

LEGISLATIVE DEVELOPMENTS AND THE

TOP 20 CASES OF 2015-2016

49TH ANNUAL CANADIAN EMPLOYEE BENEFITS CONFERENCE

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LEGISLATIVE DEVELOPMENTS AND COURTS AND TRIBUNALS

LEGISLATIVE DEVELOPMENTS

The past year has been a relatively quiet one in terms of the development of pension legislation across Canada.

The most widely discussed change is to public pensions, where the Liberal government in Ontario passed legislation enabling the Ontario Retirement Pension Plan, and then quickly backed away from that reform as the federal government and most of the provinces including Ontario came to an agreement on an expansion of the Canada Pension Plan. The enhancements will be phased in over several years, with increased contributions beginning in 2019 and the full force of the enhancements not being enjoyed on the benefit side for 40 years.

In Ontario, the temporary solvency relief for private sector pension plans that was instituted in 2009 and 2012 was extended again. A regulation was also passed which allows MEPPs to utilize the existing asset transfer rules in section 81 of the PBA.

A new regulation was also passed which will allow for public sector single-employer plans to be converted into jointly-sponsored pension plans. In order for such a SEPP to be converted, there are a variety of benefit protection requirements and disclosure obligations that must be met. Ontario has also launched a consultation on solvency funding for defined benefit plans, which is expected to lead to significant changes to the province's solvency funding regime.

Several jurisdictions passed legislation to assist with the development of pooled registered pension plans. New Brunswick made certain amendments to its legislation with regards to the priority of death benefits between a designated beneficiary and a spouse. In Quebec, new funding rules for defined benefit plans registered in that jurisdiction came into force, as did rules allowing for the removal of mandatory pre-retirement indexation.

While none of the provinces have passed legislation of any great significance, alterations to the Federal Investment Regulations ("FIR") in the *Pension Benefits Standards Regulations* came into force in July, and this will have an impact on the rules in several provinces. The FIR are incorporated into the regulations of several provinces, including Ontario, and set out rules for pension fund investments. Changes have been made to the related party rules, in regards to the disclosure of investment information to DC plan members, and to certain requirements for annual statements.

None of these changes are as significant as the announcement that the CPP will be enhanced. On October 6, 2016, the federal government introduced Bill C-26, which, if passed, will lead to increased contributions, increased benefits and a series of administrative changes to the CPP and its investment board. The changes include the expected replacement rate increasing from 25% to 33.3% of the Year's Maximum Pensionable Earnings ("YMPE") from 2019 to 2023. In 2016, the YMPE is approximately \$55,000, but is projected to rise to approximately \$83,000 by 2025. This will mean that the CPP maximum annual benefit will rise from roughly \$13,100 in 2016 to approximately \$27,000 in 2025. However, the change is not retroactive, so it will take decades for the full impact to be felt by beneficiaries.

The new benefits are to be fully funded, and contributions will rise from 4.95% of payroll per employer and employee to 5.95%. The contribution rate increase is to be phased in over 5 years, from 2019 to 2023. Starting in 2024, there will also be an additional matched contribution of 4% on the Year's Additional Maximum Pensionable Earnings ("YAMPE"). It is expected that it will be 40 years before the full effect of the new CPP rules is felt. Unlike with the ORPP, however, there is no exemption for employers offering a comparable plan. All employers and employees will be required to make these extra contributions.

The federal government has also announced proposed changes to allow the development of target benefit plans in the federal jurisdiction. The federal regime for target plans will allow single-employer plans to be designed as target plans, regardless of the existence of a collective bargaining relationship. The legislation does not allow for the conversion of existing plans to target benefit plans. More detail will emerge as regulations are developed.

Developments are also continuing with the Department of National Revenue regarding the treatment of Private Health Services Plans ("PHSPs"), and the changes have led to amendments to the health welfare trusts Folio – S2-F1-C1. After an initial round of consultations, changes to the treatment of PHSPs were issued in November 2015 clarifying the handling of "non-qualifying benefits", which can now constitute up to 10% of the annual benefit costs of a PHSP, without causing disqualification. Other issues still outstanding include defining the classes of persons eligible for benefits (particularly, people who are not technically employees) and defining the difference between a "temporary" and "permanent" surplus. No date has been set for further changes.

