordinate to the security of the Secured Lenders."⁹⁶

⁹² 2013 QCCS 5762 [*Aveos*]

⁹³ [1997] 1 SCR 411, 4 CBR (3d) 1.

⁹⁴ *Aveos*, *supra* note 92 at para 63.

⁹⁵ *Ibid* at para 65.

⁹⁶ *Ibid* at paras 66-67.

Justice Schragger confirmed this conclusion by noting that, in *Century Services Inc v Canada (Attorney General)*,⁹⁷ the Supreme Court of Canada held that where the legislature's intention is to protect deemed trust claims in insolvency matters, the legislature expressly states so; absent an express statutory basis for concluding that certain assets enjoy statutory protection, no such protection exists. In the present case, there was no express statutory protection for the \$2.8 million owed to the Plan in either the *CCAA* or *PBSA*. Thus, these assets could not be given priority over the secured lenders' interests.⁹⁸

19. *Re Timminico Ltee*, 2014 QCCS 174

Timminico was a metal manufacturer with operations in Ontario and Quebec that became insolvent. The company's restructuring under the *Companies' Creditors Arrangement Act* (the "*CCAA*") occasioned several precedent-setting legal decisions. In the January 2014 case *Re Timminico Ltee*,⁹⁹ the Quebec Superior Court decided a priority dispute between two underfunded pension plans, as represented by the relevant pension committees and Investment Quebec ("IQ"), a secured creditor of Timminico's subsidiary, Becanour Silicon Inc. ("BSI").

Timminico and BSI filed for *CCAA* protection in January 2012. BSI sponsored two defined benefit pension plans, one covering unionized employees and one non-unionized employees. Both plans were significantly underfunded on a solvency basis when *CCAA* proceedings began. Under Quebec's *Supplemental Pension Plans Act* (the "*SPPA*"), BSI was required to make special payments of \$93,810 and \$41,710 per month to the plans, but these special payments ceased upon the company's solvency.

A few months into the *CCAA* proceeding, Timminico and BSI, in conjunction with the monitor of the *CCAA* proceedings, approached the pension committees and pointed out that IQ's secured claim was costing the company a huge amount in interest each week. BSI's business had been sold to a third party, and approximately \$30 million had come into the estate. Both IQ and the pension committees asserted that they were the beneficiaries of a deemed trust under section 49 of the *SPPA*. The debtor and the monitor suggested the repayment of IQ's secured claim and the creation of a mechanism whereby IQ would be repaid, pending the resolution of the priority dispute, and would agree to repay the pension committees if they were found to rank in priority to IQ.

Because Quebec law would govern the priority dispute, Justice Morawetz of the Ontario Superior Court of Justice, in consultation with the parties, decided that the dispute would be best adjudicated by a Quebec judge. The proceeding was transferred to Quebec for the purpose of determining the priority issue.

Section 49 of the *SPPA* provides: "Until contributions and accrued interest are paid into the pension fund or to the insurer, they are deemed to be held in trust by the employer, whether or not the latter has kept them separate from his property." Justice Mongeon, who heard the priority dispute, had previously held in *White Birch Paper Holding Company*¹⁰⁰ that section 49 did not

⁹⁷ 2010 SCC 60, 3 SCR 379.

⁹⁸ *Ibid*

⁹⁹ 2014 QCCS 174.

¹⁰⁰ 2012 QCCS 1679.

create a deemed trust that had effect in insolvency proceedings. In *White Birch*, the court had to decide whether the deemed trust created by section 49 had priority over the superpriority claim of the debtor-in-possession (“DIP”) lender authorized under the *CCAA*. In the *Timminico* priority dispute, however, the relevant lender was a pre-filing secured creditor without any special priority created under the *CCAA*. *White Birch*’s ruling that there was no deemed trust created by section 49 was an obstacle for the pension committees in the *Timminico* case.

