LEGISLATIVE DEVELOPMENTS AND THE TOP 20 CASES OF 2011 - 2012

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LEGISLATIVE HIGHLIGHTS

Various provincial and federal governments introduced significant innovation through pension legislation this year. While Ontario focused on bringing in regulations to bring into force changes that were first introduced in bills dating back to 2010, other jurisdictions have both brought in similar changes to those introduced by Ontario or have introduced new models of their own. In many instances, including Ontario and BC, a complete set of regulations is necessary in order to complete the "pension reform" picture.

INNOVATIONS

The New Brunswick government introduced a new option for pension plans based on a Dutch model with Bill 63, *An Act to Amend the Pensions Benefits Act*, which came into force on July 1, 2012. The new "Shared Risk Pension Plans" (SRPP) allow a pension fund to offer a minimum basic benefit. If the fund over-performs, contributions may be lowered or the plan may offer cost-of-living increases or other "ancillary benefits" to the members. Ancillary benefits described in the legislation include early retirement benefits, postponed retirement benefits, bridging benefits, and others prescribed in the legislation or by regulation. On the other hand if the pension fund under-performs, the administrator may increase contribution levels or may reduce or suspend benefits. These changes to the basic benefit must be provided for in a funding and investment policy that must be submitted to the Superintendent. The administrator of the SSRP must be a trustee, board of trustees, or a non-profit corporation, and this cannot include the employer.

The federal government has introduced a new model for pension plans as well with the *Pooled Registered Pension Plans Act*. Under the *Act*, expected to come into force sometime in 2013, federally regulated employers may voluntarily establish a Pooled Registered Pension Plan (PRPP) for their employees. A PRPP is intended to be a single large multi-employer vehicle for accumulating individual account savings for retirement. Employees of a participating employer will be automatically enrolled in the plan, subject to an opt-out, and employee contribution rates are set by the administrator. Contributions are then held in separate accounts and locked-in until retirement. The administrator must provide employees with a default investment option for their contributions, although they may provide up to five other investment options with varying degrees of risk and expected return.

In order to be approved as a PRPP administrator, the financial institution must demonstrate to the Superintendent that, among other things, it has the financial resources and operational capacity to administer the plan, and file with the Superintendent a plan showing that the administration costs charged to members of the PRPP will be at or below the costs charged to members of defined contribution plans with 500 or more members.

The government introduced corresponding changes to the *Income Tax Act* (ITA) to accommodate PRPPs that generally fit PRPPs into the basic system and rules applicable to Registered Pension Plans (RPPs) and Registered Retirement Savings Plans (RRSPs).

OTHER CHANGES IN PROVINCIAL LEGISLATION

Other jurisdictions have brought in pension legislation over the past year that closely mirror the changes introduced by the Ontario government through Bills 120 and 236, particularly with respect of introducing "target plans".

The British Columbia *Pension Benefits Standards Act* (PBSA) received royal assent on May 31, 2012, and is expected to come into force by regulation sometime in 2013. Much like the Ontario legislation, the PBSA includes immediate vesting, access to funds for members under financial hardship, and enhanced disclosure requirements. Administrators are required under the PBSA to establish governance policies and, in the case of DB and target benefit plans, funding policies. The Superintendent may levy penalties of $250,000 against administrators and $50,000 against individuals for contravention of the Act or regulations.

The BC legislation also provides for jointly sponsored pension plans (JSPP) and target benefit plans that are similar to the provisions in the Ontario legislation. Under the BC legislation, however, JSPPs will be available to private-sector employers, and target benefit plans will be available in non-unionized workplaces. Negotiated cost plans, defined as those plans that were established under a collective agreement where contributions to the plan are determined by the collective agreement, are the third new model brought in by this legislation. Negotiated cost plans may include target benefit provisions. The liability of the employer for funding benefits under a negotiated cost plan is limited by the legislation to the contractual obligation of the employer under the collective agreement.

The BC PBSA allows the administrator of a plan to establish a solvency reserve account, a separate account within the fund for payments made to resolve a solvency deficiency. The *Act* also makes a distinction between actuarial excess and surplus. Actuarial excess may be withdrawn from a solvency reserve account despite any wording in the plan text document, subject to forthcoming regulations.

Nova Scotia and PEI both introduced bills this past year that are modeled on the Ontario legislation.

Much like the Ontario PBA, the new Nova Scotia and PEI Acts include immediate vesting, financial hardship unlocking, provisions for jointly sponsored pension plans ("JSPPs") and target benefit plans. The Acts also include provisions allowing for electronic notices and record-keeping, and increased notice requirements for amendments and intended wind-ups to members, former members and retired members.

Both Acts add retired members, independent of former members, as a category of pension plan participants. They also allow for contribution holidays in prescribed circumstances and allow employers to use letters of credit to fund solvency deficiencies. Entitlement to plan surpluses will be governed by the plan documents, or by written document approved by a number of members and former members to be prescribed by regulation. Both Acts will allow the Minister to enter into multi-jurisdictional pension plan agreements with the other provinces.

The Nova Scotia and PEI legislation differ from each other and the Ontario legislation on grow-in provisions and the allowance for partial wind-ups. While Ontario extended grow-in rights to all plan members whose employment is involuntarily terminated, neither the Nova Scotia nor the

PEI legislation does so. Both PEI and Ontario have eliminated partial wind-ups, while they remain in the Nova Scotia legislation.

The Nova Scotia Act has received royal assent and will be proclaimed in force by regulation. The PEI Act received first reading on May 17, 2012.

In Ontario, regulations have been brought in over the past year to bring into force SOME of the changes that were included in Bills 120 and 236. Effective July 1, 2012, pension plans must provide for immediate vesting and locking-in. Grow-in benefits must be provided for plan members whose employment is involuntarily terminated without cause (other than JSPPs and MEPPs, which can opt-out, and construction employees, who do not receive automatic grow-in upon termination without cause). A pension plan may now allow for unlocking of small benefits. Provisions in Bill 236 prohibiting partial wind-ups are now in force. Regulations for "target plans" have yet to be released.

Both Ontario and Quebec brought in regulations allowing for temporary solvency funding relief for prescribed public sector, specified Ontario multi-employer pension plans (SOMEPPs), JSPPs, and some large private sector plans. Ontario's SOMEPP regulation has been extended for a 5-year period.

EMPLOYER INSOLVENCIES

The effect of employer insolvency on plan members was addressed by the federal government in the past year through changes to the ITA. Subject to Ministerial approval, terminated members of a pension plan with a reduced entitlement due to funding deficiencies where their employer is insolvent may transfer tax free the amount they would have been able to tax shelter had their pension not been reduced. Affected individuals may also apply the additional RRSP contribution room retroactively in respect of the 2009 and 2010 taxation years. In addition, payments made by employers in connection with the termination of health and dental benefits arising as a result of an insolvency occurring prior to 2012 will not be taxable against employees' income even if the payment is made in 2012 or later.

