LEGISLATIVE DEVELOPMENTS AND THE TOP 20 CASES OF 2012 - 2013

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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

TABLE OF CONTENTS

LEGISLATIVE DEVELOPMENTS AND COURTS AND TRIBUNALS 4

INTRODUCTION: 2012 – 2013...4

COURTS AND TRIBUNALS 5

SUPREME COURT OF CANADA DECISIONS 8

1. ***Sun Indalex Finance, LLC v. United Steelworkers et al*., 2013 SCC 6**..........................8

2. ***Professional Institute of the Public Service of Canada v. Canada (Attorney General),* 2012 SCJ No 71** 11

3. ***Regie des Rentes du Quebec v. Canada Bread Company Ltd*, 2013 SCC 46** 13

NEW BRUNSWICK DECISIONS..13

4. ***Fredericton (City) v FPA, Local 911*, 2012 NBQB 363** 13

NOVA SCOTIA DECISIONS...16

5. ***Nova Scotia Power Inc. and IBEW, Local 1928*, (2013) 2 C.C.P.B. (2nd) 296**.............16

QUEBEC DECISIONS 18

6. ***Ubaldini v. Rio Tinto Canada Management Inc.,* 2012 QCCS 4323**............................18

ONTARIO DECISIONS 20

7. ***Carrigan v. Carrigan Estate,* 2012 ONCA 736**..20

8. ***O'Neill v. General Motors of Canada*, 2012 ONSC 4654** 22

9. ***Chapman v. Benefit Plan Administrators*, 2013 ONSC 3318** 24

10. ***Royal Ontario Museum Curatorial Association* v. *Superintendent of Financial Services et al*., 2013 ONFST 9**..........26

11. ***Vladescu v. CTV Globe Media Inc.,* 2012 ONSC 4233**..29

12. ***Grant Forest Products,* 2011 ONSC 7698** 31

13. ***International Brotherhood of Electrical Workers, Local 636 v. Horizon Utilities Corporation* (6 January 2013), unreported (Arbitrator MacDowell)**.........................32

14. ***Kidd v. The Canada Life Assurance Company,* 2013 ONSC 1868** 34

15. ***Pryden v. Swiss Reinsurance Company Ltd.*, 2013 ONSC 2661** 35

SASKATCHEWAN DECISIONS 38

16. ***May v Government of Saskatchewan,* 2013 SKCA 11 (CanLII)** 38

BRITISH COLUMBIA DECISIONS 40

17. ***Bain v. The Great-West Life Assurance Company*, 2012 BCSC 1335** 40

18. ***Ellsworth v. Boilermakers Lodge 359 Health and Welfare Plan (Trustees of)* [2013] B.C.J. No. 689 (Prov. Crt.)** 41

19. ***Madsen v. Madsen*, 2012 BCSC 1535** 43

20. ***Weldon v Teck Metals Ltd.*, 2013 BCSC 345** 45

LEGISLATIVE DEVELOPMENTS AND COURTS AND TRIBUNALS

INTRODUCTION: 2012 – 2013

The last 12 months have seen little substantive change to pension legislation across the country. The most widespread changes occurred in Alberta, where significant amendments were made to its *Employment Pension Plans Act* to respond to the findings of the joint expert panel. This largely aligns with amendments made in 2012 by British Columbia. The emergence of the shared risk model from New Brunswick, and similar proposals across the country have been a major topic of discussion among pension lawyers and other industry participants. Solvency relief continues across many jurisdictions, and various proposals, from academia, industry experts and politicians continue to be made about how to respond to a demographic and economic landscape that is very different than what was originally imagined when pension legislation was first developed.

Pension jurisprudence has advanced in a number of key areas, with issues of insolvency, family law, and litigation surrounding pension administration and maladministration making up the majority of the important cases.

LEGISLATIVE HIGHLIGHTS

The last year has not seen a great deal of substantive changes to pension legislation across the country.

One of the more dominant themes has been the introduction of the shared risk pension plan model from New Brunswick and similar developments in other provinces. In Newfoundland and Labrador, the government has announced that negotiations surrounding the "sustainability" of public sector pension plans will begin in Fall of 2013. In Quebec, an Expert Report on the province's retirement scheme was released. Perhaps unsurprisingly, the findings echoed those of other provincial expert reviews conducted in the past few years. In the Federal sphere, the budget announced a review of distressed plan workout schemes, but no proposed changes have been announced. In Saskatchewan, solvency relief was announces for listed broader public sector plans, but it was accompanied by tighter going-concern amortization periods and even rumours of the regulator requiring 10% reserves.

In Ontario, the 2013 Budget promised reform through the activation of previous enactments. New draft asset transfer regulations were released in August of 2013 and a final version is expected to be released before the year is out. The Ontario government continues to oppose the use of PRPPs and supports the expansion of the CPP. Premier Wynne's government has even floated the idea of creating an Ontario Pension Plan. Ontario also announced the continuation of solvency relief for valuations filed prior to September 30, 2014. However, phased relief for public sector plans was closed as of February 28, 2013. Provincial Regulations for "target plans" which could affect most MEPPs have yet to see the light of day.

In Alberta, the *Employment Pensions Plans Act* was amended to reflect changes brought about by the joint expert panel. These changes included the introduction of target plans, JSPPs, negotiated costs plans, immediate vesting, and increased disclosure. Alberta has also announced the introduction of target plans for the public sector and the implementation of joint governance. This aligns with legislative changes that the British Columbia legislature enacted in 2012. In March of 2013, Alberta Treasury Board and Finance released a position paper on Target Benefit Funding Rules, where they introduced the "Going Concern Plus" funding model and solicited comments from plan administrators and actuaries on the proposed model.

The legislative development which attracted the most attention may have been Bill C-377, the union disclosure private member's bill sponsored by Russ Hiebert, a conservative MP from Alberta. The Bill, at first reading, was broad enough that it appeared to cover virtually all pension and benefit plans and funds. It would have required that plan administrators disclose an immense amount of information about their plans and the members of those plans, provided that at least one of the beneficiaries was a unionized employee. Fortunately, prior to the House of Commons passing the Bill, amendments were put in place which exempted most plans and funds from the Bill's ambit. However, some funds will still be covered, including training funds and market-stabilization funds, and the impact on unions and their administration remained in place. The Bill passed third reading and went to the Senate, where significant amendments were put in place which would have limited the Bill's impact to only the largest unions. As a result of prorogation, the Senate's amendments to Bill C-377 were cancelled, and the Bill now goes back to the Senate in the same form as it was when it left the House of Commons.

COURTS AND TRIBUNALS

The past 12 months have seen jurisprudential developments in several areas of pension law. The intersection of insolvency law and family law with pension law are the themes that have garnered the most attention, but recurring issues in pension law such as the scope and content of fiduciary duties have also been prevalent.

There were three pension cases decided by the Supreme Court of Canada, although the most recent decision, *Regie des Rentes du Quebec v. Canada Bread Company Ltd.,* is only peripherally about pension issues. It arose as a result of the closure of two stores in Quebec and the resulting dispute over whether those two closures should lead to a partial termination of the pension plan. Despite the facts giving rise to the case, the decision of the Supreme Court centred on the extent to which Court's must apply legislation that is declaratory to disputes which arose prior to the legislative enactment. However it does indicate that even pension funds may be subject to retroactive changes.

In *Re Indalex,* the Supreme Court of Canada overturned what had become a somewhat controversial decision of the Ontario Court of Appeal. While the decision – which reinforced the jurisdiction of a CCAA Judge to override provincial priorities when granting super-priority status to bodies that provide lending to distressed companies – came as a relief to members of insolvency bar, there were aspects of the decision which will provide some measure of protection to pension plan members whose plan sponsor becomes insolvent. The deemed trust provided in the PBA was found to cover the entire wind-up deficiency, not simply normal cost and special payments which were due but had not yet been paid. The Supreme Court also held that, subject

to the doctrine of paramountcy, the deemed trust continues to operate in CCAA proceedings. The court also held that priorities in the BIA do not automatically apply in the CCAA. As a result, it is possible that pension beneficiaries will place above both secured and unsecured creditors in CCAA proceedings, provided that their pension plan has been wound up, at least in relation to certain of the company's assets. The idea that the relevant pension plan must be wound up prior to the deemed trust arising was also confirmed in *Re Grant Forest Products*, the first case to provide a detailed treatment of the Supreme Court's decision in *Indalex.*

The Court also held that Indalex, in failing to take steps to ensure that pensioners could have a voice in the proceedings, had breached its fiduciary duty. The "two-hats" doctrine has also been called into question. The Court has held that fiduciary obligations relate to more than just administrative tasks, and the Supreme Court has directed pension plan administrators who are also employers to focus on the consequences of their actions on pension beneficiaries as opposed to the nature of those actions. This is important when MEPP trustees who are appointed by labour or management are faced with difficult decisions. Any conflict must be resolved in favour of plan members.

The Supreme Court also dealt with the issue of fiduciary duties in its other major pension case, PIPSC v. Canada. In that case, where the plaintiffs challenged the Government of Canada's amortization of approximately $30 billion in three public sector pension plans, the Supreme Court held that the Government did not owe a fiduciary duty to the members of those plans as such members are not subject to the same risks and vulnerabilities as members of private sector plans, and because a government's duty is to society as a whole and not a single group of pension plan members. In *May v. Saskatchewan,* the Saskatchewan Court of Appeal made this same point about the allegations of fiduciary breach in that case, and held that The Government of Saskatchewan has no contractual or other legal obligation to provide additional pension benefits to members of the Public Service Superannuation Plan.

Several other cases also considered the fiduciary duties of plan administrators. In *Ellsworth v. Trustees et al.,* Mr. Ellsworth argued that the enforcement of mandatory reciprocity by the Trustees of the Boilermakers Pension Plan was a breach of fiduciary duty, but the B.C. Supreme Court disagreed with that position, and noted that it will be rare for a court to intervene in trustee decisions. *Chapman v. Benefit Plan Administrators* also dealt with fiduciary duties and the challenging of trustee decisions. In that case, the Plaintiff brought an action against the Plan trustees, the Plan's administrative agent, and former and current Plan actuaries (and their employers) alleging that they had all been negligent and/or in breach of their trust obligations because they continued to consent to the payment of early retirement benefits at a time when the Plan could not afford to do so and as a result had to reduce benefits. The proceeding was launched as a class action and in a recent decision, the Court certified the class action, allowing it to proceed to an eventual common issues trial. Another ongoing class proceeding out of British Columbia, *Weldon v. Teck Metals,* also involves allegations of breach of fiduciary duty and a variety of other causes of action asserted against a plan administrator for taking actions alleged to have harmed plan beneficiaries.

O'Neill v. General Motors also concerned a group of beneficiaries challenging the actions of their plan administrator, with that case focusing on the issue of post-retirement reductions to OPEB entitlements. The Ontario Superior Court found the employer liable for breach of contract,

finding that their communications of their right to modify the benefits was not clear enough to dislodge the presumption that the rights had vested.

Another central issue in the jurisprudence over the past year has been the intersection of family law and pension law. In *Carrigan v. Carrigan Estate,* the Ontario Court of Appeal issued a split decision which has altered the widespread practice of plan administrators when determining priority between competing beneficiaries under section 48. In that decision, two judges of the Court of Appeal held that a pre-retirement death benefit payable from the deceased member's pension plan should go to the designated beneficiary under s. 48(6) rather than the common law spouse under s. 48(1).

Vladescu v. CTV Globe Media also dealt with the intersection of pension and family law. In that case, the Ontario Superior Court of Justice affirmed that the federal statutory pension regime allows a person to assign all or part of their pension interest to a spouse or former spouse upon marriage breakdown, but held that the assignment must be clear and unambiguous to be effective. *Madsen v. Madsen*, from the British Columbia Supreme Court, concerned an application for rectification of a separation agreement which had referred to an inapplicable statute when describing how a pension benefit would be split upon separation.

Ubaldini v. Rio Tinto concerned both issues of spousal pension entitlement and allegations of maladministration and negligence against the plan administrator and sponsor. In that case, the plan administrator had, for many years, mistakenly sent forms showing entitlement to a survivor's pension for Erica Ubaldini, whom Mr. Ubaldini had married after his retirement. After his death, she sued for payment of the benefit, but the Court held that the administrator's error could not give her a right that she did not have under the pension plan.

Although no longer as prevalent as it once was, proceedings surrounding surplus entitlement still make up a significant part of the pension law decisions made each year. The Supreme Court's PIPSC case dealt with notional surplus in statutory "Superannuation Accounts", but as mentioned above, the plan members were not found to have any entitlement. Both *Pryden v. Swiss Reinsurance* and *Kidd v. The Canada Life Assurance Company* involved the approval of surplus sharing settlements and each advance both the law on the settlement of surplus disputes and on class action settlements generally.

Beyond these cases, there have also been cases on the legality of a "hard freeze" (*ROM Curatorial Association v. Superintendent of Financial Services*), on the meaning of the word "retire" (*IBEW, Local 36, v. Horizon Utilities Corporation*), and on whether a unilateral amendment to a pension plan should be considered an unfair labour practice (*Fredericton (City) v. FPA).*

SUPREME COURT OF CANADA DECISIONS

1. *Sun Indalex Finance, LLC v. United Steelworkers et al.*, 2013 SCC 6

On February 1, 2013, the Supreme Court of Canada issued its long-awaited decision in *Re Indalex* concerning the priority of pension claims against an insolvent company undergoing court-supervised restructuring. Even though the group of pensioners who brought the case lost, the decision may be seen as a victory for those seeking to uphold the rights of pension beneficiaries in future cases.