COURTS AND TRIBUNALS

There are no cases this year which come close to outweighing CPP expansion as the most impactful development in the pension industry. There are fewer cases of note than in prior years, including no relevant Supreme Court of Canada cases on pension issues.

Some of the most relevant jurisprudence relates to employer insolvencies, and the legal responses that employees and pension administrators may have at their disposal to recover amounts owing to them. Another subject of interest in the jurisprudence concerns lawsuits and other legal processes being commenced against boards of trustees which administer pension and benefit plans.

On the insolvency side, the most significant case arises in the U.S. Steel CCAA proceeding. The Ontario Court of Appeal issued a decision which concerns whether employees and pensioners in that proceeding could rely on a doctrine known as "equitable subordination" to subordinate the claims of the American parent company below the claims of the employees and pensioners, including with respect to the hundreds of millions of dollars owing to various underfunded pension plans. Equitable subordination has been claimed in several CCAA proceedings involving pension plans, including the *Indalex* case, but the Supreme Court has yet to rule on the extent of its applicability in Canada. In a unanimous decision, the Ontario Court of Appeal determined that the supervising CCAA judge did not have jurisdiction to grant the remedy under the CCAA. The decision is a blow to pension interests in employer insolvencies.

A more helpful decision for pension and benefits administrators and beneficiaries concerns director liability for amounts owing to a pension or benefit plan. In *Insulators Local 95 et al. v. Vella*, the Ontario Superior Court of Justice confirmed that directors of Ontario corporations can be liable for contributions owing to pension and benefit plans in a multi-employer environment. The court also held that the debt owed to the funds was in breach of the trust provisions of the *Construction Lien Act* and arose out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity.

Although *Vella* is a useful case for pursuing directors, a decision was also released in the *Nortel* CCAA proceeding which illustrates the difficulty of pursuing directors individually. A claim was brought against the directors of Nortel under the director liability provisions of the Canada Business Corporations Act, alleging that certain representations made in the months leading up to Nortel's insolvency gave rise to director liability for amounts that had been classified as severance payments. Typically severance payments are not recoverable against directors, and Justice Newbould of the Ontario Superior Court of Justice held that these amounts were not recoverable in this case. Of greater concern for pension and benefits claimants was his finding that the directors were entitled to rely on a "reasonable diligence" defence in the CBCA, and could shield themselves from liability through following the advice of their counsel and the financial and operational managers of the company.

The next interesting theme in the jurisprudence relates to aggrieved members taking legal action against trustees and possibly trade unions or employers sponsoring benefit plans. In *Watt v. HSA*, a group of long-term disability beneficiaries brought claims against their union and the board of trustees for reductions to their benefits. Three causes of action were pleaded against the union: breach of contract, breach of fiduciary duty as a result of acting as *de facto* trustee of the Trusts; and breach of fiduciary duty as a result of trustee *de son tort* in relation to the Trusts. The plaintiffs' claim against the Trustees was framed as failing to ensure that the Trusts were fully funded. The Court of Appeal held that the claims for breach of fiduciary duty could not possibly succeed and dismissed those claims against the trustees and the union, but also held that the negligence claims against the trustees and the union and breach of contract claims against the union could continue. While not about actions against trustees, the *McCann v. CMHC* decision from the Ontario Court of Appeal provides additional jurisprudential guidance on commencing and defending pension class actions.

In *Bricklayers and Stonemasons Union, Local 2 Ontario Pension Plan (Trustees of) v Ontario (Information and Privacy Commissioner)*, 2016 ONSC 3821, the Ontario Divisional Court dealt with a judicial review of a decision of the Information and Privacy Commissioner, who had ordered that access to certain confidential financial records and other confidential information prepared and filed by two construction unions' multi-employer pension plans with Financial Services Commission of Ontario be given to the vice-president of a rival trade union who had requested such documents. A majority of the court set aside the decision of the Commissioner, holding that there was a risk of harm in releasing the confidential information.