OTHER FEDERAL CHANGES

Other amendments to the ITA included a change to the taxation of employee benefits. Employer contributions made for wage-loss replacement benefits payable in a lump-sum will now be included in the employee's income for tax purposes at the time the contributions are made. The tax is effective for contributions made as of January 1, 2013, and for contributions made after March 28, 2012 for coverage in 2013.

The 2012 federal budget also included an increase in the age of eligibility from age 65 to 67 for the Old Age Security (OAS) pension and the Guaranteed Income Supplement (GIS) that will take effect between the years 2023 and 2029. Measures were also introduced to allow take-up of the OAS to be deferred for up to five years past the age of eligibility in order to receive a higher, actuarially adjusted pension.

Finally, the private members' Bill C-377 was introduced in Parliament in the past year to amend the ITA. Under the Bill, every labour organization and labour trust must file an information return each year. Information that must be disclosed includes, among other things: a statement

setting out all transactions over $5000 that must include the name and address of the payer and payee; a statement of consideration paid to officers, directors, trustees, employees and contractors including, among other things, gross salary, vehicles, bonuses, gifts, and a record of the percentage of time dedicated to political and lobbying activities; a statement of disbursements on administration; and, a statement showing the sale of investments and fixed assets, including a description, cost, book value and price paid. Information disclosed under Bill C-377 is exempt from the normal confidentiality protections under the ITA and the Bill mandates that the information be made publicly available on a government website. The Bill imposes a $1000.00 penalty per day for each infraction of the reporting requirements. Bill C-377 has passed second reading and is now before the Finance Committee. The "labour trust" provisions of Bill C-377 include pension and health benefit plans that cover union members and are particularly onerous and invasive of privacy. Parliamentary hearings on the bill in the near future will deal with public concerns, but no hearings have been scheduled to date.

COURTS AND TRIBUNALS

A wide range of pension-related issues have been canvassed by the courts over the past year. Retiree benefits, deductions from Long-Term Disability (LTD) benefits, division of marital property and surplus ownership were at issue in important decisions.

Numerous cases deal with retiree benefits; a recurring theme as the retiree population grows. In Ontario, the Human Rights Tribunal (HRT) found that a plan policy of removing the eligibility for supplemental benefits from pensioners that continued to work did not amount to discrimination based on age. In *Burrows v. U.A Local 463*, the HRT found that the change in eligibility was not linked to age, but was the result of a voluntary choice of the member. In a case where the employer introduced premiums for retiree medical and extended health benefits, the court in *Bennett v. British Columbia* found that a description of retiree health benefits that was provided to employees by the government of British Columbia was not an enforceable promise, but merely a representation of the benefit structure then in place. The court held that the government could alter the terms of the extended health benefits to require a premium from retirees, and that the previous premium-free benefits had not vested in the members.

Despite this view, BC courts have generally taken a dim view of private-sector employers and administrators making unilateral changes to retiree benefits this year. Where an employer has made substantial promises to employees in respect of the level of benefits to be provided (*Gustavson v. TimberWest Forest Corp.*), or where those benefits had already vested (*Lacey v. Weyerhauser Company Limited*), the courts found that changes to those benefits that resulted in increased costs or diminished benefits for the members were contrary to the Plan. In both cases, the BC courts found that employer promises of a "guarantee" of benefits or "benefits for life" meant that the benefits were deferred compensation and the retirees were entitled to the benefits originally promised by the employer.

Various deductions made by administrators from employee LTD benefits have also been ruled to be contrary to the terms of the Plans under which the LTD benefits were offered. Whether an administrator may deduct monthly disability pensions from LTD payments was at issue in both *Manuge v. Her Majesty The Queen* (*Manuge*) and *Cambridge Memorial Hospital Ltd. v. O.N.A.* In both cases it was held that the deductions were not allowable under the terms of the Plan. It was further held in *Manuge* that a signed agreement allowing for such deductions was not

enforceable, reflecting "a profound misunderstanding by the [government] what is contractually appropriate to demand from an insured in terms of third-party benefit offsets or recoveries."

The division of marital assets in pension plans was again before the courts this year in *Kearley v Hepsoe* (*Kearley*) and *Briére v Saint-Pierre* (*Briére*) and in both cases the courts emphasized the equitable principles underlying the division of marital assets. In *Kearley*, the court held that the intent of legislation allowing for division of spousal property is the equitable division of that property, including debt. It would be inequitable to order the division of a spouse's pension benefits where that spouse had already accepted an inordinate share of the debts arising from the marriage. A spouse's repeated attempts to defeat the equitable division of spousal property led the court in *Briére* to order that a lump-sum payment from the spouse's pension be made rather than the customary periodic payments.

Finally, considering present economic conditions, it was surprising to see the issue of surplus ownership make a showing in two cases of note this year: *Sutherland v. Hudson's Bay Company* (*Sutherland*) and *McGee v. London Life Insurance Co.* (*McGee*) The two cases split on whether the Plan in question was impressed with a trust, with the court in *McGee* finding that there was no evidence that the employer intended to create a trust to fund its obligations, while such an intention was found on the evidence in *Sutherland*. Once again the court relied on equitable principles in finding that the intention to create a trust in *Sutherland* defeated the terms of the Plan text that would have otherwise allowed the employer to claim the surplus assets in the event of a wind-up of the Plan.

FEDERAL COURT DECISIONS

1. *Manuge v. Her Majesty The Queen*

The Federal Court recently ruled on the legality of the federal government's practice of deducting monthly disability pensions payable under the *Pension Act* from Long Term Disability (LTD) payments to disabled Canadian Forces (CF) members under the CF Service Income Security Insurance Plan (SISIP).

Former CF member Dennis Manuge brought a claim on behalf of 4500 other former members, arguing that the government policy of reducing SISIP LTD benefits by any amounts received as *Pension Act* disability benefits was not contractually justified.

The Court held that non-contracting beneficiaries had a sufficient legal interest to bring the action. Although the risk of the policy was underwritten by the Chief of Defence Staff (CDS) and managed by Manulife, "the *de facto* insurer is the CDS and the *de facto* insured are CF members." The plaintiff, therefore, was entitled to bring this action.

The Court also held that the government was not entitled to deduct *Pension Act* disability payments from the SISIP LTD benefits, as these benefits were not dependent on whether the member was working or tied to income the member was earning elsewhere. Rather, the benefit was "compensation for impairment to the activities in daily living, including loss of function and for reductions in the quality of life."