Indalex Limited sponsored and administered two employee pension plans, one for unionized employees and one for executives (together, the "Plans"). Both Plans had wind-up deficiencies. Indalex sought protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), and was authorized by the *CCAA* Court to enter into debtor in possession ("DIP") financing. After Indalex sold its business, the proceeds of the sale were not sufficient to repay the DIP loan and so Indalex U.S., who had guaranteed the loan, paid the shortfall. This allowed Indalex U.S. to claim the same priority that the DIP lenders would have had.

The members of the Plans argued that funds should first be directed to satisfy the Plans' deficiencies, which had priority over the DIP Loan by virtue of the statutory deemed trust under the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*") and/or as a result of a constructive trust due to the fact that Indalex had breached its fiduciary duty as the Plans' administrator.

Justice Campbell of the Ontario Superior Court had held that the statutory deemed trust did not apply to wind up deficiencies, and that the pensioners were merely unsecured creditors. The Court of Appeal reversed Justice Campbell's ruling and held that the wind-up deficiencies were subject to deemed *and* constructive trusts which had priority over the claims of Indalex's American parent company. Moreover, the Court of Appeal held that Indalex breached its fiduciary obligations to the Plans' members by doing nothing to protect their best interests and taking active steps to defeat their entitlement.

The Supreme Court dealt with 5 issues.

a) Does the deemed trust provided for in s. 57(4) of the PBA apply to wind-up deficiencies?

This issue was answered in the affirmative, although three of the seven judges disagreed. For the Salaried Plan, which had been wound up *prior to* the CCAA proceeding, the Majority held that Indalex was deemed to hold in trust the amount necessary to satisfy the entire wind-up deficiency. The wording of s. 57(4), the legislative history and the purpose of the PBA were found to militate in favour of the inclusion of the wind-up deficiency in the protection afforded to members with respect to employer contributions upon the wind up of their pension plan.

No deemed trust arose for the Executive Plan as it had not been wound up until *after* the sale. Interestingly, the Court is not clear or consistent as when the Plans needed to be wound up in order for the deemed trust to arise. Justice Deschamps mentions both the time of the sale of the company's assets and the time when the CCAA proceeding began, but it is not clear which one is actually the relevant date.

b) Does the deemed trust supersede the DIP charge?

On this point, the Supreme Court unanimously overturned the decision of the Court of Appeal. The Appellants made two arguments for why the deemed trust should not have priority over the DIP lender's charge, as subrogated to Indalex U.S.:

First, they argued that the *PBA* deemed trust does not apply in *CCAA* proceedings because the applicable priority scheme is the federal insolvency scheme, namely the *Bankruptcy and Insolvency Act,* and that statute does not recognize provincial deemed trusts. Second, they argued that by virtue of the doctrine of federal "paramountcy", the DIP charge supersedes the *PBA* deemed trust.

The first argument was rejected, as the Court unanimously held that although courts should favour an interpretation that affords creditors analogous entitlements under the CCAA and the BIA, courts cannot read bankruptcy priorities into the CCAA at will. Priorities may be determined by provincial property law rather than the federal scheme set out in the *BIA*.

However, the Court ultimately held that the federal and provincial laws are inconsistent because they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

c) Did Indalex have any fiduciary obligations to the Plan Members when making decisions in the context of the insolvency proceedings?

All the judges agreed that Indalex had fiduciary duties to the Plan members and there was some type of breach of those duties, although their views on the nature and extent of those duties and breaches differed.

Deschamps J. appears to reject the traditional "two hats" doctrine from *Imperial Oil*, noting that:

> "[a]n employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a "corporate hat". What is important is to consider the consequences of the decision, not its nature."

In seeking the stay under the CCAA, Indalex did not breach its duties to Plan members, but by failing to provide notice to the pensioners of the company's intention to override their priority through the DIP financing motion, Indalex breached its fiduciary duty to the Plan members. Indalex also breached its duties under s. 22(4) of the *PBA* to avoid conflicts of interest.

Lebel J., who wrote a minority opinion on this issue and was joined by Abella J., found Indalex's breaches of fiduciary duty to be much broader in scope than was found the majority reasons. In his view, Indalex actively took a course of action that was inimical to the interests of the Plans' beneficiaries. His ultimate finding was that "there were constant conflicts of interest throughout [the CCAA proceeding]. Indalex did not attempt to resolve them; it brushed them aside. In so

acting, it breached its duties as a fiduciary and its statutory obligations under s. 22(4) of the PBA."

d) Did the Court of Appeal properly exercise its discretion in imposing a constructive trust to remedy the breaches of fiduciary duties?

Five of the seven judges held that a constructive trust could not be ordered because proprietary remedies are generally only awarded where the property at question is directly related to the relevant wrong. The majority also refused to apply equitable subordination, holding that there was no evidence that the lenders committed a wrong or engaged in inequitable conduct.

Lebel and Abella JJ., on the other hand, held that a constructive trust should be awarded due to the seriousness of Indalex's breaches of fiduciary duty justified the imposition of a constructive trust. In their view, the particular vulnerability of the pensioners calls out for the law to give them some protection.

e) Did the Court of Appeal err in refusing to grant the USW's its costs out of the pension plan?

The Supreme Court has provided guidance on the factors to be considered when costs are sought from a pension fund, and in doing so, they appear to have moved away from the "test" that was established in *Nolan v. Kerry*. They held that cost awards are highly discretionary and noted that there is no strict test. The two broad inquiries from *Nolan v. Kerry* – whether the litigation concerned the due administration of the trust and whether the litigation was ultimately adversarial – are simply "highly relevant considerations" guiding the exercise of discretion with respect to costs. The Court held that the USW was not entitled to its costs because the union should not be able to impose the risks of the litigation on all the Plan members when it only represented a small number of the members. The eventual failure of the litigation buttressed the decision to deny the USW its costs from the Plan.

Although the pensioners in Indalex did not successfully establish that they should have priority over the American parent company, there were several aspects of the case which can be seen as positive developments for pensioner protection in CCAA proceedings. The deemed trust was found to cover the entire wind-up deficiency, not simply normal cost and special payments which were due but had not yet been paid. The Supreme Court also held that the deemed trust continues to operate in CCAA proceedings, subject to paramountcy. The priorities in the BIA do not automatically apply in the CCAA. At the end of a CCAA proceeding, provincial law may be used to determine priority. Pension beneficiaries should place above both secured and unsecured creditors in CCAA proceedings, at least in relation to certain of the company's assets. The Court also held that Indalex, in failing to take steps to ensure that pensioners could have a voice in the proceedings, had breached its fiduciary duty, finally, the "two-hats" doctrine has been put into question. The Court has held that fiduciary obligations relate to more than just administrative tasks, and the Supreme Court has directed pension plan administrators who are also employers to focus on the consequences of their actions on pension beneficiaries as opposed to the nature of those actions.

2. *Professional Institute of the Public Service of Canada v. Canada (Attorney General),* 2012 SCJ No 71

The Supreme Court of Canada ("SCC") unanimously dismissed a claim for relief that would have required the government to return approximately $28 billion in surplus funds it had amortized or debited since 1990 to a public pension plan. Mr. Justice Rothstein, for the court, held that the Superannuation Accounts at the center of the dispute were accounting ledgers, and not separate pension funds containing assets, and therefore plan members' entitlements were limited to their statutorily defined benefits. The SCC also dismissed the appellants' claims that the government was subject to a fiduciary obligation, or in the alternative that there was a constructive trust.

The claim was brought by the Professional Institute of the Public Service of Canada (PIPSC), with regards to three statutory, public sector pension plans administered by the Government of Canada for public service employees, members of the Canadian Forces, and members of the RCMP (the "Plans"). Each plan was a contributory, defined benefit pension plan, with statutes establishing a Superannuation Account for each in order to record payments into and out of the Plans.

During the 1990-1991 fiscal years, the government began to amortize actuarial surpluses which existed in the Plans. The government amortized approximately $18.6 billion during that decade, with further amounts being amortized after the year 2000.

The *Public Sector Pension Investment Board Act*, S.C. 1999, c. 34 ("Bill C-78") came into force on April 1, 2000 and made a number of significant changes including replacing the Superannuation Accounts with a Pension Fund for post-March 31, 2000 service; granting discretion to, and creating an obligation on, the Minister to debit the Superannuation Accounts to reduce the actuarial surplus; and changing the basis for the government's annual contributions as being determined by the President of the Treasury Board, based on the actuarial valuation for each Plan.

Between 2001 and 2004, the government debited over $28 billion from the Superannuation Accounts, relying on Bill C-78.

The appellants brought an action for the return of the actuarial surpluses reflected in the Superannuation Accounts. They argued that Plan members had an equitable entitlement to the actuarial surpluses and that the government has breached its trust and fiduciary duties by amortizing and debiting the surplus. In the alternative, the appellants argued that there was a constructive trust and that Bill C-78 did not extinguish Plan members' interest in the surplus as it did not evidence an unambiguous intent to expropriate without compensation.

The action was dismissed at trial, which decision was upheld by the Ontario Court of Appeal.

The nature of the Superannuation Accounts was an issue of central importance in the SCC's decision. Concurring with the findings of the lower courts, Rothstein J. examined the historical and current versions of the legislation that established the Superannuation Accounts and held that the Superannuation Accounts were no more than accounting records which tracked transactions and estimated the government's pension liabilities to Plan members.

In considering the appellant's arguments, Rothstein J. rejected the "borrowing theory" presented by the appellant's expert, which posited that the assets of the Plans were promises to pay to the account the amount that was owed by the government. Rothstein J. based his decision on his finding that the Superannuation Accounts were simply informational accounting records. The word "assets" when used in connection with the Superannuation Accounts, was held to refer to the credit balances and not actual property of value the appellants could have an interest in.

Rothstein J. held that the Superannuation Accounts did not contain assets but even if they did, a plain reading of the legislation establishing the Plans made no suggestion that there was property to which Plan members could have a legal or equitable interest.

Rothstein J. also found that there was neither a *per se* fiduciary relationship nor an *ad hoc* fiduciary relationship between the government and the appellants. He made this finding on the basis that participants in a public pension plan are not subject to the same risks and vulnerabilities as private pension plans. In addition, Rothstein J. also observed that as a result of the nature of governmental responsibilities and functions, governments are not able to forsake interests of others but have a duty to act in the best interests of society as a whole.

At trial the appellants argued that the Superannuation Acts created an express trust for the benefit of Plan members; but on appeal the appellants refined their position by arguing that a constructive trust over the Superannuation Accounts ought to be imposed, in favour of the Plans' members. In considering the appellant's argument, Rothstein J. examined the two grounds on which a court could impose a constructive trust.

In considering the first ground, where a constructive trust for wrongful conduct could be imposed, the SCC found that the appellants failed to meet the first requirements of the test established in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217. Since the SCC had already found that the government was not subject to a fiduciary obligation in relation to its management of the Plans, and the appellants did not argue that there was a breach of any other equitable obligations, this argument was dismissed.

Next, Rothstein J. considered the appellant's argument that a constructive trust could be established as a result of an unjust enrichment on the basis that the government was enriched at the appellants' expense. The argument was dismissed, however, as a result of the SCC's finding that the Superannuation Accounts did not contain assets and as a result there was no deprivation when the surpluses were amortized. Further, the SCC stated that even if it could be found that the additional deductions taken from employee pay cheques after Bill C-78 came in force constituted deprivations, there was no link between the deprivation and the amortized surplus and subsequently debited surplus.

In considering whether Bill C-78 authorized the government to debit the actuarial surpluses in the Superannuation Accounts, the SCC affirmed the lower courts' findings that Bill C-78 did not expropriate the Plan members' property because they did not have an equitable interest in the surpluses. Further, Rothstein J. provided that it would be absurd to read Bill C-78 as requiring the government to compensate Plan members for the amounts debited, as it would have converted the relevant provisions of Bill C-78 into a distribution mechanism, which was clearly not the intent of Parliament.

3. *Regie des Rentes du Quebec v. Canada Bread Company Ltd*, 2013 SCC 46

Due to the closure of two of Multi-Marque's various divisions, The Regie des Rentes issued two decisions which sought to partially terminate the portion of the pension plan attributable to the employees at those divisions. Multi-Marques argued that the termination provisions of the SPPA should be inapplicable, and instead, under the terms of sections 9.12 and 9.13 of the pension plan, employee benefits would have to be reduced if there was not enough funding to pay the shortfall. The Regie des Rentes reviewed those provisions, and held that they were incompatible with the SPPA, which provides that employer's must pay for any deficiency such that full benefits can be delivered. The Administrative Tribunal of Quebec (TAQ) agreed, as did the Superior Court, but the Court of Appeal held that the SPPA and section 9.12 and 9.13 were not incompatible, and sent the matter back for determination in accordance with its reasons.

Leave to appeal the Court of Appeal's decision was sought, and while this application was pending, the legislature amended the SPPA to adopt the original position of the TAQ on the incompatibility of sections 9.12 and 9.13 with the SPPA. As a result of this, the Regie refused to act in accordance with the Court of Appeal's decision, and instead just applied the new legislation and continued with the partial termination of the pension plan. This decision was appealed to the TAQ, who agreed with the Regie's course of action, but both the Superior Court and the Court of Appeal held that the Regie had been wrong to ignore the decision of the Court of Appeal and continue with the partial windup.

The Supreme Court, in a split decision, held that the Regie had acted correctly and allowed the appeal. The Court, in a majority decision authored by Wagner J., held that the amendments to the SPPA were declaratory legislation, and the legislature has the right and ability to offer binding interpretations of its own legislation. These provisions were intended to be declaratory, and as such, have an immediate impact on cases that are currently before the courts. The Regie, after the matter was remitted back, were entitled to apply the amended SPPA.