Duncan v. Retail Wholesale Union Pension Plan concerned a human rights complaint from a plan member who alleged that the trustees of the Retail Wholesale Union Pension Plan in British Columbia discriminated against him by applying a different subsidized benefit to him as a single plan member than was applied to a married plan member. The tribunal determined that

this was not a violation of the human rights code, and noted that such differences were a common practice across pension plans.

The decision of *Mumby v. GM* also concerned a human rights complaint, and the employee's union was named as a respondent. In that case, a disabled former employee argued that he was discriminated against because his WSIB benefits were deducted from his early retirement payments. The claim was rejected on the basis that differential treatment on the basis of whether an employee was or was not working was acceptable.

There were other significant human rights cases this year which interact with pension and benefits issues, including *Johnston v. Vancouver*. In that case, the termination of LTD benefits at age 65 was held to not be discrimination under BC's human rights legislation. There was no evidence the impugned rule was tied to mandatory retirement or was established in bad faith by the defendant, and thus it did not qualify as discriminatory conduct. A similar case came out in Alberta, where *Rein v. Alberta* concerned a unionized employee complaining that the termination of her life and health benefits at age 65 was discriminatory. Her claim was rejected on the basis that the plan providing the benefits was "bona fide" and thus not discriminatory.

There were also several family law decisions which impact on pension and benefits issues. In *Cossette v Cossette*, the court held that there is an exception to the normal rule against "double-dipping" on a pension for family law asset division when the payer spouse voluntarily and unilaterally shifted circumstances in an attempt to escape support obligations. Though the pension was used to calculate division of assets, when he retired at age 55 the respondent was not allowed to escape his monthly payments simply because the funds to pay them came from his pension income. In *Welsh v. Ashley*, the Ontario Court of Appeal determined that, under the PBA, a separation agreement with no ambiguity takes precedence over the rights of other potential beneficiaries and there is no need to look to the intent of the parties in applying the terms of a separation agreement. In the *Frame v. Mancinelli* decision, a court in Nova Scotia dealt with the issue of a conflict between a pension plan's terms and the PBA. The court held that the PBA controlled whether or not a separated spouse received a certain benefit because the plan's more restrictive definition did not trump the PBA's by virtue of being more beneficial to plan members.

Another case out of Nova Scotia, *Industrial Alliance Insurance v. Brinse*, concerned whether certain long-term disability payments were inappropriately clawed back. The insurance company of a former police officer currently on LTD benefits was held to have breached the insurance contract by clawing back the LTD benefits and stopping payment for a period rather than prorating the overpayment over the life of the policy. The Nova Scotia Court of Appeal confirmed the lower court's decision but reduced the damages despite the fact that the employee had been forced to file in bankruptcy because of the stopped LTD payments. LTD issues also arose in the case of *Feldstein v. 364 Northern Development*, where an employee with cystic fibrosis received significantly reduced LTD benefits because of a failure to fill out a health questionnaire when hired. The employer's representative had allegedly advised the employee that proof of good health was not required during the three month waiting period. The court held that the employee could recover the difference between the amount paid and full LTD benefits.

There were a few cases that dealt with the interaction of collective bargaining agreements and procedures with pension issues. In *Provincial Health Association v. BCGEU*, an employee filed five grievances on her last day and after her retirement over errors impacting her pensionable service and benefits. It was held that mandatory time limits in the collective agreement took effect when grievor became aware of the issue, but the grievances stemming from ongoing communications were not out of time. In *Canadian Northern Shield Insurance Co v CUPE*, an arbitrator in BC allowed employers to force a switch from a defined benefit to a defined contribution plan because the collective agreement did not expressly forbid it.