The Court gave no weight to an agreement that Class members were required to sign in order to receive benefits. The Court felt the agreement "reflects a profound misunderstanding by the

[government] what is contractually appropriate to demand from an insured in terms of third-party benefit offsets or recoveries."

The Court held further that it would also rule against the government based on the principle of *contra proferentem*. If the drafter of a plan wants to rely on exceptions and limitations to the coverage, it is incumbent that the language "clearly expresses the extent and scope of those limiting provisions." The Court held that the language was not sufficiently clear to allow the government to offset benefits.

Manuge v. Her Majesty The Queen, 2012 FC 499

NEWFOUNDLAND AND LABRADOR DECISIONS

2. *Kearley v. Hepsoe*

In October, 2011 the Supreme Court (Trial Division) of Newfoundland and Labrador issued a decision concerning the division of a foreign pension on an application brought by a former spouse for a compensation order. The parties had settled all division of property matters between them, including responsibility for significant debts accumulated during the marriage, and the Court was only faced with considering the husband's two pensions situated in Norway.

During the marriage the family home was in Newfoundland, but Mr. Hepsoe was a citizen of Norway and worked for a Norwegian shipping company. Mr. Hepsoe participated in the Seaman's Pension Plan. In addition, Mr. Hepsoe participated in Norway's National Insurance Scheme which included a pension component. Under Norwegian legislation, pensions are not considered marital assets and are exempt from division between spouses on marriage breakdown.

At the time of separation the spouses had few assets and substantial debts. The debts were largely assumed by Mr. Hepsoe. Assuming Mr. Hepsoe worked for 50 years (he commenced employment at age 17 and intended to work into his 60s), and with regard to the nine-year marriage, the Court determined that Ms. Kearley's interest in the pension based on an "if and when" method would be less than 10% of any total payment.

The Court ultimately rejected Ms. Kearley's claim because the division of assets between the spouses, which had been negotiated and agreed to, was already unequal. Mr. Hepsoe had not only assumed all the debt from the marriage, but paid spouse and child support, and substantial special expenses related to the children of the marriage.

The Court emphasized that the intent of the legislature is to ensure that the marital assets of parties including debts are shared equitably. On the facts, the consensual division of assets between the spouses was greatly unequal in favour of Ms. Kearley, and ordering the she receive any portion of pension monies in the future would exacerbate the inequality. The Court dismissed Ms. Kearley's application for a compensation order.

Kearley v. Hepsoe, 2011 NLTD (G) 137

NOVA SCOTIA DECISIONS

3. *Savoury v. Nova Scotia(Attorney General)*

In the recent decision *Savoury v. Nova Scotia (Attorney General)*, the plaintiff George Savoury claimed damages against the Nova Scotia Government arising out of the transfer of his pension credits from his prior employment with the Province of Newfoundland & Labrador. The Supreme Court of Nova Scotia considered the claims of breach of contract, negligent misrepresentation, declaratory relief, and the defence under the *Limitation of Actions Act*.

The Court held that the plaintiff failed to meet the evidentiary burden of establishing a breach of contract or negligent misrepresentation. The Court held that there was no evidence to support the plaintiff's interpretation: there was no anticipatory breach of contract, nor was there proof of any negligent misrepresentation. As the Court put it, "there was nothing that could be done to satisfy Mr. Savoury's request… [that] is the cold, harsh reality that he must contend with."

Moreover, the Court held that even if there was sufficient evidence to ground a claim in contract or in tort, the plaintiff's claim was barred by the Nova Scotia *Limitations of Actions Act*, which restricted actions based in tort or contract to six years from the time the plaintiff knew of the alleged loss. The Court determined that the plaintiff knew, at the very latest, by July of 1989 that there was a deficiency and would have to spend a sum of money to obtain full pensionable service from his employment in Newfoundland, and yet he did not commence his action until more than 16 years later. The Court held that the time in which the plaintiff was entitled to bring his claim had clearly expired.

Similarly, Savoury's claim for declaratory relief that he was entitled to be credited for the equivalent pensionable service pursuant to the Nova Scotia legislation was also denied on the basis that there was no cause to grant such relief. Moreover, even if cause could be established, the time for granting such relief had expired years before.

The Court held that any deficiency when transferring pension credits under the Agreement was the responsibility of the transferring employee. In the event that an employee elects not to make a lump sum or periodic payment to remedy that deficiency, the transferring employee "alone must bear the consequences of that decision."

Savoury v. Nova Scotia(Attorney General), 2012 NSSC 70

QUEBEC DECISIONS

4. *Dell'Aniello v. Vivendi Canada Inc*.

Vivendi Universal Canada Inc. acquired the Seagram Company Limited in December 2000, later becoming Vivendi Canada Inc. At that time, Seagram employees were entitled to employee benefits as part of their employment contract, including a supplementary health insurance plan. The plan, implemented in 1977, covered employees and their dependants during their working life and upon retirement. In 1985, a provision was added to the plan allowing Seagram to modify or suspend the plan at any time.

On September 5, 2008, Vivendi informed retirees and other beneficiaries that it was unilaterally reducing the benefits they received under the plan as of January 1, 2009. Only retirees were still in the plan, since Vivendi no longer had any operations in Canada related to the production and distribution of wine and spirits.

Mr. Dell'Aniello, a former employee of Seagram and the vice-president of a Seagram subsidiary, brought a motion for leave to institute a class on behalf of the employees. Justice Mayer of the Superior Court of Quebec dismissed the motion. Section 1003(a) of the Quebec *Code of Civil Procedure* requires that "the recourses of the members raise identical, similar or related questions of law or fact." After analyzing the individual claims of each subgroup of employees, Justice Mayer held that the condition set out in the legislation had not been met as a number of issues required individual analysis and that a class action was not appropriate in this case.

The Quebec Court of Appeal allowed Mr. Dell'Aniello's appeal on the basis that the threshold set by Justice Mayer was too high. The trial judge should have determined whether Vivendi's modifications to the plan were common to all employees. The trial judge erred in dismissing a motion for leave to institute a class proceeding on the basis that that damages might have to be determined individually. The Court of Appeal held that the motion raised a common issue and that recourses of members raised identical, similar, or related questions of law or fact, in accordance with the legislative requirement.

Leave to appeal has been granted by the Supreme Court of Canada.

Dell'Aniello v. Vivendi Canada Inc., [2012] QCCA 384

ONTARIO DECISIONS

5. *Briére v. Saint-Pierre*

In *Brière v. Saint-Pierre*, the Ontario Superior Court of Justice considered the issue of transferring an entitlement under a locked-in retirement account ("LIRA"), in the context of an application to vary a support order, and where there were significant arrears in spousal support payments. At issue was whether Brière should be found in contempt of court for failing to disclose information and comply with the spousal support payments, whether $24,150.00 that had been authorized to be paid out of Brière's LIRA on the basis of undue hardship should be paid in full to Saint-Pierre, and whether a lump sum spousal support award should be transferred to Saint-Pierre from the LIRA.