NEW BRUNSWICK DECISIONS

4. *Fredericton (City) v FPA, Local 911*, 2012 NBQB 363

Fredericton (City) v FPA, Local 911 determined an application for judicial review of decisions made by the New Brunswick Labour and Employment Board (the "Board"). The Board had held that City of Fredericton's (the "Employer" or "City") unilateral change to the definition of "pensionable earnings" in its Pension Plan constituted an Unfair Labour Practice because it interfered with the administration of the Union contrary to section 3(1) of the *Industrial Relations Act (*the "Act"). The Employer sought to quash these decisions on judicial review.

The Employer and the Union had been parties to a collective agreement set to expire on June 30, 2011. The Union gave its notice to bargain on March 30, 2011. Two years earlier, the Board of Administrators for the Superannuation Plan for Employees of the City of Fredericton (the "Plan") had reported a $37.7 million Plan deficit. As a result, the City had been required to determine how to fund the Plan before July 2011. At the time the Union filed its notice to bargain, the City was nearing the end of its two year consultation to determine how to recoup the Plan deficit.

Throughout the consultations input from the Union had been solicited to varying degrees. In June 2010 the Employer met with the Union to discuss how to fund the Plan. In July 2010 the Employer held information sessions for Plan members. In November 2010 the Employer issued a letter to Plan members requesting they put forward their suggestions for consideration. In February 2011 the City again consulted with the Union as to how to fund the Plan deficit.

On March 29, 2011, one day before the Union issued its notice to bargain, the Board of Administrators issued a recommendation that the City change the definition of pensionable earnings in order to fund the Plan deficit. The new proposed definition would change "pensionable earnings" to regular earnings plus Benefit Spending Allowance, but would exclude overtime and non-regular earnings, and would change indexation to 2/3 of the Consumer Price Index. Such changes amounted to a 0.9% increase in contributions from members. However, the change to eliminate overtime as part of the calculation would have a disproportionate negative impact on the pensions of police officers.

The police officers were represented by the Union. The Plan had originated in a City by-law and was not part of the collective agreement. The Plan covered all City employees, unionized and non-unionized. Section 11.1 of the Plan gave the City the right to "amend, alter, modify or terminate the Plan… without the consent of any other person." The Union's permission was not explicitly required to amend the Plan.

The recommendations of the Board were adopted on May 24, 2011. The Union filed an Unfair Labour Practice Complaint shortly afterward. The Union alleged three grounds for its Complaint:

1) the Employer had acted in violation of the statutory freeze period contrary to section 35 of the Act;

2) the Employer had interfered in the administration of the Union contrary to subsection 3(1) of the Act; and

3) the Employer had violated its duty to bargain in good faith, contrary to subsection 34(2) of the Act.

The Union withdrew the first allegation. The Board dismissed the third allegation. However, the Board held in favour of the Union that the Employer's unilateral change to the definition of "pensionable earnings" had interfered with the Union's representation of employees contrary to section 3(1) of the Act. In a September 23, 2011 decision, the Board ordered the Employer to meet with the Union to discuss the change, and "in the absence of resolve," the Employer was required to appear before the Board for a final order. The Employer did take steps to consult with the Union, however, no resolution was reached. A final order on the matter was issued on January 18, 2012. The Employer filed an application for judicial review.

On judicial review, both parties agreed that the standard for reviewing the Board's decisions was whether they were "reasonable."

The Employer asserted that the Board's decisions were unreasonable. The Employer argued that it had no obligation to consult with the Union regarding the Plan amendment. The Employer, according to the terms of the Plan, was free to make unilateral changes. Further, if there was a duty to consult, it had been fulfilled through the consultation process both before, and after, the

Board's September 23, 2010 decision. The Employer also argued that the Board's decisions were based on a requirement that the City obtain the consent of the Union to make the amendment. In the Employer's view, that requirement arose from a misinterpretation of case law.

In contrast, the Union argued that the change in the definition of "pensionable earnings" amounted to a fundamental change in the working relationship between the Employer and Union members. In the Union's view, by making the change without consulting the Union, the City clearly interfered with its representation of its members. Further, the Union argued, the Board fashioned a reasonable remedy in all the circumstances. The Union placed emphasis on the Board's expertise as a specialized tribunal in matters of labour relations.

Garnett, J. reviewed the Board's reasoning at length before turning her attention to the Employer's argument and the case law surrounding section 3(1) of the Act. Garnett J described a two part test that had developed around section 3(1). The first branch of the test determined if there was "interference" with the Union. The second branch focused on if there was "justification for the interference." In reviewing the Board's reasoning, the court agreed with the Union's argument that the Board "has much more expertise in these matters than a court. It has a greater understanding of the culture surrounding labour/management activities and greater sensitivity for the potential effect of particular events on the entire process." The Court decided that the Board had thoroughly canvassed the evidence and law, and clearly stated its reasons for reaching its conclusion.

The Court gave deference to the Board and found that its decisions were reasonable in all the circumstances. The Board had emphasized that the by-law amending the Plan was made almost two months after receiving notice to bargain, at a time that the parties were engaged in the collective bargaining process. The amendment was a unilateral change by the City that had "serious consequences" for Union members. Therefore, the Union had a definite interest in the proposed change and the finding that the unilateral change amounted to interference was reasonable.

The Court did not address the issue as to whether there was "business justification" for the interference, noting that the Employer's argument was based on an incorrect reading of the Board's decision. The Court further commented that that the finding as to whether any duty to consult was a factual determination, and declined to discuss the issue further. On the issue of the Board's September 23, 2013 remedy that required the parties to reach a resolution, the court found that it was a reasonable remedy and was not based on a misinterpretation of case law as the Employer had alleged.

The Court ultimately found that the Board's decision that section 3(1) of the Act had been violated was reasonable in all the circumstances, and that the remedies ordered were reasonable given the Board's "greater understanding" of the collective bargaining process. The Court upheld the Board's decisions and ordered costs in the amount of $2500 against the Employer.

NOVA SCOTIA DECISIONS

5. *Nova Scotia Power Inc. and IBEW, Local 1928*, (2013) 2 C.C.P.B. (2nd) 296

In *Nova Scotia Power Inc. and IBEW, Local 1928* a Nova Scotia labour arbitrator considered whether a pension plan amendment to reduce entitlements for employees who left their employment prior to age 55 should be applied to an employee who retired at age 52 and applied for an "ill health disability pension" provided for under a collective agreement.

Blaine Kelloway was an employee of Nova Scotia Power Incorporated (the "Company") with just under 32 years of service. Mr. Kelloway became disabled in 2007 and received disability benefits until August of 2009 when his eligibility expired. Mr. Kelloway then informed the Company he was not planning to return to work and wished to retire. He exercised his right under the collective agreement to apply for a seldom used "ill health disability pension."

The ill health disability pension provision of the collective agreement stated:

> If a Member becomes totally and permanently Disabled... and he qualifies for disability benefits under the Canada Pension Plan, but does not qualify for benefits under either the Employer's Long Term Disability Plan or Worker's Compensation, such Member shall be eligible for an immediate unreduced pension <u>determined in accordance with subsection 8.2…</u>

Five years prior, in 2004, the pension plan had been the subject of collective bargaining between the Union and the Company. The outcome of these negotiations had been changes made to subsection 8.2. In particular, the negotiations had focused on entitlements to pension benefits for employees who left their employment before age 55. The provision in question contained a formula that determined the amount of unreduced pension payable to members based on the age the employee elected to receive his or her pension.

Before the 2004 collective bargaining, the pension plan had provided bridging benefits for employees who left prior to age 55 as well pre-retirement indexing. The Company believed that this was more generous than plans provided by similar employers. During the 2004 bargaining, the Company retained an actuary, Paul Chang, to make recommendations to reduce pension costs. Mr. Chang tabled a number of proposals which included removing bridging and indexing benefits for employees who terminated before age 55. The removal of the bridging benefit was agreed to by the Union and eventually accomplished through amendments to subsection 8.2.

However, the ill health disability pension continued to incorporate the revised 8.2 formula post-2004 which removed bridging benefits for employees who left before age 55. For this reason, in 2009, Mr. Kelloway's "ill health disability" pension was determined with reference to the formula altered during collective bargaining. Mr. Kelloway was treated as an employee who had 'ceased employment' prior to age 55 and the Company calculated his pension amount without bridging benefits, instead of treating him as retiring due to a disability. The difference in pension Mr. Kelloway received amounted to $129.90 per month, or $1557.63 per year, between the employer's calculation and what would have been provided in the pre-2004 plan.

The Union brought a grievance and sought to introduce evidence on the history of negotiations between the Union and the Company. The Union argued that there had never been an agreement between the parties to reduce the ill health disability benefit and that negotiation of potential amendments had focused only on employees who had "quit" their employment.

In the Union's submission, there was ambiguity collective agreement through the method of drafting "in which each of several related sections incorporates another section which then incorporates a further section." In support of this point, the Union pointed out that the amended provision explicitly calculated a "deferred" pension, while the "ill health disability" pension explicitly provided for an "immediate" pension. These provisions were contradictory, the Union argued, and the Company had either breached an article of the collective agreement that prevented unilateral changes to retirement and pension benefits, or else had calculated Mr. Kelloway's pension incorrectly.

The Company argued that the negotiating history should not be considered and that there was no ambiguity in the pension plan. In the Company's view, the ill health disability pension clearly specified use of the amended formula in calculating the pension amount. The Company pointed out that the amendment had been negotiated and agreed upon by both parties, and the Kelloway's monthly pension had been calculated correctly on that basis of the revised formula. The Company noted that a specific exception had already been requested by the Union and concerned only employees who had been involuntarily laid off and at no point during negotiations did the Union request an additional exception.

The arbitrator decided the negotiating history was admissible. The ill health disability pension was a "benefit" and a "right to a pension" and affected an occupied field of the collective agreement and therefore required approval by the Union. Because the Union had never seen the final drafted amendment, the discussions between the Union and the Company, and the documents exchanged by the parties, were the only evidence on the issue as to whether there had been approval and had to be considered.

The arbitrator ultimately determined that the final language used in the amendment did not reflect the understanding of the Union as to what the Company had proposed. The arbitrator concluded that "there was never any agreement during collective bargaining to change the pension plan to affect the amount of the ill-health disability pension benefit. Neither party considered making that change and such a change was never discussed."

In support of this finding the arbitrator determined that in meetings between the parties the discussions on the proposed amendment never extended beyond the example of employees who had quit their employment. The arbitrator also looked to the documents exchanged by the parties that made a consistent distinction between "termination" and "retirement" that reflected terminology used in the Pension Plan. "Termination" was used where an employee ceased employment without an immediate pension but was entitled to a deferred pension. "Retirement" was used where an employee was entitled to an immediate pension. The ill health disability pension provided for an immediate pension, thus Mr. Kelloway and others on the ill health disability pension would have been considered "retired" rather than "terminated" according to the Pension Plan.

The arbitrator noted that the Company's documents reflected the distinction and that the proposed changes were described as applying only to employees who had terminated. For example, one proposal outlined that the Company would "[o]nly pay the bridge pension for those who retire from active service. Members who *terminate* prior to age 55 would not be eligible for the bridge pension." Further notes and offers by the Company also confirmed there would be no impact on members who *retired*. However, the language in the final amendment drafted by the employer applied generally to all persons who had "ceased employment" prior to age 55.

The arbitrator chose to consider the documentary evidence on the principle that extrinsic evidence, including information given to by the Company to employees, can be used to guide interpretation in pension cases. The arbitrator further looked to the principle that the provision should be interpreted in favour of the party who did not draft the language of the agreement.

The arbitrator found that the change, as it affected the ill health disability pension, had never been agreed to or ratified by the Union and violated sections of the collective agreement that required the Union to ratify changes to pension benefits. The arbitrator declined to further consider the Union's argument that the Company had misinterpreted the provision as there was no need since the parties had not agreed to the amendment during bargaining. The arbitrator ultimately ordered that all employees who retired post-2004 amendments on the ill health disability pension were entitled to receive the full pre-amendment amounts inclusive of the bridging benefit.

QUEBEC DECISIONS

6. *Ubaldini v. Rio Tinto Canada Management Inc.*, 2012 QCCS 4323

In *Ubaldini c. Rio Tinto Canada Management Inc.,* Justice Thomas Davis of the Superior Court of Quebec had occasion to consider whether representations that implied that someone was a spousal beneficiary under a pension plan could have the effect of granting that person rights under that pension plan even though they were not in fact the eligible spouse.

Erika Ubaldini was the 77 year old widow of a former Alcan (now Rio Tinto) employee. Mrs. Ubaldini married Mr. Ubaldini after he retired from Alcan. At the time of his retirement, Mr. Ubaldini was married to another woman, whom he divorced in 1982, five years after his retirement. When he retired, he opted for a 50% spousal pension, identifying his first wife as the beneficiary under both the Alcan Pension Plan and the Life Insurance Plan.

After Mr. Ubaldini remarried, he wrote to Alcan to ask them to change the beneficiary under both plans to his new wife. Alcan responded by saying that could be done for the life insurance policy, but the survivor benefits under the Pension Plan would still be payable to his first wife. However, despite this initial denial, Alcan sent annual personal benefit statements to Mr. Ubaldini, from at least 2002 until 2008, which indicated that Erika Ubaldini was the beneficiary under both the Pension Plan and the Life Insurance Plan. When Mr. Ubaldini passed away in 2009, Mrs. Ubaldini asked Alcan to begin the survivor benefits and to pay her the life insurance amount.

Alcan refused to pay the survivor benefits. In a letter to Mrs. Ubaldini's lawyer, Alcan stated:

> "… under the Alcan Pension Plan (Canada) an eligible spouse is the person [sic] when pension payments begin is legally married to the Member. Thus, for purposes of the pension plan, Mrs. Erika Ubaldini […] does not qualify as his spouse…"

Mrs. Ubaldini sued Alcan, seeking an order requiring Alcan to pay the survivor benefits to her for the rest of her life, as well as back-payment for the amounts that should have been paid to the date of the action. She also sought an award of $10,000 in moral damages.