Justice Mongeon began his analysis with the following statement:

... despite the analysis of the undersigned in the *White Birch* case, it must be concluded that section 49 of the *SPPA* creates a deemed trust that is enforceable against the claim of IQ. However, the present case deals with a different issue than the *White Birch* and *Indalex* cases. In both of those cases, the court had to decide whether the special payments or the balances of the pension plans’ actuarial deficits pension took precedence over the claim of the “DIP” lender, itself protected by a super-priority under the *CCAA*, while provincial law provided for the existence of a deemed trust applicable to the contributions or actuarial balances in question, as the case may be.¹⁰¹

Justice Mongeon held that the words of section 49 were “sufficiently clear” to establish a deemed trust and to cause deductions that had been “deducted, withheld or collected by the debtor to constitute a well-defined trust patrimony.”¹⁰²

Justice Mongeon then laid out the legal principles governing deemed trusts in Quebec and applied these principles to the facts of the present case:¹⁰³

- i For a deemed trust to exist in Quebec law, it must be created by express legislation. This occurred in the present case;
- i The deemed trust under section 49 of the *SPPA* states that it exists whether or not there is physical separation of the property covered by the trust from the employer’s patrimony. These words, once they were added to the provisions of section 20 of the federal *Income Tax Act*, allowed the deemed trust to produce the effects intended by the legislator. Upon reflection, it is clear that the same words used in section 49 of the *SPPA* must produce the same effects;
- i Contrary to what was concluded in *White Birch*, section 49 of the *SPPA* creates a true legal trust and ensures that the special payments due and unpaid because of Justice Morawetz’s stay order are covered.

However, Justice Mongeon then noted that the existence of the deemed trust was not sufficient to conclude that the claims of the pension committees had priority over IQ’s claim. He noted that, unlike in other provinces, Quebec has no personal security legislation that could give priority to the deemed trust over other secured claims.

¹⁰¹ *Ibid* at para 82.

¹⁰² *Ibid* at paras 97, 128.

¹⁰³ *Ibid* at para 132.

In the absence of such legislative prescriptions of priority, Justice Mongeon turned to another part of the *SPPA* to determine that the pension committees had priority over IQ's claim. He noted that pension money cannot be assigned or seized. Section 264 of the *SPPA* stated that "all contributions paid or payable into the pension fund" are "unassigned and unseizable." He therefore found that the special payments that had been stayed by the initial *CCAA* order were the object of a deemed trust under section 49 of the *SPPA* and, under section 264, could not be assigned or seized. As such, the assets of the employer were subject to a deemed trust and could not be assigned, which meant that these amounts "cannot be subject to a universal hypothec on moveable property."¹⁰⁴

20. *Re Indalex Ltd*, 2013 ONSC 7932

Re Indalex Ltd,¹⁰⁵ as stated by Justice Brown of the Ontario Superior Court of Justice – Commercial List, was "the final chapter of the Indalex saga."¹⁰⁶ The appointed monitor of Indalex's financial affairs moved for the approval of a settlement agreement. The administrator of the Retirement Plan for Salaried Employees of Indalex and Associated Companies (the "Salaried Plan") and the Retirement Plan for Executive Employees of Indalex Limited and Associated Companies (the "Retirement Plan"), moved for an order amending the Salaried Plan to give effect to the Settlement Agreement. Justice Brown granted both motions.

After the Supreme Court of Canada released its decision in *Sun Indalex Finance, LLC v United Steelworkers* in February 2013, the monitor paid a US trustee approximately US \$10.751 million pursuant to an approval and vesting order. The monitor held CDN \$4.06 million and US \$918,055 available for distribution to the creditors of the estate.

The USW and retired executives requested that the monitor distribute those funds to the Salaried Plan and the Executive Plan. A number of parties asserted priority:

- i (i) US Trustee - US \$5.4 million;
- i (ii) Salaried Plan - \$5.008 million;
- i (iii) Executive Plan - \$3.305 million; and,
- i (iv) Sun Indalex Finance, LLC - \$38.049 million.