Justice Beaudoin noted that there were "ample grounds" to find Brière in contempt, emphasizing the fact that Brière stopped paying spousal support despite receiving a significant amount of money in severance payments. Briere had also transferred his pension into a LIRA instead of receiving regular pension payments that might have been subject to garnishment. Furthermore, Brière withheld this information.

The Court found that Briere never intended to comply with the Minutes of Settlement, and ordered that Brière make a lump sum payment of $200,000 to Saint-Pierre. In making this order, Justice Beaudoin relied on the holding in *Belton v. Belton* that the Court had the authority to order lump sum payments to satisfy property claims. Justice Beaudoin emphasized that Brière's pattern of behaviour indicated that there was a real risk that he would not provide periodic

spousal support. Further, Justice Beaudoin noted that section 65(3) of the *Pension Benefits Act* makes an exception for assignment of an interest in money payable for support from a pension plan from the general prohibition on assignment of pension benefits.

Briére v. Saint-Pierre, 2012 ONSC 421

6. *Burrows v. U.A Local 463*

A recent Ontario Human Rights Tribunal decision considered an allegation of age discrimination in the administration of a Supplementary Unemployment Benefit (SUB) Plan, a Long Term Disability (LTD) Plan, and a pension plan. In particular, the applicant alleged that the limited benefits available to 're-employed pensioners' constituted age discrimination under the Ontario *Human Rights Code*.

One of the policies of the union's pension plan was an option, only available to Members that are 55 years of age or older, that allowed them to transfer their account balance out of the pension plan into a "prescribed vehicle at another financial institution." Under the union's pension plan this action constituted a Member choosing to become a "pensioner". Members who selected this option could continue to work as before, but their work status was changed to that of a "re-employed pensioner" and the Member was no longer eligible to receive SUB and LTD benefits.

The applicant alleged that the policies for eligibility for SUB payments and LTD benefits amounted to discrimination on the basis of age. The applicant noted that, notwithstanding his ineligibility to receive payments and benefits from those plans, the employers he worked for continued to be required to contribute to the plans on his behalf. He alleged that removing eligibility under the SUB and LTD plans for "re-employed pensioners" after a Member chooses to become a "pensioner" is discrimination on the basis of age because the Member could not have made the choice to become a "pensioner" without having first reached age 55.

The Tribunal found that the change in eligibility was not linked to age, but rather was the result of the voluntary choice of the Member to become a "pensioner" under the provisions of the pension plan. It found that "disadvantageous treatment which is linked to retirement status … is not necessarily discriminatory, even where employees must be a certain age to retire." It further made clear that the Tribunal "has no jurisdiction to deal with general claims of unfair treatment." The Tribunal found that the applicant had no reasonable prospect of success and the Application was dismissed.

Burrows v. U.A Local 463, 2011 HRTO 2215

7. *Cambridge Memorial Hospital Ltd. v. O.N.A.*

A recent labour arbitration decision, *Cambridge Memorial Hospital v. O.N.A.*, involved deductions to long-term disability (LTD) benefits. Under the terms of the collective agreement, the Grievor had the option of retiring early but elected not to do so. However, the employer's disability insurance carrier began deducting from the Grievor's disability benefits the amount of the disability pension benefits the Grievor would have begun receiving if she had elected to retire early.

Much of the decision focused on the language of the Employer's disability carrier policy with respect to deductions. The policy stated that LTD benefits otherwise payable to the member would be reduced by the amount of any disability payments which were "available" to the member. At issue was whether the monthly payments that the Grievor would have received under the Hospital of Ontario Pension Plan (HOOPP) was "available" to her at the time she was collecting the disability benefit.

The arbitrator found that the term "available" did not refer to payments an employee could only receive by surrendering some other substantial right or entitlement under the plan unless the surrender had actually been made. As no surrender had been made, the arbitrator concluded that disability pension payments under the HOOPP were not "available" to the Grievor and therefore no deduction should have been made from the Grievor's disability benefits. The deductions were found to be contrary to the collective agreement and the Employer was ordered to ensure that the Grievor received the disability payments without the deduction.

Cambridge Memorial Hospital Ltd. v. O.N.A., [2011] OLAA No 558

8. *General Motors of Canada Limited* v. *Abrams et al.* and *Laurendau et al.* v. *General Motors of Canada Limited*

In the autumn of 2009, proceedings were commenced in Ontario and Quebec in which General Motors Canada Limited ("GMCL") claimed that it could unilaterally reduce or eliminate post-employment health care benefits provided pursuant to collective agreements with the Canadian Auto Workers ("CAW"). Representatives of retirees and the CAW took the position that GMCL could not make any reductions to health care benefits provided under a collective agreement.

On September 13 and 19th, 2011, the Ontario Superior Court and the Quebec Superior Court each approved a settlement between GMCL and representatives of retirees of GMCL formerly represented by the CAW.

The settlement provides for participation in the first "employee life and health trust" ("ELHT") created in Canada, a pre-funded health care trust, called the asrTrust. The asrTrust was first established pursuant to a similar settlement reached between retirees of Chrysler Canada Inc., the CAW and Chrysler retirees in October, 2010.

The settlement will permit approximately 30,000 GMCL retirees and their spouses and dependents to receive post-employment health care benefits from the asrTrust. Under the terms of the settlement, GMCL will contribute over $2 billion to the asrTrust in cash and promissory notes. Once the settlement is implemented, both Chrysler and GMCL retirees (and spouses and dependents) employed or retired prior to the restructuring in 2009 shall receive their post-employment health care benefits from the asrTrust.

The Ontario and Quebec courts certified the proposed class and approved of the settlement. In his reasons discussing approval of the settlement, Justice Perell of the Ontario Superior Court noted that the Court had heard from several class members objecting to the settlement, but that while the objections demonstrated the difficult circumstances faced by individual class members, the settlement was still preferable to a protracted litigation or a potential insolvency and liquidation of GMCL.