Although Alcan admitted that it had made an error in issuing the annual statements with Mrs. Ubaldini listed as the beneficiary, it argued that the error "cannot give Mrs. Ubaldini a right that she would not otherwise have based on a proper interpretation of the pension plan." Ultimately, the Quebec Superior Court agreed with Alcan on the main issue. It did however grant Mrs. Ubaldini $10,000 in moral damages as a result of Alcan's error.

Section 2.38 of the Pension Plan text mandated that the status of "spouse" is established at the earlier of the date that the pension commences or the date preceding the death of the member. In this case, Mr. Ubaldini's first wife was the spousal beneficiary identified at the time of retirement.

Mrs. Ubaldini argued that Alcan had consented to the change of beneficiary, and this consent had thus created a contractual relationship between Mr. Ubaldini and Alcan. The contract in question contained a stipulation in favour of Mrs. Ubaldini, in accordance with article 1444 of the *Civil Code of Quebec* (C.C.Q.). Mrs. Ubaldini further argued that even if this stipulation was given erroneously, Alcan's error was inexcusable, and therefore in accordance with article 1440 of the C.C.Q., Alcan's consent was not vitiated. She also pointed out that Alcan's consent was provided at least seven times in the annual statements that were sent each year, and that this annual statement was required under the terms of the *Supplemental Pension Plans Act.*

In response, Alcan argued that Mrs. Ubaldini was not the spouse at the time of retirement, and in accordance with the Plan Text, is not entitled to the survivor benefit. Further, it argued that to the extent that it committed an error, that error did not create any rights in Mrs. Ubaldini's favour.

The Court held in Alcan's favour on the question of Mrs. Ubaldini's entitlement to survivor benefits. The rationale was that:

> [48] The pension plan provided to Mr. Ubaldini by Alcan was part of his conditions of employment. Subject to any applicable legislation, the rights of Mr. Ubaldini, and a beneficiary, crystallized upon Mr. Ubaldini retirement. That contract provided for the payment of a pension to him for his life and the payment of the survivor benefit to his first wife. While Alcan's error, repeated successively in the annual statements of benefits provided to him beginning in 2002, is

> certainly unfortunate and did cause damages to Mrs. Ubaldini, it did not modify the contract.
>
> [49] Alcan is correct when it submits that an error does not give rise to any contractual right, particularly where pension or insurance matters are concerned.

On the question of moral damages, the Court held that despite the fact that the errors had not created new contractual rights, Alcan's errors had done harm to Mrs. Ubaldini and an award of $10,000 in moral damages was appropriate.

One question that flows from the result in this case is whether the result might have been different in a jurisdiction other than Quebec. Under the common law, Mrs. Ubaldini might have pleaded her case under negligent misrepresentation. If she could demonstrate that she relied on the annual statements to her detriment, the case may have been decided differently.

ONTARIO DECISIONS

7. *Carrigan v. Carrigan Estate,* 2012 ONCA 736

On October 31, 2012 the Ontario Court of Appeal released a controversial decision on entitlement to a pre-retirement death benefit under section 48 of the Ontario *Pension Benefits Act* ("PBA") which departs from the established case law, and has significant implications for Ontario pension plan administrators, plan members, and their spouses. The losing party sought leave to appeal to the Supreme Court, but leave was denied.

Melodee and Ronald Carrigan married in 1973 and separated in 1996, but were still legally married when Ronald passed away in 2008. They never formalized their separation with a court order or separation agreement, and Ronald continued to pay for all of Melodee's expenses until his death. In 2002 Ronald designated Melodee and his two daughters as beneficiaries to of any death benefit payable in respect of his pension.

By no later than 2000, Ronald was living in a conjugal relationship with Jennifer, and lived with her until the time of death. Melodee and Jennifer both claimed entitlement to the death benefit. Jennifer asserted that she was the rightful recipient of the death benefit as the spouse of Ronald under s. 48(1) of the PBA. Melodee, on the other hand, claimed she and her daughters were entitled to the death benefit, as the designated beneficiaries under s. 48(6).

At trial, the judge decided that although both Melodee and Jennifer qualified as a "spouse" under section 1 of the PBA, only one of them could qualify as spouse for purposes of a pre-retirement death benefit under s. 48. As Ronald and Melodee were living separate and apart at the time of his passing, she was not entitled to the benefit. Jennifer was the live-in spouse of Ronald at the time of his death and thus met the statutory definition of spouse, as well as the requirement that she not be living separate and apart from him under s. 48(3), and was thus entitled to the pre-retirement death benefit.

At the Court of Appeal, the three-judge panel split two to one in favour of overturning the trial judge's decision. All three of the judges provided written reasons, with the two majority judges differing in the rationale for their decision, as well as a dissenting opinion.

Justice Juriansz held that Melodee was entitled to the death benefit in her capacity as one of the three designated beneficiaries. He found that both Melodee and Jennifer qualified as a "spouse" under the definition in section 1 of the PBA: Melodee because she was legally married to Ronald; and Jennifer because she lived in a conjugal relationship with Ronald for at least three years at the time of his death. Justice Juriansz decided that the reference to "spouse" in subsection 48(3) of the PBA *only* refers to a married spouse, because a common-law spouse - by definition - cohabits with the member. Because Ronald and Melodee were living separate and apart at the time of his death, the circumstance in s. 48(3) was engaged rendering s. 48(1) was inapplicable, and no spousal priority issue arose. Neither Melodee nor Jennifer is entitled to the pension benefit as a spouse. Where there is no eligible spouse, the death benefit devolves to the designated beneficiary or beneficiaries under s. 48(6). Justice Juriansz did not believe there was a policy reason for preferring the entitlement of a cohabiting spouse over a married spouse, preferring instead to "…interpret the statute to allow pension members the freedom to order their affairs in a way that suits their particular circumstances."

In concurring reasons, Justice Epstein agreed that the definition of "spouse" in s. 1 of the PBA contemplates two categories of spouse, and that the scheme of section 48 is designed to apply to a situation where a spouse has only one spouse at a time. If at the time of death the member has a married spouse with whom he is living separate and apart, the designated beneficiary will be entitled to the death benefit under s. 48(6), regardless of the fact that the plan member was living with a person who fell within the definition of spouse.

The dissenting reasons of Justice LaForme reflect the common understanding of how section 48 of the PBA operates, namely that section 48 provides a priority scheme that gives precedence to a plan member's cohabiting spouse at the date of death, provided the spouse has not waived his or her entitlement and is not otherwise disentitled to the benefit under s. 48(3). Justice LaForme observed that the definition of spouse does not give priority to a married spouse over a common law spouse, nor does s. 48(1) state that a married spouse has priority. To read the reference to "spouse" in s. 48(3) as only meaning a married spouse is a more restrictive meaning than under s. 1. Section 48(1) does not apply to Melodee because even though she met the statutory definition of spouse on the date of death; she was living separate and apart from Ronald.

Plan administrators have operated under an assumed priority scheme for decades, which now appears to no longer exist. In particular, the entitlements of common-law spouses to pre-retirement death benefits will now depend on whether the member has a married spouse from whom he or she is not divorced and is still recorded as the designated beneficiary. Member communications should be reviewed and revised where appropriate. As leave to the Supreme Court was denied, there has been some discussion of the Ontario government stepping in and amending the PBA to bring back the traditional priority scheme.

8. *O'Neill v. General Motors of Canada*, 2012 ONSC 4654

In this case, the Ontario Superior Court considered a claim for breach of contract arising from unilateral changes made by the employer to post-retirement benefits after the employees had retired. Negligent misrepresentation was also alleged, but the Court found that the case could be decided without considering this particular claim.

For many years General Motors of Canada Limited (the "employer") had provided and paid for post-retirement life insurance and health-care benefits for their retirees. The dispute arose in December 2007 when the employer announced that it would reduce the retirees' post-retirement health-care benefits, and in September 2009 sent a letter advising that the life insurance benefits would also be reduced. The changes applied to former employees who retired after January 1, 1995.

The retirees argued that they had received repeated promises regarding their post-retirement benefits, which vested as early as the date on which they became eligible to retire, and in any event no later than their actual date of retirement, and that the reduction in their benefits was a breach of contract. The employer argued that all documentation about post-retirement benefits had incorporated "Reservation of Rights" ("ROR") clauses consistently since 1994, it therefore the employer had *"... the right to amend, modify, suspend or terminate any of its programs (including benefits)...*" for both current employees and retirees after their retirement. The Court was required to determine whether the ROR language was sufficiently clear and unambiguous to allow the employer to alter and reduce the post-retirement health-care and life insurance benefits of retirees after the employees had retired.

The proceeding was brought as a class action and was certified on consent. The class consisted of 2,978 salaried retirees and 252 surviving spouses, and 67 executive retirees, all of whom had retired between January 1, 1995 and October 20, 2011. The Certification Order incorporated a Settlement Agreement which confined the Court's determination to only the 'objective meaning' of the evidence before it, which included approximately 260 benefit documents listed in Schedule A that formed part of the overall contract between the parties. There was no stand-alone 'benefits agreement' between the parties, rather these "*contract documents*" consisted of company brochures, booklets, letters, announcements or other communications between the employer and the class members.

Upon reviewing the documents, the Court made some key findings:

First, Justice Belobaba noted that it was a reasonable expectation of the salaried employees that they could plan for and rely on a core of health-care and life insurance post-retirement benefits that would continue unchanged for the remainder of their lives. This was based on numerous and repeated representations and reassurances set out over the years in the benefit documents such as: in the retirees Initial Notice of Continuing Life insurance, a statement that the insurance "*remains in effect, without premium cost to you, for the rest of your life*"; and in the 1975 booklet Highlights of Your Health Benefits, that the health benefits make "*the future of yourself and your family more secure.*"

The second finding was that it was beyond dispute that the benefits were provided by the employer as deferred compensation for services rendered and were an important part of the

compensation. Even where such benefits are offered unilaterally, they become contractually enforceable as employees continue to work.

With respect to the ROR clause, the Court found that the employer was not required to reproduce the clause in every employer communication. Rather it was sufficient if the ROR clause was included in the main benefit documents provided to employees.

The addition of the phrase "*at any time*" was found to add little to an ROR clause. Where an employer has reserved certain rights it follows that those rights can be actioned at any time. The addition of this phrase did not act to expand the scope of the right that was reserved.

Prior to 1994 there was no consistent ROR clause in place. But after 1994 various forms of an ROR were consistently included, the most explicit of which is copied below with the major post 1994 amendments. While relevant amendments to both the first and the second sentence of the ROR were made, the employer insisted that its rights rested solely in the first sentence and that the second sentence was not to be considered. Regardless, Justice Belobaba stated that even had amendments to the second sentence been considered, it would not have affected the decision.

His analysis was a relatively straightforward matter of contract interpretation because the parties had agreed on two 'starting propositions'. The first was that *"... "vesting" is a matter of contract - that is whether retirement benefits can be changed after retirement is a matter of contractual interpretation*". The second was that *"... an employer has the contractual right to [change retirement benefits after retirement], but only if the contractual language allowing it to do so is clear and unambiguous ...*". The Court also set out a third starting position that, "absent arguments of economic duress (which were not made)" the reasons for which the changes were made (e.g. to cut costs and avoid bankruptcy, inter-generational equity) were not relevant in a breach of contract case.

For the retired former salaried employees, Justice Belobaba ruled that the employer was not contractually entitled to reduce the health care and basic life insurance benefits after the salaried employees had retired and that its actions amounted to a breach of contract. This ruling included both early retirees (who had signed a form that acknowledged the ROR clause) and employees hired after 1999 (under a slightly modified version of the ROR). However the Court found that the ROR clauses did permit the employer to alter retirement benefits for employees who were 'eligible' to retire by virtue of an age and years of service formula, but who were still actively employed.

In reaching its decision the Court employed the principle that contract provisions that are ambiguous or capable of more than one reasonable interpretation shall be interpreted against the drafter (*contra proferentem*). While the justice found that the 2012 version of the ROR was clear and unambiguous, all of the previous RORs could reasonably be interpreted in a manner that reserved (and limited) the right to change retirement benefits for only "a salaried employee (i.e. an active employee) – but not after he or she retires and becomes a retiree".

This decision raises the clarity bar quite high for ROR clauses where an employer seeks to alter retirement benefits. The Court found that even ROR language that mentions former employees and retirees within the clause needs to specify that retirement benefits can be changed 'after retirement' in order for the meaning and intention of the language to be clear.

The Court also considered the subsequent conduct of the employer. Although courts may consider the conduct of the parties subsequent to entering into a contract as evidence of their contractual intent, the conduct observed by the Court (changing/tightening the ROR language) was after that claim was filed in court about that very intent.

The outcome of this case was very different for the executive retirees. It is not clear the extent to which their status as executive employees played into the result. Certainly the commentary about the vulnerability of employees and the concern with unilateral contracts was not evident in this part of the reasons. Moreover, a number of the cases cited earlier in the reasons draw a distinction between line employees and management employees. Regardless, in a comparatively short set of reasons, the justice found that the employer was not in breach of contract by reducing post-retirement benefits for the executive retirees and their dependants.

Executive post-retirement benefits were provided by to the executive retirees through the Canadian Supplemental Executive Retirement Program (CSERP). The justice found the 1992 foundational CSERP document "*made it clear*" that the CSERP program: was "*not pre-funded*", was paid "*out of current earnings of the Company*", was "*not guaranteed*", and "*may be reduced or eliminated …*". Overall, Justice Belobaba found that the executive retirees "*knew from the outset*" and "*should reasonably have understood*" that their retirement benefits were not guaranteed and could be reduced or eliminated even after retirement.

On August 2nd 2013, the employer filed a Notice of Appeal citing numerous alleged errors in law including: failure to properly apply the Settlement Agreement; finding that the retirement benefits were deferred compensation; failing to appreciate and consider all the evidence; failing to correctly interpret and apply all contractual documents; and errors in the majority of the Court's conclusions.