There were also a few cases of significance which do not fit into an easily identifiable theme. In *Groskopf v. Shoppers*, the Court of Appeal dealt with the exclusion of statutory grow-in benefits from the calculation of commuted values in a supplementary employee retirement plan. In *Bonisteel v. Investment Counsel*, motions for summary judgement were brought in a case where the plaintiff claims he was misled regarding his ability to realize his retirement dreams by establishing an individual pension plan. The motions were dismissed as there were genuine issues for trial. Finally, in *Carleton University v. Threlfall*, a professor signed an election that when he died, pension payments would cease to be due. He disappeared and the University was forced to pay during the seven years he was presumed alive, but later when his remains were found and backdated, the payments had to be reimbursed.

Case Summaries

Ontario Decisions

1. *Cossette v Cossette*, 2015 ONSC 2678

The issue of "double dipping" - accessing a pension first as a family asset subject to property division, and again for support purposes - has been a heated topic in family law courts across Canada. Although there is a general rule against double dipping, a recent decision from a three-member, unanimous panel of the Ontario Divisional Court demonstrates one of the exceptions to this rule: where the payor spouse voluntarily and unilaterally shifts circumstances to sidestep support obligations.

Robert and Claire Cossette were married for 22 years and separated in 2001. They resolved their spousal support issue by way of a consent court order, which included a requirement that Mr. Cossette pay spousal support of \$1,000 per month for an indefinite period of time. The parties also consensually settled the division of their family property, including the value of Mr. Cossette's pension.

In November, 2013 Mr. Cossette retired from his employment at age 55. His income from employment was approximately \$104,000 per year, which dropped to \$48,000 when he started his pension. Mr. Cossette alleged that he had suffered from depression and had to retire for medical reasons.

Following his retirement, Mr. Cossette brought a motion to terminate his monthly spousal support payments, on the grounds that his retirement was a material change of circumstance and that payment of support out of his pension constituted double dipping because the pension had already been divided as a matter of sharing of net family property.

The motion judge found that Mr. Cossette had failed to provide full and proper disclosure of his financial circumstances to the court; and his medical evidence was not compelling. Although it was evident that he had suffered from depression, it could not be said that the depression prevented him from working altogether and led to his retirement. He had refused to disclose some medical records, and did not apply for long term disability benefits at any time. The medical evidence that was available showed that Mr. Cossette had a number of different stressors, but none of them gave rise to an inability to work

The motion judge concluded that retirement was Mr. Cossette's "self-engineered method to retire from the labour force." In other words, he retired because he wanted to, and not because he was required or forced to for medical reasons. The court held that Mr. Cossette's retirement was not enough to amount to a material change in circumstances warranting the termination of spousal support.

Appeal courts typically observe great deference to lower courts' determinations of fact. In this case, the motion judge's decision turned on determinations of fact, and the reviewing court was not prepared to interfere with those findings. Mr. Cossette's lawyer argued that he was eligible to retire, and should not be required to continue working simply to satisfy his spousal support obligation. But the appeal court cast aside this

argument, given the motion judge's finding that one of the reasons that Mr. Cossette chose to retire was because he wanted to stop paying spousal support.

In the result, the Divisional Court held that Mr. Cossette's retirement did not constitute a material change in circumstances; and reinforced the message often seen in spousal support cases that parties cannot avoid support obligations by unilaterally deciding to be underemployed or to stop working.

The Court was also careful to note that every case must be determined on its own unique facts, including what the parties agree to in their settlement documents. The timing and effect of retirement on support obligations can be incorporated into a separation agreement, and avert litigation down the road.

On the question of whether continued spousal support payments out of Mr. Cossette's monthly pension constituted "double dipping," the Court found that it was justified in this case, since he was the author of his own circumstance.

2. ***McCann v. CMCH, 2016 ONSC 2641***

Before the Divisional Court, CMHC sought and was granted leave to appeal both the certification of the class action (a court must certify a group of plaintiffs as a class to commence class proceedings) and one of the "common issues" that was certified relating to its own conflict of interest. The conflict of interest arose from allegations that the CMHC acted solely in its own interest by failing to inform departing plan members that they had a beneficial interest in the pension surplus. The first appeal was dismissed--there was sufficient proof of a conflict. The second appeal was upheld - the class definition was under-inclusive and the class definition was amended accordingly.