General Motors of Canada Limited v. *Abrams et al.*, 2011 ONSC 5338 and *Laurendau et al.* v. *General Motors of Canada Limited,* Court File No. S.C.M. 500-06-000508-107 (Quebec Superior Court of Justice)

9. *Re Indalex*

On September 6, 2011, the Court of Appeal for Ontario released two decisions to resolve issues arising out its earlier judgment in *Re Indalex,* dated April 7, 2011. *Re Indalex* dealt with the claims of two groups of pensioners facing major deficiencies in their pension plans in the context of a *Companies' Creditors Arrangement Act* (CCAA) insolvency proceeding. The Court has now released two more decisions in connection with *Re Indalex.*

In its original decision, the Court of Appeal said that if the parties could not agree on costs, they could make written submissions on the issue. Attempts were made by the parties to settle the question of costs, but ultimately the intervention of the Court was necessary. The Plans' administrator, the Ontario Superintendent of Financial Services, and counsel for the Executive Plan beneficiaries reached an agreement on costs, and the Court endorsed their agreement. The Court ordered that the costs be allocated among 14 beneficiaries in relation to their pension entitlement from the Executive Plan. The other three members of the plan, who were not parties to the original appeal, will not have their pensions reduced as a result of the costs award. The Court further ordered that the amount be paid to the law firm representing the Executive Plan beneficiaries, and that any costs recovered from the other side would be paid into the fund, and distributed among the fourteen beneficiaries in relation to their pension entitlements under the Executive Plan.

Counsel for the United Steelworkers (USW) sought a similar order, but the Court denied the request. It held that the USW was in a materially different position than the Executive Plan beneficiaries, insofar as it is not a beneficiary, and is merely the bargaining agent for seven of the 169 beneficiaries of the Salaried Plan. Unlike the order to pay costs from the Executive Plan, parties that never consented to the appeal or got notice of it would be forced to bear the brunt of the legal costs ordered from the Salaried Plan fund. The Court also highlighted the fact that the Salaried Plan was already underfunded, so the payment would not be coming out of a surplus.

The Court declined to make any order to pay costs for the underlying motions, noting that it is rare to issue cost orders in CCAA proceedings. The Court mentioned that sound policy reasons were behind this approach, including the fact that in the case of an insolvent company, there are limited funds to be distributed, and parties ought not to expect to recover their costs.

The parties were also unable to settle the terms of the formal written order flowing from the reasons. Counsel for the Executive Retirees wanted the order to include declarations that Indalex had breached its fiduciary duty under the common law and the PBA and that a constructive trust existed in favour of the Executive Plan's beneficiaries. Sun Indalex, on behalf of itself, the Monitor and the U.S. Trustee, sought to have these declarations omitted from the order, arguing that these provisions went beyond incorporating the operative relief granted, and were therefore inappropriate. The Court disagreed, and held that the order would include the declarations.

Counsel for the USW asked for similar provisions, and also asked that a declaration be included that noted that "the Wind-Up deficiency in the Salaried Plan accrued as of the date of the wind up … and pursuant to s. 57(4) of the *Pension Benefits Act*…is subject to a deemed trust." Sun

Indalex, the U.S. Trustee and the Monitor opposed this inclusion for the same reason they opposed the declarations requested by counsel for the Executive Retirees. Again, the Court disagreed with them, and held that the order should include the declaration requested by the USW.

Re Indalex 2011 ONCA 578

10. ***Lacroix v. Canada Mortgage and Housing Corporation***

A group of former employees of the Canada Mortgage and Housing Corporation ("CMHC") brought two related pension class proceedings arising out of the large number of terminations of employment that took place over a decade ago. The plaintiffs alleged that the CMHC breached the conflict of interest provisions of the *Pension Benefits Standards Act* ("PBSA") in deciding certain subsequent benefit enhancements, and asked the Court to remedy this alleged breach by ordering a partial termination of their pension plan or damages in lieu. On a motion to certify common issues for trial, among other things, the Court rejected the proposed remedy as disclosing no viable cause of action known to law.

The thrust of the plaintiffs' claims was that in making decisions about surplus sharing and benefit enhancements, CMHC acted in its own interest, and the interests of the remaining Plan members, and at the expense of employees who had left the Plan. The primary legal issue for the Court of Appeal was whether the Court has the jurisdiction to order a partial termination of a pension plan, or order an employer to effect a partial plan termination.

The Court found that the scheme and objects of the PBSA do not support an interpretation favouring a court's power to order the partial termination of a pension plan. The only two parties that may initiate the termination of a pension plan are the employer or the Superintendent. There is nothing in the PBSA which empowers employees to initiate a termination, because their recourse is to ask for the Superintendent's assistance.

The Court of Appeal also considered its prior decision in *Lomas v. Rio Algom* ("*Rio Algom*"). In that case, a group of aggrieved employees sought the wind-up of their employer's pension plan, which was registered under Ontario's *Pension Benefits Act* ("PBA"). The Ontario Court of Appeal decided that a court could not order an employer to commence proceedings to wind up a pension plan, relying on the Supreme Court of Canada's decision in *Buschau v. Rogers Communications*. Although *Rio Algom* concerned the PBA and not the PBSA, the Court held that the analysis and holding applied to the present facts because: 1) the two statutory schemes do not markedly differ; 2) the Court in *Rio Algom* relied on *Buschau* which did in fact deal with the PBSA; and 3) the policy reasoning applied with equal force.

With respect to whether the Court has jurisdiction to order damages equivalent to a pro rata distribution of surplus on a partial termination, the Court held that it cannot do indirectly what it cannot do directly, namely, order a partial termination of the Plan. The Court refused to certify the issues related to partial termination or damages based on partial termination as disclosing no reasonable cause of action.

Lacroix v. Canada Mortgage and Housing Corporation, 2012 ONCA 243

11. *MacKinnon v. Ontario Municipal Employees Retirement Board*

The settlement of a representative action against Ontario Municipal Employees Retirement System (OMERS) on behalf of all persons who had a present, future, contingent or unascertained interest in the OMERS Fund was recently approved by the Ontario Superior Court of Justice in *MacKinnon v. Ontario Municipal Employees Retirement Board*. The plaintiff had alleged that transactions transferring management of real estate assets from OMERS to a private real estate management company were improper and at commercially unreasonable levels.

Following a mediation and fact-finding process, a report and letter of recommendation was released by the mediator finding that there was no wrongdoing by any defendant and concluding that the disputed transactions were carried out on commercially reasonable terms. The report went on, however, to find that "although there were not actual conflicts of interest in the transactions, and the defendants acted appropriately throughout, the OMERS Board ought to have taken greater care to have avoided the appearance of a conflict of interest."

After this litigation was commenced, OMERS initiated changes to the Fund, including better communications and governance to address perceived conflict of interest issues. Following these changes and the release of the mediation report, a settlement agreement was signed by the parties recognizing the improved governance structure and dismissing the action.

MacKinnon v. Ontario Municipal Employees Retirement Board, 2012 ONSC 4450

12. *McGee v. London Life Insurance Co.*

A 1996 reorganization of London Life and the resulting layoffs that followed triggered a partial wind-up of the London Life Insurance Company Staff Pension Plan (the "Plan"). In 2004, the Superintendent of Financial Institutions approved the wind-up report, except to the extent that it failed to address the issue of ownership of the surplus generated by the partial wind-up, which as of May 1, 2005 was estimated to be approximately $16 million.