9. *Chapman v. Benefit Plan Administrators*, 2013 ONSC 3318

The Ontario Superior Court certified a class action against a number of Defendants related to the Eastern Canada Car Carriers Pension Plan ("Plan"). The Plan is a federally-regulated, multi-employer, defined-benefit pension plan funded by contributions from participating employers and Plan members, negotiated through the collective bargaining process and set out by collective agreement. The Plan is administered by a joint board of trustees (the "Trustees").

The normal retirement age under the Plan is age 65, but members are entitled to early retirement benefits ("ERBs") after reaching age 55 (with a certain number of years of service), but only with the consent of the Plan Trustees and on the advice of the Plan actuary. The Plaintiff asserts that the Trustees' practice was to grant consent to payment of ERBs as of right without any consideration of the associated cost to the Plan.

Between 1998 and 2001 the Plan actuary reported that the Plan's solvency ratio dropped from 1 (i.e. fully funded on a solvency basis) to .97. By the end of 2005, the Plan's solvency ratio fell further to .8, with a solvency deficit of over $43 million. The Plan actuary's reports, however, did not incorporate an assumption about consent to payment of ERBs, which was in fact occurring. Notwithstanding the falling solvency position of the Plan, the Trustees continued to

consent to payment of the ERBs to all who applied. Effective January 1, 2008, a number of reductions to Plan benefits were introduced.

The Plaintiff brought an action against the Plan trustees, the Plan's administrative agent, and former and current Plan actuaries (and their employers) alleging that they had all been negligent and/or in breach of their trust obligations during the period 2000 to 2006 because they continued to consent to ERBs at a time when the Plan could not afford to do so, and subsequently reduced benefits as a direct result of their negligence. The Plaintiff claims damages for a portion of the Benefit Reductions that occurred as a result of the solvency deficiency.

There is a five-part test to certify a proceeding as a class action. In the first part of the test, the Plaintiff must establish that there is a reasonable cause of action to be tried. A claim will be allowed to proceed unless it is plain and obvious that it cannot succeed. No evidence may be put before the court, rather the allegations of fact set out in the pleading must be accepted as true (unless patently ridiculous or incapable of proof).

Some of the Defendants argued that the Plaintiff did not suffer damages, because benefit entitlements were always subject to the Trustees power to reduce (or increase) benefits, and the claim for damages is flawed because it is based on a theoretical solvency test. The Court rejected these arguments, stating that the Trustees' ability to reduce benefits does not insulate them from the consequences of wrongdoing that depletes the Plan's assets.

The Plan's administrative agent argued that it did not owe a duty of care to the Class, and could not be held responsible to anyone other than the Trustees with whom it had a contractual relationship. After reviewing the case law, the Court concluded that an administrative agent or trustee *may* have a common law duty to pension plan beneficiaries beyond its contractual obligations, and this will depend on factual findings about the role and functions assumed by the agent. In this case, the facts pleaded are broad enough to include such a role, and it would be improper to dismiss the case against the Plan's administrative agent at this early stage in the proceeding.

The Court also held that it was not plain and obvious that a claim by Plan members against the current and former Plan actuaries (and their employers) could not succeed, based on prior case law.

A class definition must identify those persons who are bound by the decision and entitled to notice, with reference to objective criteria that are unrelated to the merits of the claims. The Court certified the following definition:

> All active members, terminated, fully and partly vested members, retired members and beneficiaries or annuitants in receipt of monthly benefits, of the Eastern Canada Car Carriers Pension Plan except all such persons acting as trustee at any time from January 1, 2000 to March 13, 2006.

The Court rejected the Defendants' argument that the proposed class definition was too broad, and that members who received ERBs should not be included because they benefitted from the conduct that is being challenged. The Court found that excluding ERB recipients would unduly narrow the Class, since they may in fact have suffered net losses even after taking into consideration the value of ERBs.

To satisfy the test for certification there must be common issues to all members of the Class, such that deciding these issues avoids duplication of fact-finding or legal analysis. The question of whether the Defendants' decisions and conduct cause or contributed to the Benefit Reductions was common to the Class, and the Court certified six common issues related to the Defendants' liability.

The Court must also consider whether a class action would be fair, efficient and manageable, and is better than any other available legal procedure. The Defendants asserted that this case was one to advance before the federal pension regulator, the Office of the Superintendent of Financial Institutions, who could take whatever remedial measures it thinks are appropriate. The Court dismissed this argument on the basis that the litigation is about the alleged improper conduct of the Defendants, and there is no basis to conclude that the pension regulator has any interest in the issues.

The last hurdle in the test for certification is to establish that the proposed representative plaintiff is suitable, in that he or she does not have a conflict of interest with other members of the class, and has a stake in the proceeding. The Defendants' objections to Mr. Chapman acting as a representative plaintiff were summarily dismissed.

In lengthy written reasons Justice Conway certified the action as a class proceeding, defined the class, and re-articulated the common issues. It is important to note that this is a preliminary procedural decision which does not decide any of the claims in favour of any of the parties, but simply establishes the procedure for the advancement of the case. The parties must now move through the next steps in the litigation including documentary and oral discovery, and eventually to trial.

10. *Royal Ontario Museum Curatorial Association* v. *Superintendent of Financial Services et al.*, 2013 ONFST 9

In the *Halliburton* case from 2010, the Court of Appeal for Alberta upheld the decision of its Superintendent of Pensions finding a "hard freeze" amendment – one freezing the average salary calculation at the salary levels at the date of the amendment – to be contrary to Alberta's pension legislation. Since then, there has been a question about the ability of some plan sponsors to implement hard freeze amendments and considerable criticism of the decision, particularly from the actuarial community. The *ROM* decision is the first considering the same issues and comes to the opposite conclusion. The hard freeze issue was considered at length in this decision of the Financial Services Tribunal of Ontario (FST), which examined the meaning of the term "accrued benefits" and focused on the calculation of a benefit amount instead of specific formula for calculating it. The FST distinguished the statutory provisions in Alberta and Ontario and found that a hard freeze of the Royal Ontario Museum pension plan was not contrary to s. 14(1)(a) of the *Pension Benefits Act* (Ontario) (PBA). The decision will provide comfort to the actuarial community and plan sponsors implementing a hard freeze.

Effective January 1, 2010 the Royal Ontario Museum (ROM) amended its pension plan to change the benefit accrual formula from a "final three years" to a "final five years" average earnings. These amendments are intended to reduce the cost of the plan by creating a lower

average salary which is multiplied by the years of service and accrual rate to calculate the pension benefit. Actuarial evidence before the FST demonstrated that the effect of the amendment was to reduce a typical members' pension benefit by about $1,500 per year. About two-thirds of that reduction was attributed to the amendment's effect on past service – that is, service accrued prior to the amendment.

The association of curators at Royal Ontario Museum (ROMCA) challenged the Superintendent's decision to register the amendment. Two other bargaining agents first grieved the matter, had those grievances dismissed, and then were added as parties to the ROMCA proceeding before the FST.

The ROMCA (and added parties) took the position that the amendment was void as contrary to s. 14(1)(a) of the PBA. This section voids amendments that would "reduce … the amount or the commuted value of a pension benefit accrued … with respect to employment before the effective date of the amendment". The focus of the submissions by both the ROMCA and ROM were on the meaning and content of the term "accrued" and "benefit accrued".

The ROMCA argued that the form of calculation of benefit was something that "accrued" prior to the amendment and could not be reduced. In essence, ROMCA argued that prior to the date of the amendment, plan members were entitled to have their benefits calculated with reference to the final three years *at the date of retirement*, not, as the ROM argued, the final three years calculated *at the date of the amendment*. The difference is that a members' salary will increase between the date of the amendment and retirement, but the "final three" calculation would not reflect those increases.

The ROM took the position that the "benefit accrued" was that benefit calculated at the date of the amendment based on information available at that time. The ROM argued that the accrued benefit does not include projections into the future (such as projected or expected salary increases), even if such projections are used to estimate costs of the plan or for other administrative purposes.

The FST acknowledged the impact of the amendment on past service and asked itself what benefit was protected by s. 14(1)(a). In so doing it contrasted the two parties' positions. The ROMCA position was one that defined "accrued benefits" as protecting the benefit formula itself, a "set of rights" to have pensions calculated in accordance with the formula in place during the period in which the service was earned. The ROM and Superintendent, on the other hand, focused on the calculation of an amount of pension. The FST framed the question it faced as one of deciding what benefit it was that accrued, and whether that benefit was reduced. With this question and two possible meanings of "accrued benefit" in mind, the FST considered the actual language of s. 14(1)(a) and submissions of the parties on relevant precedent.

The FST reviewed its own decision in *McGrath* v. *Superintendent of Financial Service et al* (2008) FST P0335-2008-2 and its consideration of the term "accrued" in relation to an amendment that altered post-retirement indexing in the OMERS plan. In that case, the FST took the view that the analysis of an amendment under s, 14(1)(b) (prohibiting amendments reducing

deferred and pensions in pay) should take into consideration the "long view" in determining whether it actually reduced an accrued benefit, that requiring it to take into account projected impacts of the amendment. However, the FST distinguished that analysis from one that engaged s. 14(1)(a) because it was determining whether the benefit had accrued at all. Given the similarity in the language of 14(1) (a) and (b), and given the impact appears in both cases to reduce the benefit payable to the member, the distinction appears strained, but the result in both cases is consistent.

The FST then considered the actuarial evidence and general jurisprudence on the meaning of the term "accrued benefits", and found that actuarial practice supports the ROM's position, namely that the final three calculation is commonly understood to be made with reference to the final three years prior to the date of the amendment. The FST noted that "accrued benefit" is something of a technical term that, while undefined in the PBA, can reasonably be expected to reflect dominant actuarial practice. Although the FST was careful to state it did not rely on the actuarial evidence, the FST's observations on this issue are unsurprising for two reasons – actuarial practice has traditionally interpreted void amendment provisions this way, and actuarial consultants have designed the hard freeze amendment.

The FST made two primary findings about the *Halliburton* decision: that the distinctions between the Ontario and Alberta pension legislation were sufficient to account for the different results, and that the court's reasoning in *Halliburton* was not clearly convincing to the Tribunal. These two findings also reflect some of the critical commentary of the *Halliburton* decision. Section 81(1)(a) of the EPPA states that an amendment may not "reduce … a persons' benefits in respect of employment on or after the initial qualification date [enrollment in the plan] and before the date of the amendment … ." Section 81(2) provides that s. 81 does not apply "to that portion of benefits that is based on earnings of a member projected in relation to a period after the date of the amendment" "unless the plan so provides".

The FST noted the term "accrued" was not used, and contrasted the protections in the clause "a person's benefits in respect of employment" with the "amount of pension accrued in respect of employment prior to the date of the amendment". It also noted the additional exclusion of projected increases in salary. In the end the FST did not find the *Halliburton* case of assistance and distinguishes it on the basis of statutory language.

The FST then finally considered the terms of the plan text, which may provide rights in excess of the PBA, and found that it did not provide any materially higher protection of members' benefits.

This decision will provide comfort to plan sponsors and their advisors desiring to implement a hard freeze amendment. Void amendment language varies across Canada and the decision confines the *Halliburton* decision to the particular statutory formulation in Alberta. It also provided a consideration of "accrued benefits" for the Ontario void amendment language. One lingering discomfort in the decision is the FST's acknowledgement that a hard freeze amendment reduces benefits through an impact on past service.

11. *Vladescu v. CTV Globe Media Inc.,* 2012 ONSC 4233

In this decision, the Ontario Superior Court of Justice affirmed that the federal statutory pension regime allows a person to assign all or part of their pension interest to a spouse or former spouse upon marriage breakdown, but held that the assignment must be clear and unambiguous to be effective.

In the case before the Court, an assignment contained in a separation agreement was found not to be clear or unambiguous. The Court held that the separation agreement in question merely "authorized" the Plan's Administrator to pay "survivor benefits to the Plaintiff" but did not actually assign the interest to the former spouse because of the agreement also contemplated remarriage. As a result, the Court awarded the pre-retirement death benefit to the subsequently acquired spouse, even though the deceased was separated from her too at the time of his passing.

Gabriel Filotti ("Filotti") worked as a cameraman for the Defendants, CTVGLOBEMEDIA Inc. and CTV Inc. (collectively, "CTV"). Starting on October 1, 1983, Filotti began accruing benefits under the Defined Benefit Pension Plan for Employees of CTV Inc. (the "Plan").

In 1993, Filotti met the Plaintiff, Florina Vladescu ("Vladescu") and they married in 1998. The couple separated in 2001 and a separation agreement was signed on August 27, 2002 (the "Separation Agreement"). The Separation Agreement provided that in exchange for survivor benefit from Filotti's pension, Vladescu assumed responsibility of Filotti's share of a $30,000 joint debt and released her right to spousal support, among other things.

In addition to a beneficiary designation sent in July 2002 following an agreement in principle, an "Irrevocable Direction" was signed by Filotti and sent to CTV on November 5, 2002. Since a separation agreement or court order was not provided, CTV viewed the direction as a beneficiary designation instead of an assignment.

On April 18, 2004 Filotti married Natalia Garanovscaia ("Garanovscaia") and submitted a Personal Information Change Form listing Garanovscaia as his current spouse and seeking to designate her as the primary beneficiary of any death benefits not payable to a spouse. CTV contacted Filotti for clarification and did not receive a response.

In February 2006, Filotti provided documentation naming Garanovscaia as his spouse and certifying that "no interest in my pension entitlement…has been assigned or granted by agreement or court order." Filotti and Garanovscaia separated in 2005/2006 but never divorced.