Priority for the claims by the Salaried Plan and the Executive Plan rested on the deemed trust, lien, and charge provisions of the Ontario *Pension Benefits Act*. In addition, 347 creditors had filed claims of approximately \$33.8 million. The US trustee informed the monitor that there were payments of about \$12.355 million made by US debtors to Indalex which could potentially constitute preferential payments under US law.

¹⁰⁴ *Ibid* at para 155.

¹⁰⁵ 2013 ONSC 7932.

¹⁰⁶ *Ibid* at para 1.

In June 2013, the monitor secured a litigation timetable order to determine threshold issues relating to the distribution of estate funds. Some of the issues related to the claims advanced by the two pension plans, included: whether the deemed trust claimed by the Executive Plan was enforceable against Indalex's accounts or inventory; the effect of a bankruptcy order on the existence, enforceability and priority of both Plans' deemed trust claims; and whether the beneficiaries of the Plans were "secured creditors" of Indalex for purposes of the *Bankruptcy and Insolvency Act*.

In the result, in 2013, Indalex, the US trustee, the Plans' Administrator (Morneau Shepell), the Superintendent of Financial Services, the Retired Executives, and the USW reached a Settlement Agreement under which the funds in the hands of the monitor would be distributed as follows:

- i 1. The distribution of \$1.405 million to:
 - o (a) the Administrator for deposit into the Salaried Plan (\$650,000)
 - o (b) \$105,000 to the USW for seven members of the Salaried Plan
 - o (c) \$15,000 to four members of the Executive Plan
 - o (d) \$350,000 to counsel in trust for the Retired Executives, and
 - o (e) \$285,000 to counsel as partial reimbursement of the legal fees of the Retired Executives; and
- i 2. The balance of the funds would be paid to the US trustee on behalf of the bankruptcy estates of the US debtors without prejudice to the claims of Indalex in those proceedings.

Other provisions of the Settlement Agreement dealt with releases, the lack of need to indemnify certain directors' and officers' liability claims, and fees and disbursements of the monitor and monitor's counsel.

The US trustee received US court approval to enter into the Settlement Agreement in October 2013. The monitor recommended approval of the Settlement Agreement because costly and lengthy litigation would be required to determine the outstanding competing claims against estate funds. No interested party voiced any opposition to the approval order sought. Justice Brown accepted the monitor's recommendation, and granted the approval order, stating that "the Settlement Agreement is a reasonable, proportionate resolution of the outstanding claims."¹⁰⁷

Implementation of the Settlement Agreement required the Salaried Plan to be amended to exclude Salaried Plan members represented by the USW from the \$650,000 to be deposited into the Salaried Plan. Notice of the proposed amendment was sent to all Salaried Plan members. No party opposed the proposed amendment. However, Indalex, the employer under the Salaried Plan, was the only party entitled to amend the Salaried Plan. The administrator reported that neither Indalex nor the US trustee was willing or able to take the corporate steps necessary to enact the proposed amendment.

¹⁰⁷ *Ibid* at para 9.

Justice Brown granted an order amending the Salaried Plan as proposed by the administrator. Although no clear explanation was given about why Indalex, as employer, would not or could not amend the Salaried Plan, the need for the amendment in order to implement the Settlement Agreement was established. Indalex, by filing an application under the *Companies' Creditors Arrangement Act* invoked the jurisdiction of this Court, including the general power of this Court under section 11 of the statute to “make any order that it considers appropriate in the circumstances.” That power includes the ability of the Court to amend a pension plan of an applicant where the amendment is necessary to give effect to a reasonable compromise of claims against the estate of the applicant, where notice of the proposed amendment is given to all affected persons, and where no affected person objects to the amendment sought.¹⁰⁸

¹⁰⁸ *Ibid* at para 12.