The Applicants submitted that the assets of the Plan were impressed with a trust, and as a result of a partial windup of the Plan associated with a restructuring that occurred in 1996, the Plan surplus must be distributed to members affected by the partial windup.

The principle issue for the Court was whether London Life demonstrated an intention to establish a trust of assets to fund its obligations under the Plan prior to a 1973 amendment to the Plan text containing a provision permitting the Company to terminate the Plan and receive back excess contributions.

The Court held that a trust had not been created by any of the successive by-laws which established and transformed the Plan. The first reason for this was that various federal statutes granted London Life the authority to establish a pension plan as a contractual promise to pay without creating a trust or insurance contract. Second, because there were no tax rules or policies at the relevant time which governed pension plans, there was no inference that could be drawn by the Court that the Company had intended the Plan assets to vest in a trust from its inception. Third, there was no evidence that the Plan funds had been segregated in any way and it is well established that "the one element that predominates in the common law idea of a trust is segregated property."

The Court declined to order a constructive trust in this case for several reasons, including the fact that London Life never truly acted improperly. The Applicants failed to establish that the Company had misrepresented anything to the tax authorities, and the Company had no duty to establish the Plan as a trust. The Court also found that the element of unjust enrichment, which would have been necessary if there was no wrongful conduct, was not present. Finally, the Court noted that constructive trust is an equitable remedy that is granted at the discretion of the Court, and in this case, allowing it would be inequitable as London Life had always acted within the bounds of the law at the time.

The Applicants lost on all counts. The Court held that there was no trust impressed upon the surplus assets, that members of the class had no entitlement or damages flowing from the partial windup, that London Life had not breached any common law or statutory duties, and that neither a constructive trust nor resulting trust should be ordered.

McGee v. London Life Insurance Co,. 2011 ONSC 2897

13. *Sutherland v. Hudson's Bay Company*

This case involved the cross-appeal of a trial decision holding that members of the Dumai Pension Plan (the "Plan"), which is sponsored by the Hudson's Bay Company ("HBC"), were exclusively entitled to the surplus assets held in the pension fund in the event of a wind-up of the Plan. In a split decision written by Justice Gillese, the majority of the Court upheld the trial decision. In dissenting reasons, Justice Rouleau held that the trial determination that surplus ownership rests with Plan beneficiaries should be overturned.

Justice Gillese began her analysis with a review of *Schmidt v. Air Products of Canada Ltd.* ("*Schmidt*"), outlining the analytic framework by which issues of surplus entitlement are to be determined, and reviewing the key terms of the documents reviewed by the Court in that case. Applying this framework, the majority held that: 1) it is readily apparent that the Plan is impressed with a trust; 2) because the Plan is impressed with a trust, to the extent that equitable principles conflict with Plan provisions, equity must prevail; 3) there is no language in the underlying trust document limiting the operation of the trust such that Plan members' interests have no interest in Plan surplus; and, 4) HBC did not reserve to itself an express power of revocation over the trust at the time the trust was established.

Justice Gillese went on to consider whether the terms of the trust permitted HBC to claim the surplus on termination, and concluded that the language of the original trust agreement clearly demonstrated HBC's intention to establish an irrevocable trust for the exclusive benefit of Plan members and their beneficiaries. In response to HBC's argument that certain provisions of the Plan text supersede the trust agreement, Justice Gillese stated very clearly that "Equitable principles prevail; therefore, it is the original Trust Agreement, not the original Plan Text, that 'trumps.'" Justice Gillese rejected HBC's submissions that the recent decision of the Supreme Court of Canada in *Burke v. Hudson's Bay Co.* ("*Burke*") was determinative of the issue before the Court, citing a number of material factual differences.

The majority of the Court held that the trial decision was correct, notwithstanding the fact that the trial judge did not have the benefit of *Burke* at the time he rendered his decision.

In his dissent, Justice Rouleau held that, although *Schmidt* remains good law, the Plan and the trust documents must be read together as an integrated whole. Reviewing the terms of the Plan and trust, Justice Rouleau held that "[a]t its highest, the "exclusive benefit" language found [in the trust document] . . . refers to use of the actual funds in the ongoing plan; however, on termination, when the plan ceases to exist and a surplus may arise, Article 12 and s. 16.02 determine how those funds may be used." In the result, Justice Rouleau would have overturned the trial decision in respect of surplus entitlement on Plan wind-up.

Leave to appeal to the Supreme Court of Canada was dismissed.

Sutherland v. Hudson's Bay Company, 2011 ONCA 606

14. *Re Timminco Limited*

The Ontario Superior Court of Justice - Commercial List recently issued two decisions on two separate motions that were brought in connection with proceedings under the *Companies' Creditors Arrangement Act* ("CCAA") involving Timminco Limited and Bécancour Silicon Inc. (collectively, the "Timminco Entities"). These decisions addressed the priority to be granted to pension claims in an insolvency (collectively referred to herein as the "Timminco Decisions").

In both decisions the Court considered principles that were set out by the Ontario Court of Appeal in *Indalex Ltd.* (*Re)* ("Indalex"). Unlike the Court in *Indalex*, however, in the Timminco Decisions the Court found that the pension claims did not have priority. This is in part based on the holding in *Indalex* that a Court may override the deemed trust provisions of pension legislation where the evidence satisfies the judge that not overriding the provincial statutes would "frustrate the company's ability to restructure and avoid bankruptcy."

In the first Timminco Decision, the Court found that it was unlikely that the advisors would participate in the CCAA proceedings unless the Administration Charge was granted to secure their fees and disbursements and that their participation was critical to the efforts of the restructuring of the Timminco Entities. Similarly, the Court concluded that it was not reasonable or realistic in the circumstances to expect the directors and officers to continue without the protection of the D & O Charge. The Court concluded that the Timminco Entities would be, "directionless and unable to effectively proceed with any type or form of restructuring under the CCAA" without the advisors or a functioning governance structure.

The Court also found that the evidence clearly indicated that the Timminco Entities did not have sufficient liquidity to make the special payments to the pension plans. The Court found that the employees and former employees of the Timminco Entities would not be prejudiced if the special payments were suspended. In this regard, it noted that bankruptcy was the likely alternative if the restructuring efforts failed and that bankruptcy would not produce a better result for the employees and former employees.

The Court determined that it was both necessary and appropriate to grant a super priority to both the Administration Charge and the D & O Charge and to suspend the obligation of the Timminco Entities to make special payments.

In the second Timminco Decision, the Court considered a motion commenced by the Timminco Entities seeking approval of a DIP Facility and an order granting a priority charge in favour of the DIP Lender.