In July 2006, Filotti provided CTV with a copy of his divorce judgment and Separation Agreement from his marriage to Vladescu. CTV wrote Filotti advising that the Separation Agreement did not constitute an assignment of survivor benefits because they understood that Garanovscaia did not waive her rights, as required by section 13.5 of the Separation Agreement. There was some uncertainty as to whether Vladescu had actually received a copy of CTV's letter.

Filotti died on February 10, 2009 and the Plan actuaries calculated a commuted value of his pre-retirement death benefit as $445,285.47. On October 20, 2011 Vladescu filed a Summary Judgment Motion requiring CTV to pay her the full value of the pre-retirement death benefit.

The Court considered the following two issues:

1. Does section 25(4) of the *Pension Benefits Standards Act* (the "*PBSA*") permit an assignment of all or part of a pre-retirement death benefit to a spouse or a former spouse?

2. If so, was the wording in the Separation Agreement sufficient to effect an assignment?

Section 25(4) of the PBSA states:

> 25 (4) A member or former member of a pension plan may assign all or part of their pension benefit, pension benefit credit or other benefit under the plan to their spouse, former spouse, common-law partner or former common-law partner, effective as of divorce, annulment, separation, or breakdown of the common-law partnership, as the case may be. The assignee is, in respect of the assigned portion of the pension benefit, pension benefit credit or other benefit, deemed for the purposes of this Act, except section 21,
>
> (*a*) to have been a member of that pension plan; and
>
> (*b*) to have ceased to be a member of that pension plan as of the effective date of the assignment.
>
> However, a subsequent spouse or common-law partner of the assignee is not entitled to any pension benefit, pension benefit credit or other benefit under the pension plan in respect of that assigned portion.

The Court found that although the federal pension regime expressly prohibits assignment of a pension interest under s. 18(1)(a) of the PBSA, section 25(4) provides an exception that allows "all or part" of a pension to be assigned to a spouse or former spouse on marriage breakdown. As a result, the Court held that Parliament had opted to give separating spouses more flexibility under the federal statutory pension regime.

The Court also stated that allowing up to 100% of an interest in a pension to be assigned on marriage breakdown did not prejudice a subsequent spouse because the loss was for something that he or she never had in the first place.

In reaching its conclusions, the Court rejected CTV's technical argument that it was impossible for a pension plan administrator to calculate and administer an assignment to a former spouse, who was a former member. The Court found that all the administrator was required to do was note that the request was made within the necessary time frame and make the necessary transfer, in this case, upon Filotti's death.

Despite its finding in favour of Vladescu on the first issue, the Court considered the Separation Agreement and held that it did *not* provide a clear and unambiguous assignment to Vladescu. The Court reviewed section 13.5 of the Separation Agreement and found that it contemplated or acknowledged that a full or complete transfer or irrevocable assignment may not be possible in the event of Filotti's remarriage. Since Filotti remarried and did not execute a marriage contract, the Court found that he did not release any rights or claims and therefore as long as his surviving spouse met the definition provided under the *PBSA*, the Separation Agreement did not disentitle her from the pre-retirement death benefit. The Court ordered CTV to pay Garanovscaia the pre-retirement death benefit with interest from the date of death of Filotti. The decision is under appeal to the Ontario Court of Appeal.

12. *Grant Forest Products,* 2011 ONSC 7698

This decision dealt with one of the questions that arose after Indalex, and that is the impact of the date of windup on the existence and enforceability of the PBA's deemed trust.

The case concerned a priority contest between PWC, the windup administrator of two pension plans, and West Face Capital, a pre-filing secured creditor of Grant Forest Products. Grant Forest Products entered CCAA protection in June of 2009. The Salaried Plan had an effective windup date of March 31, 2011, and the initiation of the windup had occurred on February 27, 2012. The initiation of the windup of the Executive Plan occurred on the same day, but its effective date was June 30, 2010.

As the CCAA process wore on, several parts of Grant Forest's business were sold. Both West Face Capital and PWC on behalf of the plan members claimed priority to the funds. A reserve was created from the proceeds, which reserve was meant to be sufficient to satisfy the funding deficiencies in the two pension plans.

On August 27, 2012, a motion was brought by the debtors for directions as to what to do with the amounts held in escrow. As a result of the fact that the Supreme Court had the *Indalex* decision under reserve at the time, Justice Campbell ordered that the motion be adjourned. It was ultimately argued in November of 2012, before the decision of Indalex came out, and following the release of *Indalex* in February of 2013, the parties were invited to make additional submissions.

Ultimately, Justice Campbell held that the deemed trust did not arise as the pension plans were not wound up prior to the beginning of the CCAA proceeding. He noted that "[t]he deemed trust that arises upon windup prevails when the windup occurs before insolvency as opposed to the position that arises when wind up arises after the granting of an Initial Order". Justice Campbell also rejected PWC's argument that the CCAA Court had permitted the deemed trusts to arise when it granted order providing that the plans were to be wound up.

He also refused to order that GFPI make any of the special payments that were due to the plans under the PBA In refusing this requested relief, he noted that "*Indalex* stands for the proposition

that provincial provisions in pension areas prevail prior to insolvency but once the federal statute is involved the insolvency regime applies."

The Grant Forest decision was the first case to deal with the Supreme Court's decision in *Indalex* in a detailed way. The holding is not beneficial to plan members who find themselves impacted by an insolvency proceeding. What is especially troubling about the case is that Justice Campbell held that provincial priorities for pension plans do not have any applicability once a CCAA proceeding is commenced. This appears to be at odds with the decision of the Supreme Court of Canada, who held that "The provincial deemed trust under the *PBA* continues to apply in *CCAA* proceedings, subject to the doctrine of federal paramountcy … at the end of a *CCAA* liquidation proceeding, priorities may be determined by the *PPSA*'s scheme rather than the federal scheme set out in the *BIA*."

Unfortunately, the decision was not appealed and Justice Campbell's ruling is now binding precedent in Ontario.

13. *International Brotherhood of Electrical Workers, Local 636 v. Horizon Utilities Corporation* (6 January 2013), unreported (Arbitrator MacDowell)

In *International Brotherhood of Electrical Workers, Local 636 v. Horizon Utilities Corporation*,[1] the Collective Agreement between Horizon Utilities Corporation (the "Employer" or "Horizon") and the International Brotherhood of Electrical Workers, Local 636 (the "Union") provided for pensions and post-retirement benefits for qualifying employees. Arbitrator MacDowell determined that in the absence of express language either making the receipt of post-retirement benefits conditional on age or making reference to the eligibility requirements of another benefit (such as a pension), age was not embedded in the concept of retirement.

At the age of 49 and after 26 years of employment with and its predecessors, Marni Penny (the "Grievor") "retired" effective April 11, 2012. Between the date on which she stopped working and the date of the hearing, the Grievor did not work for another employer and was not engaged in other types of remunerative activity. She had "fully withdrawn from active employment" and "truly 'retired from the working world.'"[2]

The Collective Agreement stated that, upon retirement, employees that met the eligibility requirements were entitled to both pension and post-retirement benefits.

The Ontario Municipal Employees Retirement System ("OMERS") pension plan was established by the provincial legislature for local government employees in Ontario. The terms of both the Canada Pension Plan ("CPP") and the OMERS pension plan are established by statute and cannot be amended by the parties during collective bargaining. The "normal retirement age" is 65 under both the OMERS pension plan and CPP. The "early retirement age" is 55 under OMERS and 60 under the CPP.[3]

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[1] *Ibid*.

[2] *Ibid* at para 13.

[3] *Ibid* at para 7 (The provisions of OMERS allow some employees to retire as early as age 50).

Entitlement to post-retirement benefits was addressed in "Letter of Understanding #3" (the "LOU") of the Collective Agreement and provided in part:

> A retiree will receive benefits for life if:
>
> (a) he was hired by Hamilton Hydro Inc. or its predecessor companies prior to October 1, 2001, and (b) he has twenty (20) years of service with the corporation on the date of retirement.[4]

Although age is not expressly provided in the LOU as a requirement for eligibility for post-retirement benefits, Arbitrator MacDowell considered whether the Grievor was entitled to post-retirement benefits given that she was only 49 years of age when she left Horizon's employ. The Arbitrator considered, first, whether the early retirement age in the OMERS pension plan dictated eligibility for post-retirement benefits as provided in the LOU, and, alternatively, whether age was implicit in the definition of "retired" and "retiree."[5]

Arbitrator MacDowell agreed with the Union that the interpretation of "retiree" in the LOU was not dictated by the terms of the OMERS Pension Plan. The reasons for this decision were three-fold. First, the pension entitlements addressed in Article 28 of the Collective Agreement and the post-retirement benefits addressed in the LOU "are as different as chalk and cheese."[6] Whereas the pension plan was created outside the realm of collective bargaining, and entitlement is based on contributions by employees and employers, post-retirement benefits were collectively bargained and entitlement is based on length of service. Second, the LOU does not indicate an intention that eligibility requirements for post-retirement benefits be the same as those for payment under the OMERS pension plan. Third, the LOU does not provide that an individual must be eligible to receive an OMERS pension on the date that he or she stops working in order to be entitled to post-retirement benefits.[7]

In the absence of "linking" or "definitional" language in the LOU, "[t]he OMERS criteria are not imported - either holus bolus or in bits - into the interpretation of the LOU"[8] and, consequently, the arbitrator must determine the meaning of "retired" and "retiree".

In the absence of any mention of "age" in the LOU, the commonly held notion that someone "retires" after having reached a specific age or worked for a prescribed number of years was of limited assistance in this case. Arbitrator MacDowell therefore determined whether the Grievor was eligible for post-retirement benefits by examining the original linguistic meaning of "retirement," "retiree," and "retired" in the context of contemporary workplace realities.

Although "concept of "retirement" flows from and still carries with it, its original linguistic meaning,"[9] Arbitrator MacDowell adopted a broad and flexible approach to "retirement". In this

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4 *Ibid* at para 1. (emphasis in original).

5 *Ibid* at para 16.

6 *Ibid* at para 31.

7 *Ibid* at paras 30-31.

8 *Ibid* at para 42.

9 *Ibid* at para 47.

case, the Grievor was entitled to post-retirement benefits stipulated in the LOU given that she had met the eligibility requirements expressly provided in the LOU and implicit to the meaning of retirement. More specifically, the Grievor "did fully withdraw from all employment; she is not employed elsewhere or engaged in any other remunerative economic activity; her current life situation meets the dictionary definition and ordinary understanding of the word "*retirement*"; she meets all of the service and prior-employment conditions necessary to access post-retirement benefits; and her current situation also displays the "purpose" for which the post-retirement benefits were designed — to assist workers who have put in many years of service and who after leaving active employment after long service may have reduced economic capacity to pay for things that they were accustomed to receive while they were working."[10]

For individuals involved in the drafting and implementation of pension and benefits agreements, this decision is notable for at least three reasons. First, it adopts and broad and flexible approach to defining "retirement," "retiree," and "retired." Second, it serves as a reminder that parties should always express their intentions in writing. Third, in the absence of express language to the contrary, an arbitrator will be reluctant to import the eligibility requirements of one type of benefit into anothero.

14. *Kidd v. The Canada Life Assurance Company,* 2013 ONSC 1868

This case concerned the proposed settlement in a class action where the plaintiffs sought a declaration as to the ownership of pension plan surpluses and for damages for breach of certain terms of the pension plan. Shortly after agreeing to a settlement, and successfully applying to court for its approval, the parties learned that they had been wrong about the estimated amount of surplus available for distribution. The parties amended the settlement agreement as a result, and sought to have an amended settlement agreement approved by the Ontario Superior Court. At the hearing, numerous class members objected to the amended settlement, and Justice Perell stated early in his reasons for decision that:

> On a motion to approve a class action settlement, the court's only choices are to approve or to reject the settlement using the test of whether the proposed settlement is fair, reasonable, and in the best interests of the class members. The court does not have the choice of fixing or revising the settlement to make it fair, reasonable, or in the best interests of the class members. The court's only choices are to approve or to not approve the proposed settlement.

Under the original, approved settlement, plan members would receive 57.22% of the surplus for their designated part of the Pension Plan; (b) inactive plan members would receive 12.44% of the designated surplus; and (c) Canada Life would receive 30.34% of the surplus allocable to the partial winding ups. The diminishment of the surplus was largely the result of two factors. First, a decline in interest rates increased the Pension Plan's liabilities. Second, a greater than

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[10] *Ibid* at para 53.

anticipated number of class members chose or were deemed to have chosen annuities rather than their commuted values.

In a surprising decision, Justice Perell refused to approve the amended settlement. The amended settlement provided a possible recovery, at a later date, for the class members if interest rates rebounded before December 31, 2014. Approximately 90 class members filed a petition with the Court asking it not to approve the settlement.

Justice Perell held that the settlement was unfair on a substantive, procedural, circumstantial and institutional basis. Justice Perell held that it was substantively unfair because the class members, and not class counsel or the defendants, had to bear the brunt of the mistaken assumptions about the value of the surplus.

He also held that it was procedurally unfair as the objectors did not have independent legal advice to help assist them in determining whether to challenge the settlement. Given the positions held by the defendants and class counsel, Justice Perell felt that more than simply notice of the terms of the settlement and of the settlement hearing was required.

The amended settlement was also found to be circumstantially unfair as class counsel and the defendant did suffer the same radical change in entitlements as the class members when the predictions were found to be inaccurate, and there was serious opposition from class members about the amended agreement. Justice Perell felt that the objector's views of the amended agreement should be given a significant amount of weight.

On the question of institutional fairness, Justice Perell found that the only thing that could be said was that the amended settlement was monetarily better than the original settlement. However, he held that courts should not, simply because one choice is the best in a double bind, approve a settlement that the court considers to be unfair.