3. ***Welsh v. Ashley, 2015 ONCA 464***

In *Welsh v. Ashley*, the Ontario Court of Appeal has held that where there is no ambiguity in the operative terms of a separation agreement governing pension division, a Court need not discern the intent of the parties. A three-member panel overturned the lower court judge's interpretation of separation agreement, and affirmed that Ontario's *Pension Benefits Act* clearly gives statutory priority to a separation agreement over the rights of other potential beneficiaries.

The Member participated in the Ontario Ironworkers/Rodmen Pension Plan, and died in 2012 prior to commencing receipt of a pension. In 2002 the Member designated his adult children, the respondents Michael and Michele Ashley, as his designated beneficiaries under the Plan in the event that he should die prior to retirement. The Member was married to the applicant, Ms. Welsh, but finally separated from her and entered into a separation agreement in 2007 (the "Agreement").

At the time of the parties separation in 2007 there was no means to immediately divide a pension not yet in pay. As a result, the Agreement took a 'wait and see' approach, requiring 50% of the pension accrued during the marriage to be paid to the former spouse when the Member retired. The Agreement also required the Member to designate the former spouse for the purposes of any pre-retirement death benefit.

Following the Member's death prior to retiring, his former spouse Ms. Welsh brought a court application seeking a declaration that she was the *sole* beneficiary of the Member's pension.

Ms. Welsh relied on s. 48(13) of the PBA, which states:

(13) An entitlement to a [pre-retirement death] benefit under this section is subject to any right to or interest in the benefit set out in an order made under Part I (Family Property) of the *Family Law Act*, a family arbitration award or a domestic contract.

Ms. Welsh asserted that s. 48(13) is determinative, because it gives a statutory priority to a separation agreement over the rights of any other beneficiaries.

The Member's adult children, who were the designated beneficiaries, argued that the terms of the Agreement were ambiguous and required interpretation by the Court. They asserted that the intention of the Agreement was for Ms. Welsh to only receive a proportionate share of the Member's pension, and not the whole of the pre-retirement death benefit, notwithstanding the requirement that she be designated as the Member's beneficiary.

The lower Court concluded that the intention of the parties was that Ms. Welsh would receive her proportionate share of the pension accrued during the spousal relationship; and that this translates to a proportionate share of the pre-retirement death benefit. As a result, the designated beneficiaries had an interest in the death benefit, amounting to approximately one half of its total value.

Ms. Welsh appealed to the Ontario Court of Appeal ("OCA"). In brief written reasons the three-member panel overturned the lower court decision. The OCA noted that the Agreement clearly distinguished between what Ms. Welsh would receive in the event the Member lived to receive his pension, and what she might receive if he passed away prior to retirement.

The OCA acknowledged that the Agreement was ambiguous as it related to Ms. Welsh's entitlement if the Member lived to draw a pension, but that ambiguity was irrelevant to this dispute. It was also not relevant that the Member had designated his children as beneficiaries at one point in time, since the Agreement continued to govern Ms. Welsh's pension rights until the Member's death.

This case is indicative of the importance of clear drafting when entering separation agreements that deal with pensions. Although pension division reform in Ontario came into effect in 2012, and the 'wait and see' approach is no longer required, there are undoubtedly many separation agreements pre-dating the new rules which will require courts' interpretation for years to come.

4. ***Groskopf v. Shoppers, 2016 ONCA 486***

Shoppers Drug Mart Inc. underwent a corporate restructuring after buying Shoppers Drug Mart business from Imasco. Appellants Boys and Groskopf, were executives of Imasco who were terminated in 2000 and 2004 and became employees of Shoppers. Shoppers established a defined benefit pension plan (the "Plan") for executives, registered under the *PBA*. Shoppers also established a supplementary executive retirement plan (the "SERP") which was not subject to the *PBA*.