The Court concluded that it had jurisdiction to override the provisions of Ontario's *Pension Benefits Act* (PBA) and Québec's *Supplemental Pension Plans Act*. In addition, the Court noted that the CCAA provides the Court with the authority to grant a DIP financing charge and outlines the factors to be considered by the Court in deciding whether to grant such a charge.

The Court concluded that the DIP Facility was necessary. It commented that it was not realistic to expect any commercially motivated DIP Lender to advance funds without being granted a priority, and that not granting the priority would likely result in a failure of the CCAA process. The Court commented that it was, "satisfied that bankruptcy was not the answer and, in order to ensure that the objectives of the CCAA are fulfilled, it is necessary to invoke the doctrine of paramountcy" to override the provisions of the applicable pension benefits standards legislation. Therefore, given the facts, the Court approved the DIP Facility and the DIP Charge was granted super priority.

Re Timminco Limited (2012) ONSC 506 and (2012) ONSC 948

BRITISH COLUMBIA DECISIONS

15. *Bennett v. British Columbia*

Since 2003, nearly 30,000 public sector retirees in British Columbia have been required to contribute to the cost of their retiree medical and extended health benefits. Prior to this time, the retirees had enjoyed benefits at no cost to them. A class action was certified in 2007, challenging the unilateral imposition of premiums by the BC government. The claim was not successful at the trial level, and was appealed to the B.C. Court of Appeal. The Court of Appeal considered whether members of the Class had a vested contractual or statutory right to enjoy premium free benefits indefinitely into retirement, notwithstanding a change in the legislative scheme underlying those benefits.

There were two issues for consideration by the Court of Appeal: Did the retirees have a contractual right to premium-free insurance? Were the benefits "vested" prior to 2000?

The Court held that the trial judge had rejected the idea that employees had continued to work to retirement based on promises made by the B.C. government, and that this was a finding of fact made after careful consideration of all the evidence. As such, it could not be overturned unless there was a palpable or overriding error. The Court of Appeal further analyzed the distinction between promises and representations, underscoring that a promise contains an undertaking to do or not do something, not a statement of fact. The documents put before the Court only contained descriptions of the benefits available at the time, and did not constitute promises to the class to pay benefits premiums indefinitely.

With respect to whether the class had a vested statutory right to premium-free MSP and EHB, the Court found that it was not intended that any particular premium contribution level prescribed for a group was immutable, and that if the legislature had intended this it ought to

have stipulated this in the legislation. Further, the Court noted the unfairness that would result from creating classes of retirees with each change to the legislation.

Bennett v. British Columbia, 2012 BCCA 115

16. *Gustavson v. TimberWest Forest Corp.*

The Provincial Court of British Columbia recently reviewed a company's unilateral decision to modify the post-retirement benefit plan coverage offered to some of its retirees. The Plaintiff (the "Retiree") was a retired employee of Fletcher Challenge Canada Limited ("FCCL") which was a predecessor corporation of the Defendant, TimberWest Forest Corp. ("the Former Employer"). The Retiree worked for FCCL for over 23 years and retired at the age of 62, three years early. FCCL presented the Retiree with a letter outlining the proposed terms of an early retirement arrangement, which became subject to negotiations and eventually resulted in the execution of an amended arrangement (the 'Retirement Letter').

The core of the case stemmed around a particular provision for the Retirement Letter, in which the Former Employer reserved the right to amend its benefits plans, but also made that reservation of rights subject to a limitation in favour of the Retiree (the "Notwithstanding Clause"). In order to determine which benefits had been guaranteed, or had vested, to the Retiree, the Court engaged in an analysis of the "objective" review of the relevant documents, as well as on the true "intent" of the Retirement Letter.

The Court made an important observation in that although the Retirement Letter provided that FCCL reserved the right to amend benefits that were not either statutorily vested or quantified, at the same time, the company made the exercise of that discretion subject to the Notwithstanding Provision. The Former Employer had agreed not to provide the Retiree with "substantially less" than what was outlined in the Retirement Letter.

Although the Former Employer had reserved the right to "amend and discontinue any of the benefit plans and programs," the exercise of this discretion was subject to the limitation contained in the Notwithstanding Clause. The Court ultimately concluded that there had been an alteration of the retirement arrangement, and that this change resulted in benefits offered to the Retiree that was absent an important feature, and therefore were "substantially less" than they had been before the modification. The Retiree was still entitled to receive the benefit of such coverage, and therefore was awarded damages for the losses suffered.

Gustavson v. TimberWest Forest Corp., 2011 BCPC 272.

17. *Jarman v. Jarman*

In a recent decision from British Columbia, the Supreme Court considered the applicability of the *Pension Benefits Standards Act* to a supplemental employment pension plan, and the interaction with provincial property laws in the context of a marriage breakdown.

Air Canada pilots have two pension plans: the first is a defined benefit, registered pension plan governed by the *Pension Benefits Standards Act*, and the second is a non-registered Supplemental Retirement Plan ("SRP") providing various options to its member. As administrator, Air Canada has an administrative policy related to the SRP which states that there

is "no legislation forcing the SRP to provide that rights under such contract can be assigned to the former spouse upon divorce, an annulment, separation or breakdown of common-law partnership." Under the policy, the member would be responsible to compensate the former spouse for any entitlement arising under family or other law.

Air Canada refused to divide and pay a portion of the SRP to the former spouse, and instead required the former spouse to rely on the member to honour the lifetime payments, as well as any payments after the pilot's death.

At the hearing, Air Canada took the position that even though it is a federally-regulated employer, its SRP is not governed by the PBSA, because it is not a registered pension plan. The Court held to the contrary, noting that s. 4 of the PBSA states that it "applies in respect of pension plans", and that "pension plan" is defined in s. 4(2) to include a "supplemental pension plan." Further, "supplemental pension plan": is defined in s. 4(3) to include a supplemental plan "for which membership is contingent on membership in another plan and is integral to that plan."

Section 25(1) of the PBSA makes pension plan benefits subject to "applicable provincial property law," including division of property on marital breakdown. Based on these provisions of the PBSA, and previous case law, the Court concluded that the SRP is a pension plan which is subject to applicable provincial property laws.

Section 77(1) of B.C.'s *Family Relations Act* provides that a member is entitled to receive a proportionate share of the benefits under the pension payable "from the plan." In the result, the Court concluded that the former spouse is entitled to an order requiring Air Canada to pay her SRP entitlement directly to her on a monthly basis.