Justice Perell concluded his reasons with the following:

> Some good may yet come of not approving the Amended Settlement. It is open to the parties to come back with a fair settlement. But even if they do not, it will be a good thing for others to know that under the *Class Proceedings Act, 1992*, the court will not approve an unfair settlement. If that has the effect of elevating the standard for other settlements, then the institutional purposes of the class proceedings legislation of achieving meaningful access to justice will be served.

15. *Pryden v. Swiss Reinsurance Company Ltd.*, 2013 ONSC 2661

In *Pryden v. Swiss Reinsurance Company Ltd.,* Justice Conway of the Ontario Superior Court of Justice approved a settlement put forward in a pension plan surplus case. Ms. Pryden was the representative Applicant proceeding under the *Class Proceedings Act, 1992*. She was a former employee of the Swiss Reinsurance Company and its predecessor Mercantile and General Life Reassurance Company of Canada (the "Company"). The Company's pension plan was partially wound-up in 1999 resulting in a surplus, which was estimated to be approximately $20.4 million at that time.

The Plan was established in 1961 by a trust deed. At that time it was governed by rules which restricted the Company from changing the Plan for any reason other than for the members' exclusive benefit. It was also restricted from permitting any portion of the fund from reverting to the Company. The rules did provide for retroactive amendment if advisable or required for compliance with any applicable legislation. In 1965, the Company's Board of Directors, with the consent of the trustees, changed the trust deed to revert surplus to the Company on Plan wind-up.

This proceeding was brought in February 2009, and it was certified as a class proceeding in June of that year. The "Class" was identified as the Plan members, or their estates, which had been included in the Partial Wind-Up Report issued by the Company. There was only a single common issue certified which was whether the Surplus belonged to the Class or the Company.

The Applicant asserted that the Surplus belonged to the Class. "Its position was that the Plan was established pursuant to an irrevocable trust and that the trust deed prohibited any part of the trust fund from being diverted for purposes other than the benefit of the Plan members. … the Class position was that amendments to the Plan in 1965 and 1982 permitting surplus in the Plan to revert to the employer were a revocation of trust and therefore invalid."

The company "claimed that it was entitled to the Surplus. … [The Company]'s position was that the 1965 amendments were made in compliance with new provincial laws that permitted the reversion of surplus to an employer on termination. [A witness for the employer] stated that the board of directors believed it had the power to amend the trust deed, there was no surplus in the Plan in 1965; there was no objection to the amendments when they were passed; and the 1982 amendments were requested by the Department of National Revenue."

The litigation progressed through productions, a contested motion before the Master and resolution of production issues before the parties agreed to mediate in December 2011, when a settlement was eventually reached. Justice Conway identified the principles terms of the Settlement:

a. The Class is entitled to 84% and Swiss Re the remaining 16% of the net Surplus (i.e. after expenses) in the Plan (the "New Surplus")

b. Swiss Re may apply, without opposition from the Class, to claim indemnity from the Surplus of all fees, disbursements, and other costs reasonably incurred in the litigation and related administration of the Plan (The "Expenses").

The parties moved for the approval of the settlement pursuant to s. 29(2) of the *Class Proceedings Act.* The Swiss Reinsurance Company also brought a separate motion to recover its costs from the pension surplus.

To approve any settlement of a class proceeding, the court must determine that in all of the circumstances the settlement is "is fair, reasonable, and in the best interests of those affected by it." Justice Conway laid out the factors set out in prior cases which should be assessed to determine whether to approve a negotiated settlement, namely:

(a) likelihood of recovery or success;

(b) amount and nature of discovery, evidence or investigation;

(c) settlement terms and conditions;

(d) recommendation and experience of counsel;

(e) future expenses and likely duration of litigation and risk;

(f) recommendation of neutral parties;

(g) if any, number of objectors and nature of objections;

(h) the presence of good faith, arms' length bargaining and the absence of collusion;

(i) degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and

(j) information conveying to the court the dynamics of and the positions taken by the parties during the negotiation.

The decision emphasized that this list is merely a guide for analysis and not a rigid set of criteria.

Justice Conway approved the Settlement, and concluded that it was "fair, reasonable and in the best interests of the Class members".

Québec Class members required a slightly different arrangement. As Québec law does not recognize a partial wind-up of a registered pension plan, the parties had to consult with the appropriate administrator in the province (the Régie des rentes du Québec) who confirmed that it would not oppose the participation in the Settlement by the Québec Class members. The Régie indicated that under Québec law the Class members would still be entitled to make a further claim to the surplus. The Swiss Reinsurance Company included the Québec members in the Settlement but required that they sign a release of any future payments from the Plan if it is ever fully terminated.

The parties' had an agreement that the Company would pay Class counsel's expenses without prejudice to the Company's right to request such costs from the Surplus. The Company's position was that as a condition of settlement they would claim indemnity from the Surplus of all fees, disbursements, and other costs reasonably incurred in the litigation and administration of the fees. The Company alleged that these costs should be recovered from the Surplus as they were accrued in order to administer the pension fund. This was known to Ms. Pryden and her counsel, and the percentages of entitlement to the surplus laid out in the settlement were determined with this in mind.

The determination of how costs should be obtained is a matter of the court's discretion. Justice Conway permitted the recovery of costs from the Surplus. Following the approval of the Settlement, the Swiss Reinsurance Company must apply to the Superintendent of Financial Services Commission of Ontario for approval to pay the Surplus in accordance with the Settlement.

SASKATCHEWAN DECISIONS

16. *May v Government of Saskatchewan,* 2013 SKCA 11 (CanLII)

In this case, the Saskatchewan Court of Appeal held that The Government of Saskatchewan has no contractual or other legal obligation to provide additional pension benefits to members of the Public Service Superannuation Plan beyond what is specified in the governing legislation, the Saskatchewan Court of Appeal recently affirmed.

Three plaintiffs brought a class action against the Government of Saskatchewan, alleging that their employer was obligated to provide pension benefits above and beyond what was required in the governing legislation, because it is an implied term of their employment. In the alternative, the plaintiffs argued, the Government owed the Class a fiduciary duty to provide the benefits.

The Public Service Superannuation Plan is a defined benefit, contributory pension plan, established by legislation in 1927 ("PSSP"). The legislation never required or provided for indexing of pensions after retirement, but ad hoc increases were in fact provided from the 1970s, when high levels of inflation prompted concerns among retirees.

In their statement of claim the plaintiffs asserted that there was a contract between each employee and the Government, with the following terms:

- members of the PSSP would contribute to the PSSP at an amount determined by the Government;

- the Government would provide benefits to PSSP members having regard to the members' contributions, a corresponding notional matching contribution by the Government, and interest earned on those contributions;

- the Government would treat the members of the PSSP equitably and fairly, having regard to other employees of the Government and the level of pension benefits being provided to those parties, including post-retirement pension increases, and post-retirement medical, health and dental benefits; and

- the Government would assume the costs of administering the PSSP for the exclusive benefit of the members of the PSSP.

The action was certified as a class proceeding brought on behalf of the members of the PSSP and a number of common issues were identified. After a trial in the Court of Queen's Bench, a judge determined that there was no agreement, either express or implied, between the PSSP members and the Government to anything beyond what was expressly provided for in the PSSP. The plaintiffs' higher expectations of the Government were unfortunately not legally-based conditional entitlements.

On appeal, the plaintiffs argued that the trial judge had erred in law in numerous respects. The Court of Appeal disagreed with the plaintiffs, and upheld the trial decision. With respect to whether any implied contractual term of employment existed related to the members' pensions,

the Court of Appeal held that that was a factual finding, and as such, the trial judge was entitled to substantial deference.

In addition to rejecting the plaintiffs' factual challenges, the Court of Appeal also held that there had been no legal errors committed in the course of the trial judge's reasoning on the breach of contract claim. In particular, the plaintiffs took issue with the judge's comment that he was required to rule on "legal, including contractual rights, not upon expectations – upon legal entitlements not aspirations." Justice Richards on behalf of the Court simply stated "I see no problem with this comment…"

There were a number of other alleged errors relating to the weight given to various pieces of the evidence, all of which the Court of Appeal dismissed. After dealing which each of these arguments, the Court stated:

> [30] In the end, I see no palpable and overriding error in the trial judge's conclusion that there is no implied contractual term or agreement between the Government and PSSP members to the effect that PSSP members will enjoy such increases in their pension benefits as are required to protect them from any significant inflationary erosion of the purchasing power of those benefits. Indeed, in my view, the trial judge's conclusion on this point is entirely correct.

The plaintiffs also challenged the trial determination that the Government was not under an additional fiduciary or free-standing obligation to prevent the Class' pension entitlements from being eroded by inflation. The Court of Appeal gave short shrift to this argument, stating as follows:

> [33] In my opinion, the trial judge acted correctly in rejecting this line of argument. In this regard, it is important to note that the Supreme Court's jurisprudence with respect to fiduciary obligations has been significantly clarified since Lac Minerals. Its recent decision in Elder Advocates of Alberta Society v. Alberta, 2011 SCC 24 (CanLII), 2011 SCC 24, [2011] 2 S.C.R. 261, is particularly helpful. There, the Court emphasized that the nature and responsibilities of governments must mean that they will owe fiduciary duties only in limited and special circumstances. This is so because imposing a duty on a government to act only in the best interests of a particular beneficiary or group of beneficiaries is simply at odds with its general obligation to mediate competing interests for scarce public resources and to act in the best interests of the community as a whole. For my part, I am unable to see how the Appellants' arguments can be reconciled with this basic limitation on the extent to which fiduciary obligations can or should be imposed on government.

The Court of appeal concluded that the appeal must be dismissed.

BRITISH COLUMBIA DECISIONS

17. *Bain v. The Great-West Life Assurance Company*, 2012 BCSC 1335

In *Bain v. The Great-West Life Assurance Company*, the British Columbia Supreme Court held that the plaintiff, a carpenter by trade, was ineligible for long term disability insurance benefits under an employer sponsored group policy, on the basis that he was capable of "gainful employment" within the terms of the policy.

The plaintiff ("Bain") was employed by the City of Calgary since March, 1997. In the late summer of 2007, Bain requested and was denied a leave of absence from his employer. From August 26 to September 22, 2007, Bain was off work, claiming to have suffered a back injury. After returning for one month, Bain again requested a leave of absence, which was again denied. In the interim, Bain had received a written offer of employment from Avion Construction Ltd. as a construction supervisor, which offer he accepted.

In light of Bain's physical problems, the City of Calgary issued a Notification of Accommodation on November 26, 2007, where Bain was offered work as a telecommunications parts service clerk at a slightly lower rate of pay and fewer hours per week than his previous position. For the period of August 27 to September 24, 2007, and from October 22 to December 20, 2007, Bain received short term disability benefits through the City's benefits program.

Notwithstanding the city's offer of accommodated employment, Bain began working for Avion beginning December 3, 2007, at which point Bain had not resigned from his employment with the City, and was also not working in the accommodated position. Throughout this period until December 21, 2007, Bain was calling in sick. He worked for a few days following December 21, 2007, but then advised the City that he required time off for a family emergency. Bain took vacation time for the majority of January, 2008.

From December 3, 2007 until March 14, 2008, Bain earned $23,450 with Avion, in addition to the $10,509.66 received from the City in early 2008. The Court found that an employee of the City was not entitled to receive short-term disability benefits from the City while employed by another entity.

Effective February 12, 2008, Bain's employment was terminated for cause by the City, on the grounds that he had not been truthful about his employment with Avion while still employed by the city.

Following his termination by the City, Bain held number of short term positions. From April 3, 2008 to June 27, 2008, Bain worked as a project superintendent for Western Construction and Combustion Services Inc., from August 25 to September 17, 2008 at Conco Contracting Corp. as a superintendent of construction, and from October 28, 2009 to November 13, 2008 at EllisDon Forming Ltd. as a carpenter/foreman.

In addition to the following sources of employment income, commencing on December 24, 2007, Bain commenced receiving monthly short term disability benefit payments through the City's group insurance policy, which continued for an initial assessment period until December

23, 2009, at which point the insurer determined that Bain was capable of obtaining gainful employment, and hence was not disabled within the meaning of the policy.

Both prior to and following the termination of his benefits, Bain had met with a number of medical, rehabilitation and physical capacity professionals. On balance, these professionals found that Bain suffered from chronic back pain which limited his capacity for physical work. Nevertheless, some of these professionals determined that he was capable of obtaining some forms of gainful employment, though in different fields and at lower rates of pay than his previous employment as either a construction supervisor or carpenter.

The Court noted that although the ultimate onus rests on a plaintiff to prove disability when benefits are terminated at the time of the change from what is often referred to as the "own occupation" part to the "any occupation" part of a disability policy, there is an evidentiary shift after a *prima facie* case has been established. If a plaintiff adduces enough evidence to suggest total disability, the insurer would be called upon to present evidence of other work that the plaintiff could perform.

Following a review of the evidence, the trial judge held that a determination of whether an insured is totally disabled is a question of fact dependent on the wording of the policy and the assessment by the Court of the abilities of the insured.

With respect to the medical and occupational evidence, the Court held that there was no physical reason why Bain could not undertake the different kinds of positions suggested by the various professionals, and that Bain had seriously exaggerated the amount of pain from which he suffered. This evidence was further bolstered, in the Court's view, by a review of Bain's employment since 2007. The Court also found that Bain had failed to mitigate his damages, by failing to seek appropriate rehabilitative treatment or thoroughly searching for alternative employment.

In light of all the evidence, the Court held that it could not "conclude that Mr. Bain is disabled merely because he has not been able to find work when he has not looked for work." Furthermore, the Court held that the evidence suggested that "there are a number of occupations which Mr. Bain can perform . . . [and] that the remuneration available from those positions are sufficient to produce for Mr. Bain a 40-hour work week or the equivalent of a 40-hour work week which will provide Mr. Bain with an income in excess of 50% of what he was earning at the City." Accordingly, Bain was found not to be totally disabled within the meaning of the policy, and the action was dismissed.