In 2005, FSCO announced an intention to order a wind-up of the Plan for employees terminated in the restructuring. Shoppers agreed to declare a partial wind up of the Plan which included the appellants as class participants. The appellants became entitled to the benefit of the "grow-in" provision in s.74(1) of the *PBA* which allows members whose combined age plus years of service is greater than 55 upon winding up to be entitled to the pension beginning at what would have been their earliest unreduced pension retirement date.

In 2009 Shoppers provided the appellants notice that their lump sum value of the Plan had increased with the grow-in, but entitlement under the SERP had decreased to zero. The appellants would have been entitled to supplementary benefits under the SERP at age 65 if the Plan if the plan was not wound up with grow-in consequences.

The appellants disagreed with the calculation of benefits. At trial the parties provided conflicting expert evidence as to the interpretation and application s.2.24 of the SERP. At issue between the parties was the text of the SERP and the extent to which grow-in benefits were to be considered in determining the benefit payable. The SERP contained a provision which stated "Notwithstanding anything to the contrary in the Plan, the amount of pension benefit described in 2.24(a) and 2.24(b) above shall not be subject to any grow-in provisions as provided for the applicable provisions as provided for in applicable provincial legislation".

The application judge rejected the appellant's interpretation of the SERP. He held that the limitation imposed by the provision had nothing to do with age, and was specifically intended to exclude from the calculation the grow-in benefit, and to include that benefit in the calculation of the deduction in s.2.24.

The Court of Appeal held that the application judge made no reversible error in his interpretation of s.2.24. The Court of Appeal found that the application judge's interpretation was reasonable as he:

1. correctly identified and applied the principles of contractual interpretation
2. was alert to the important terms of the SERP including the sponsor's exclusive right reserved under the plan text to interpret the plan and make conclusive determinations with respect to benefit entitlements

3. correctly grounded his construction of the Provision on specific language of that provision
4. his interpretation is supported on a plain reading of s.2.24
5. and reasonably accepted the evidence of one actuary over another

5. ***U.S. Steel Canada Inc., Re 2016 ONCA 662***

US Steel Canada (USSC) was granted Companies' Creditors Arrangement Act ("CCAA") protection on September 16, 2014. The CCAA judge set out two separate procedures for resolving claims- one procedure for creditors' claims against USSC, and another separate procedure for resolving claims of approximately \$2.2 billion by United States Steel Corporation ("USS") against USSC, which were to be determined by the court instead of the monitor. USS filed its proofs of claims, and moved for court approval. Four parties filed notices of objections.

The issue before the Court of Appeal was whether the CCAA judge had the jurisdiction to apply the legal doctrine of equitable subordination. The former employees of US Steel Canada, argued that the American parent company, USS, ran the company further into insolvency to further its own interest, and deliberately caused it to be unable to meet its pension obligations. The former employees sought to have the CCAA judge apply the American legal doctrine of "equitable subordination" to subordinate the parent company's claims to former employee's claims. The CCAA judge ruled he had no jurisdiction to do so, and the union appealed.

The appellants raised a procedural objection, in that it was unnecessary for the CCAA judge to determine whether he had jurisdiction to grant equitable subordination in the context of a scheduling motion, without a full factual record. The union argued it was blindsided, and that it was unable to make submissions on equitable subordination. The ONCA rejected the procedural objection. The issue was plainly before the CCAA judge, who was plainly aware that a determination of inter-creditor claims could have implications for approval of any subsequent reorganization, sale of business or credit bid. The evidentiary record was unnecessary as the CCAA judge was not applying facts, but determining jurisdiction.

The ONCA held that the CCAA judge did not err in deciding that he had no jurisdiction to grant equitable subordination under the CCAA. The ONCA reviewed the decision on the standard of correctness, and used the framework set out in *Century Services v Canada (Attorney General)*, considering the purpose and scheme of the CCAA before considering the language of the statute.

The ONCA highlighted that the purpose of the CCAA is to avoid bankruptcy and the subsequent devastating social and economic effects. The CCAA achieves its goals through a summary procedure for the compromise and arrangements between companies and creditors. The purpose of the CCAA informs the exercise of the court's authority.