Jarman v. Jarman, 2011 BCSC 1155

18. *Kerfoot v. Weyerhaeuser Co.*

An employee's entitlement to damages based on the loss of pension and savings benefits arising from wrongful dismissal was addressed by the British Columbia Supreme Court in *Kerfoot v. Weyerhaeuser Co.* The Court found that two supervisory employees were given no notice of a change of ownership in a pulp mill in which they had worked for over 15 years. The Court awarded each employee one month of notice for each year that they had worked for their former employer (Weyerhaeuser). As the employees were immediately enrolled in the new employer's pension plan upon the change in ownership and ceased participation in their former pension plan, they claimed damages for their inability to continue to participate in Weyerhaeuser's pension plan during the notice period.

The damages of the employees fell into three categories: defined benefits pension plan; flexible pension account; and matched savings plan. Expert actuarial reports from the plaintiffs and defendant were presented to the Court on the loss suffered by the employees due to the wrongful termination. The Court declined to accept the reports that were based on the assumption that the employees' employment was terminated at the end of the notice period, preferring the reports that were based on the actual facts of the employees' service and termination from their new employer.

Both employees opted to transfer the commuted value of their defined benefits pension plans into a locked retirement savings plan rather than leave their benefits in Weyerhaeuser's pension plan. Weyerhaeuser argued that one employee's loss was due to this decision, and not due to the termination of his employment. The Court refused to consider the reasons for the employee's choosing one option over the other, holding that any loss suffered by him was due to the failure to give reasonable notice. The employee suffered significant loss due to a missed opportunity to satisfy a "Rule of 65" and qualify for early retirement benefits. The Court accepted the expert actuarial reports that most closely matched the facts, finally settling on an assessment of damages at the mid-point of the amounts set out.

The Court also ordered damages for the lost opportunity to make tax deductible contributions during the notice period based on the employees' historical average contribution amount and for the loss of opportunity to access a matching savings plan.

Regarding mitigation of damages, the Court refused to entertain the notion that an employee failed to mitigate his damages because he terminated his employment some years later with the new employer. Weyerhaeuser had argued that the value of the employee's pension would have increased had he remained with the new employer. This argument was rejected, with the Court finding that the employee was not required to remain employed in order to "increase the theoretical value" of his pension.

Kerfoot v. Weyerhaeuser Co., 2012 BCSC 640

19. ***Lacey v. Weyerhauser Company Limited***

The five plaintiffs in this case are salaried retirees of Weyerhauser Company Limited ("Weyerhauser" or the "Company"), or its predecessor McMillan Bloedel Limited ("MB"), and retired between 1991 and 2000. Weyerhauser acquired MB in 1999 and agreed to maintain employee benefits for at least two years. Facing financial problems, the Company decided to impose a co-payment scheme. Weyerhauser cut its contribution toward B.C. Medical Services Plan premiums by the employer ("MSP premiums") and extended health insurance coverage to 50% of the actual costs. In addition, the Company told retirees that any future premium increases would be borne only by them, and not the Company.

One of the core issues for the Court was whether retiree benefits were considered part of the plaintiffs' overall compensation, or were gratuitous benefits conferred by the former employer. The Court held that the consistent description of benefit coverage "for life" or for a retiree's "lifetime" signified a common understanding that these benefits would be so provided. Employee booklets described benefits as a form of compensation and an entitlement, not as a gratuitous benefit. The Court further held that regardless of MB's subjective intention to treat retirement benefits as gratuitous, this was not what was communicated to employees in writing or verbally.

The Court then considered whether retirement benefits "vested" in the plaintiffs. The concept of vesting has been more thoroughly considered in the USA, which Weyerhauser sought to rely on. But the Court was not persuaded that the American case law on the presumption against vesting of retirement benefits was applicable here. Rather, the Court found that Canadian law is settled that a right under a common law contract of employment to deferred compensation upon retirement is one that vests.

In response to Weyerhauser's argument that the vesting of retiree benefits offends the principle of inter-generational equity, the Court found that this principle has no application to common law contracts of employment. At common law, there is no obligation upon an employer to treat current employees in the same manner as prior generations.

The Court ordered continued payment of the MSP premiums by the Company. The Court further held that the plaintiffs are entitled to the extended health care benefits in force on the date of their retirement without alteration. Lastly, the plaintiffs were entitled to receive damages in the amount of all premiums paid.

Wyerhauser has appealed the decision and the appeal is anticipated to be heard in Fall, 2012.

Lacey v. Weyerhauser Company Limited, 2012 BCSC 353

NORTHWEST TERRITORIES DECISIONS

20. *Northern Employee Benefits Services v. Rae-Edzo Community Services Authority*

In *Northern Employee Benefits Services v. Rae-Edzo Community Services Authority*, at issue was whether a pension plan contained a binding provision for a solvency deficiency payment to be imposed upon an employer withdrawing or being terminated from the plan. The plan administrator claimed over $1.2 million was owed by the defendant to make up a deficiency based on a hypothetical winding up of the plan on the date that the administrator terminated the employer's membership in the plan. The employer counter-claimed for reimbursement of contributions paid by mistake while its employees were alleged no longer members of the plan.

To decide whether the administrator had the authority to impose the solvency deficiency payment, the Court examined the by-laws applicable to the administrator of the plan. At issue was a section introduced by the trustees that required an employer that terminated membership in the plan to make up any solvency deficiency when the employer left the plan. The trustees of the plan had introduced this bylaw after becoming concerned with the solvency of the plan. The Court had to consider whether the plan administrators had the authority to impose a solvency deficiency payment on the employers contributing to the plan by passing a bylaw.

The Court held that the bylaws already clearly provided for the obligations of terminated or resigning members, and those bylaws, by their own rules, could not be amended without the approval of the members. Since the existing bylaws did not include the requirement for a solvency deficiency payment to be made by departing members, the trustees could not impose it.

As with changes to the bylaws, the Court found that changes to the plan itself could not be made by the trustees without notice to the members of the change to the plan and the effect of the change on future contributions. An announcement that the policy had been changed regarding terminating members was insufficient notice of the change that the trustees had undertaken. The employer had not agreed to the new the provision in the bylaws and could not be bound by it.

The Court went on to find that, even if the trustees had the power to change the bylaw and if the employer had proper notice of the change, the bylaw would still not have applied. In other places the bylaws made a clear distinction between resignation and termination from the plan. Because

the bylaw made reference only to members that were terminated from the plan, and not members that resigned from the plan, it did not apply to the termination of the member from the plan.

The employer's counterclaim was also dismissed by the Court. The employer could not be viewed as being "practically compelled" to make the payments. While some of the payments did appear to be made by mistake, because employees had made claims for benefits in that period, the Court held that the plan had "materially changed its circumstances" and therefore the counterclaim was defeated.

Northern Employee Benefits Services v. Rae-Edzo Community Services Authority, 2012 NWTSC 61