18. ***Ellsworth v. Boilermakers Lodge 359 Health and Welfare Plan (Trustees of)* [2013] B.C.J. No. 689 (Prov. Crt.)**

This case involved reciprocity agreements between certain health and welfare and pension plans. Mr. Ellsworth was a member of lodge 359 of the Boilermakers Union for many years. This union lodge, which was located in British Columbia, maintained health and welfare and pension plans

for its members (the “British Columbia Plans”). Mr. Ellsworth participated in the British Columbia Plans.

Most members of the Boilermakers Union outside of British Columbia, including Alberta, are covered by the Boilermakers National Pension and Health and Welfare Plans (the “Canada Plans”).

In July 2008, Mr. Ellsworth retired and began collecting pension and health and welfare benefits under the British Columbia Plans. At that time, he also terminated his membership in the union. In addition, Mr. Ellsworth returned to work in Alberta. His employment in Alberta was covered by a collective agreement under which his employer made pension and health and welfare contributions on his behalf to the Canada Plans. Material filed with the court indicated Mr. Ellsworth’s membership in the Canada Plans started on July 1, 2008.

There were reciprocity agreements between the Boards of Trustees of the British Columbia Plans and the Canada Plans to cover members traveling and working outside the jurisdiction of their home plan. These agreements provided for the benefits of a member who temporarily works outside the jurisdiction of his home plan to be transferred to his home plan. For example, under these reciprocity agreements, if a member of the British Columbia Plans worked temporarily in Alberta, his benefits earned in Alberta would be transferred back to his home British Columbia Plans.

When Mr. Ellsworth first went to work in Alberta, reciprocity was voluntary at the option the member. Mr. Ellsworth’s benefits stayed in Alberta as he did not choose reciprocity. However, the reciprocity agreements were amended effective July 1, 2009 to require mandatory reciprocity. Accordingly, pension and health and welfare contributions for Mr. Ellsworth’s employment in Alberta started to be transferred back to the British Columbia Plans. Mr. Ellsworth contested mandatory reciprocity and sought the return to the Canada Plans of the contributions that were transferred to the British Columbia Plans.

The court concluded that mandatory reciprocity was not prohibited under either Alberta’s or British Columbia’s pension benefits standards legislation. The court noted that there were some drafting issues with the reciprocity agreements and these issues lead to some uncertainty. However, in interpreting the agreements, the court found that the parties’ intent as shown by their conduct and statements should be considered. After considering the parties’ intent, the court found that the reciprocity agreements applied to Mr. Ellsworth and others in his position. In this regard, the court noted that pensioners were not expressly excluded and that there was evidence that the parties to the agreements had expressly intended the agreements to cover British Columbia retirees working in Alberta.

Mr. Ellsworth argued that the mandatory reciprocity was unfair and that the Boards of Trustees of the Canada and British Columbia Plans had breached their fiduciary duties to him and others in his position by requiring mandatory reciprocity. On this issue, the court noted the evidence that had been presented concerning the factual background that lead to the Boards of Trustees adopting mandatory reciprocity, including: that the number of British Columbia members working in Alberta was increasing; that a significant number of members take unreduced early retirement pensions and return to work; that the health and welfare benefits of retired members are subsidized by the trust fund; the decreased selection of reciprocity by British Columbia

pensioners returning to work in Alberta; the impact of the 2008 financial crisis on pension plans; and past benefit reductions under the respective plans.

The court noted that it will be rare for a court to intervene in trustee decisions. It noted that intervention in trustee decisions will only be appropriate where the trustee has failed to exercise his discretion, has acted dishonestly, has failed to exercise the prudence of a reasonable business person, or has failed treat beneficiaries in an even-handed manner.

The court rejected the claim that mandatory reciprocity breached the Trustees' fiduciary duties. In doing so, the court noted that the Trustees had exercised their discretion and had not acted dishonestly and that mandatory reciprocity was not imprudent as it was implemented to maintain the funding of the plan. On the question of the Trustees' duty of even-handedness, the court found that mandatory reciprocity applied to all members not just retired members. It found that the Trustees were concerned with maintaining existing benefits and that early retirement was expensive for the plans. Given all the circumstances, court found that the Trustees had not breached their duties to act fairly or to treat beneficiaries even-handedly.

19. ***Madsen v. Madsen*, 2012 BCSC 1535**

In this case, a British Columbia court was persuaded that the parties did not intend to refer to an inapplicable statute, and granted the former wife's request to reflect the true intentions of the parties.

The parties were married in July 1979 and separated in August, 2003. The husband participated in the Air Canada Pilots Pension Plan (the "Plan"). Following their separation, the parties agreed to divide their family assets equally between them. In 2004 they entered into a separation agreement (the "Agreement"), which stated in part as follows:

> 23. The benefits accrued to the Husband (the "Pension") under the Air Canada Pension Plan (the "Plan") are a family asset.
>
> 24. The Wife's share of the Pension is 50 per cent of the Pension that accrued between July 28, 1979, the date the parties married, and December 31, 2003, the date the parties separated.
>
> 25. The Wife's share of the Pension will be satisfied by the transfer of an amount from the Plan to the credit of the spouse in accordance with the federal *Pension Benefits Division Act* and the Pension Benefits Division Regulations.

The evidence before the Court was that there had never been any discussion or negotiation between the parties about how the wife's 50% share of the pension under the Plan was to be transferred. The evidence disclosed that the only issue concerning the division of the pension that was discussed between the parties when drafting the separation agreement was the date on which the wife's entitlement to a 50% share would end, which the parties ultimately agreed to.

However, years later when problems arose with the transfer, the wife asserted that paragraph 25 of the Agreement incorrectly identified the *Pension Benefits Division Act* ("PBDA") and its regulations, and ought to have referred to the *Pension Benefits Standards Act* ("PBSA"). The PBDA applies to pension plans of federal employers in the public sector, whereas the PBSA applies to federally-regulated private pension plans, including the Plan.

It was counsel for the wife that was tasked with drafting the agreement in 2004, and he stated in evidence that he mistakenly referred to PBDA, rather than the PBSA, and that this was through inadvertence.

The pension division was not effected right away after entering the Agreement. In 2008 the wife's counsel wrote to Air Canada to facilitate the pension transfer, citing section 25 of the PBSA. Air Canada relied upon its Administration Policy, which outlines the Plan's policy on division of pensions under the PBSA and applicable provincial property laws. The wife's counsel also prepared a supplementary agreement to effect the transfer, enclosing an actuarial report which valued the wife's lump sum entitlement at over $350,000.

The husband refused to sign the supplementary agreement, and in response retained his own actuary who valued the pension benefits in accordance with the PBDA, plus interest, at approximately $160,000. The actuarial differences arose from the application of the two different statutes to value the pension.

The wife brought a court application seeking to "rectify" paragraph 25 of the Agreement to properly reflect the PBSA and not the PBDA. She argued that it was a mutual mistake of the parties to refer to the PBDA, and the Agreement should be fixed to reflect the true intention of the parties.

The Court noted that the remedy of rectification should be used cautiously, in recognition of the importance of preserving confidence in written agreements, and not as a substitute for due diligence when entering agreements. There is a heavy onus upon the party seeking to rectify a contract to prove that it does not reflect the true and outwardly expressed intention of the parties.

The Court had no hesitation in finding in favour of the wife to rectify the Agreement. This was due in large part to the wife's lawyer's admission that it was his inadvertent error in referring to the wrong legislation, and the corresponding lack of direct statement from the husband or husband's counsel that either intended to refer to an otherwise inapplicable statute in the Agreement.

This decision serves as a reminder to carefully consider and cite the appropriate legislative enactments when drafting pension division agreements, to avoid subsequent disputes at the implementation stage.

20. *Weldon v Teck Metals Ltd.*, 2013 BCSC 345

On March 4th, 2013, the Supreme Court of British Columbia ("BCSC") issued its first common issues decision in a class action concerning the conversion of the Teck Metals Ltd. defined benefit pension plan to a defined contribution plan in 1994. The class action was certified in 2012 and the parties had agreed on twenty-three common issues. In this decision, the BCSC decided two common issues related to the limitation period in this action. The BCSC held that the applicable limitation period had expired under the *Limitations Act*, RSBC 1996 c 266 ("The Act"), but that the common issues were subject to a "postponement" of the limitation period. The parties will therefore proceed with a trial of the other common issues without being barred by failure to bring the action within the appropriate limitation period.

In 1992 *Teck Metals Ltd.* ("Teck") (formerly Cominco) joined together with other related companies and formed a new multi-employer defined contribution pension plan. At the time the non-unionized employees of Cominco were members of a Defined Benefit Plan ("DB Plan") and were given the choice to transfer to the new Defined Contribution pension plan ("DC Plan"). The employees were given until December 1992 to elect to transfer their benefits, which became effective January 1, 1993.

The Plaintiffs allege that the Teck and the other defendants gave employees incomplete, inaccurate or misleading information about the DC Plan, and ask for damages and other relief for breach of statutory and fiduciary duties, deceit and negligent misrepresentation. The Plaintiffs assert that Teck, with help of Towers Perrin Inc. ("Towers"), structured and implemented the DC Plan in a way that favored Teck's interests over those of its employees, transferring risks from Teck to the DC Plan members.

The two representative plaintiffs are Leonard Bleier ("Bleier") and David Weldon ("Weldon"). Bleier took early retirement in 2006, while Weldon remains an employee of Teck and active member of the DC Plan. Weldon commenced an action against Teck and other defendants in 2009, and Bleier in 2011. The two actions were consolidated into a single proceeding. There were a number of defendants when the action was initiated, however the only remaining defendants are Teck and Towers.

When the consolidated class proceeding was certified in 2012, the court defined the class members as both current and former "salaried, pension-eligible, non-union employees of Teck Metals Ltd., Teck Resources Limited, Cominco Resources International Limited, CESL Limited and Agrium Inc. who elected to move from the DB Plan to the DC Plan effective on or about January 1, 1993."

There were two issues for determination at the BCSC:

1. When did the right to bring an action arise pursuant to the Act?

2. If the basic limitation period has expired, to what extent, if at all, can the plaintiffs rely on the postponement provisions of the Act?

Teck's position was that the six-year limitation period had long expired. Teck asserted that the Plaintiffs had a right to bring their action as soon as the employees elected to transfer from the DB Plan to the DC Plan, in other words in 1993.

The Plaintiffs' position was that the limitation period did not begin to run when the employees elected to transfer from the DB to DC Plan, but rather does not start to run until they suffer an actual loss. They claim that in the context of a pension plan, no employee suffers a loss until a "payment event" which is simply the date that they retire or otherwise become eligible to receive money from the pension plan.

Justice Smith held that the six-year limitation period began to run when the employees transferred to the DC Plan in 1993, and thus had expired by the time the actions were started. Justice Smith cited a number of reasons for this decision:

First, prior Court of Appeal reasons in the same proceeding stated that the Plaintiffs had suffered their damages or loss when they acted on the advice of the Teck and Towers to their detriment and switched from the DB to DC Plan. Although these statements were not central to the narrow issue before the Court of Appeal at the time, the reasons present a compelling and considered opinion on the issue.

Second, the authorities the Plaintiffs relied on from Australia and the United Kingdom do not reflect the law in Canada. These cases held that where a contract or act creates a future loss, no loss is suffered until that future event occurs. The loss is *prospective* before the contingency or future event occurs. Applied here, it would mean that an individual suffers no loss until they begin to receive their benefits from the DC Plan. Justice Smith held that a pension plan creates future entitlements "but it is also an asset that has a present value that can be calculated at any point before those benefits are paid." The law is very clear on this in matrimonial litigation where pension plans are often valued prior to benefits being paid out. The courts assign a value to the member's pension benefits as of the date of separation of spouses, and this value is regardless of whether the beneficiary has begun to receive benefits.

Justice Smith also held that the English and Australian cases relied on by the Plaintiffs created a fine distinction giving rise to too much uncertainty in the law. His Honour stated that even if he did consider the distinction set out in the English and Australian cases, he would hold the Plaintiffs' loss here to be immediate and not contingent.

Justice Smith noted that in the context of pension plans that expose beneficiaries to greater risk or uncertainty, actuaries are able to discount the current value of the future benefits to reflect that risk. Therefore the plan will be less valuable in the present if it is risky or exposes beneficiaries to more uncertainty then another less risky plan. In this case when the employees transferred to the riskier DC Plan, actuaries could have valued it at less than the DB Plan, and a loss could therefore be said to have occurred when the employees transferred. Further, the Plaintiffs could have brought an action as of January 1, 1993, the date when the value of their pensions decreased. As they did not commence their actions until over a decade later, the six-year limitation period was expired.

After holding that the limitation period had expired, Justice Smith considered whether the plaintiffs could rely on the "postponement" of limitation periods in certain actions. The court held that the postponement provisions s. 6(3) and (4) of the *Act* were applicable to all the common issues in this class action, and the limitation period had therefore not expired.

The *Act* does not explicitly allow for postponement of limitation periods when there has only been a pure economic loss, as there is when pension benefits less than promised due to a breach of fiduciary duty or negligence on the part of the administrator. Justice Smith relied on a BC Court of Appeal decision, *Armstrong v West Vancouver (District)* which held that it would be unusual and contrary to the *Act* for the postponement provisions *not* to apply to pure economic loss claims. Pure economic loss can be hidden for long periods of time and is therefore particularly suitable for postponement relief. The court allowed postponement for all the common issues.

This decision addressed the difficult question that frequently arises in pension litigation about *when* a loss occurs and the obligation to assert ones legal rights arises. It is unclear, however, whether the same conclusion would apply in jurisdictions which do not have the equivalent of a "postponement" of the relevant limitation period. In this case, the parties will proceed to try the substantive common issues.