The ONCA went on to describe the scheme of the CCAA, which has been described as skeletal, and grants broad powers to the courts in general. The scheme focuses on the determination of the validity of claims of creditors against the company and the determination of classes of claims for the purpose of voting on a compromise or arrangement. Amendments to the Act were made in 2009 after the Standing Senate Committee on Banking, Trade and Commerce made recommendations, and the ONCA noted that there was nothing in the record to indicate that the issue of equitable subordination was given serious consideration.

The ONCA held that there was no authority in the words of the CCAA, express or implied, to apply the doctrine of equitable subordination. It did not fall within the scheme of the statute, nor does it fulfill the statutory purpose.

The ONCA rejected the argument that the powers granted by s.11 include the power to grant equitable subordination. The jurisdiction under s.11 has two express limitations: (1) the court must find the order is appropriate in the circumstances (2) even if appropriate, the court must consider whether there are restrictions set out in the CCAA that preclude it. The ONCA determined that the appellant did not identify how equitable subordination would further the remedial purpose of the CCAA. The ONCA clarified that orders are made squarely in furtherance of the legislature's objectives, and rejected the appellant's characterization of an at-large equitable jurisdiction to reorder priorities or to grant remedies as between creditors.

In reaching his conclusion, Chief Justice Strathy noted that there exists no gap in the legislative scheme that can be filled by equitable subordination, through the exercise of discretion, the common law, the court's inherent jurisdiction or by equitable principles.

6. ***International Assn. of Insulators Local 95 v. Vella, 2016 ONSC 4146***

International Assn. of Insulators Local 95 brought an action for a breach of the trust provisions of the Construction Lien Act against a director of Dual-Temp, Vella. The union sought \$196,836.89 in unpaid wages, vacation pay, trust fund contributions, and remittances owing to 27 members pursuant to the collective agreement. The union sought a declaration that Vella was personally liable under both the *Ontario Business Corporations Act* (OBCA) and the *Construction Lien Act (CLA)*. Vella and Dual-Temp were noted in default and were therefore deemed to admit truth of allegations of fact in the statement of claim. Neither Vella nor Dual-Temp delivered a statement of defence.

The motion was granted, and the court granted an order for default judgement against Vella, personally. The court held the amount owing constituted a debt arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity. The court noted that the funds were payable to the union as trustees for the benefit of union members.

The court noted that there were numerous court orders against the company for unpaid wages, along with Ontario Labour Relations Board ("OLRB") orders. Eventually those OLRB orders were converted into court orders and writs were filed, but the union was not able to execute against Dual-Temp.

Personal liability is provided for in sections 8-13 of the CLA, making Vella liable to repay the amounts owing for breach of trust. Due to the fact that Vella was deemed to admit the truth of the allegations, he was liable under the act. The court also granted an order for prejudgement interest of \$1,682.89 and costs of the action and motion in the amount of \$11,864.82.

7. ***Bonisteel v. Investment Planning Counsel, 2016 CarswellOnt 2154***

The Plaintiff brought an action against his lawyers, actuaries, and investment advisors for losses suffered as a result of misleading advice about the profitability of certain retirement plans. The Plaintiff was a teacher who, after attending a retirement planning seminar led by the defendants, claimed to have been duped into commuting his teacher's pension and enrolling in an Individual Pension Plan (IPP). He claimed a loss in excess of \$400,000.

The Plaintiff discontinued the action against the actuaries and advisers but brought a motion for summary judgment against the lawyers involved. The lawyers also brought a summary motion to have the action against them dismissed.

The judge held that despite the Supreme Court's fervent endorsement of the summary judgment procedure in *Hryniak v. Mauldin*, 2014 SCC 7, the option to order an issue to be tried through the normal course was still available in appropriate circumstances. The judge found that the liability of the lawyers could not be resolved summarily. A regular trial was required to determine whether a breach of fiduciary duties occurred when the lawyers advised the Plaintiff in respect of his pension.

8. ***Bricklayers and Stonemasons Union, Local 2 Ontario Pension Plan (Trustees of) v. Ontario (Information and Privacy Commissioner), 2016 ONSC 3821***

In March 2015, the Information and Privacy Commissioner of Ontario ordered that access to certain confidential financial records and other confidential information prepared and filed by two construction unions' multi-employer pension plans (the "Plans") with Financial Services Commission of Ontario (FSCO) be given to the vice-president of a rival trade union who had requested such documents (the "Order of the Commissioner"). The financial records sought by the rival trade union included actuarial valuation reports of the Plans, which contained sensitive financial information about the Plans. This request was previously denied by the Ministry of Finance (MOF) and the documents were withheld pursuant to ss. 17(1) and 19 of the *Freedom of Information and Protection of Privacy Act (FIPPA)*, which protect third party information.

The Commissioner ordered the disclosure of the actuarial valuation reports and other financial information largely on the basis that the MOF and the Plans have not provided sufficiently detailed and convincing evidence that the disclosure of the records could reasonably be expected to cause Plan members harm. The Commissioner reasoned that such documents were already available to a "not insignificant" number of interested individuals, including Plan members, who could then easily disseminate it among the trade union community, including between rival trade unions.

In *Bricklayers and Stonemasons Union, Local 2 Ontario Pension Plan (Trustees of) v Ontario (Information and Privacy Commissioner)*¹, the Trustees of the Plans, with the support of the MOF and FSCO as interested parties, applied to the Divisional Court for judicial review to set aside the Order of the Commissioner.

A majority of the Divisional Court of Ontario set aside the Order of the Commissioner, which was reviewed on a standard of reasonableness. Writing for the majority, Justice Stewart noted with approval the decision of the Supreme Court of Canada in *Merck Frosst Canada Ltd., v. Canada (Health)*, [2012] 1 S.C.R. 23, which held that a party resisting disclosure of third party information must demonstrate that such "disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm."²

Justice Stewart also emphasized the significance of context in this case. He found that the risk of harms outlined by the Trustees, the MOF, and FSCO arising out of the provision of pension documents to a rival trade union was more than just speculative when considered in the context of a union "raid" (where one union tries to displace another union) within the construction industry. The actuarial valuation reports of the Plans contained "a wealth of financial information that could inform strategy for a union raid."³ For example, the provision of actuarial reports to a competing union could allow it to compare pension benefits and raise solvency issues in the raiding campaign. Therefore, it was reasonable to expect that harm or "undue loss" within the meaning of section 17(1) of *FIPPA* would occur if a rival union spreads information about a pension plan in its raiding campaign to encourage plan members to leave the competing union.

The majority of the Court referred the matter back to the Commissioner for reconsideration in light of these reasons.

Justice Sachs wrote a dissenting opinion and noted that the Commissioner reasonably found that there was no convincing evidence to support the direct connection between releasing documents containing information about a union member's pension and the increased likelihood of success of an otherwise unsuccessful displacement application. He concluded that the evidence before the Commissioner of the risk of harm arising from the disclosure was not well beyond or considerably above a mere possibility and warranted deference from the reviewing Court.

9. ***Re Nortel*, 2016 ONSC 6030**

This case concerned the director liability provisions under section 119 of the Canada Business Corporations Act. That section provides that a director can be liable for debts owed to employees which arise as a result of "services performed for the corporation". The claimants argued that certain payments that were promised well in advance of termination of employment were a form of bonus to stay with Nortel until the end, thus

¹ 2016 ONSC 3821.

² *Ibid.* at para 46.

³ *Ibid.* at para 57.

making those debts for "services performed". The Court was not satisfied that Nortel's representations to this effect represented an amendment to any employee's contract and took the view that severance pay would have been owing in any event. Case law from the Supreme Court has determined that if a payment is just for severance pay, such payments are not a directors' liability as they are not debts for "services performed". Severance pay is ordinarily viewed as a debt owed as a result of the termination of an employment contract rather than the actual service. The Court also agreed with the defence of the Directors that they had exercised reasonable diligence and would not have been liable even if the debt had been for "services performed".

British Columbia

10. *Canadian Northern Shield Insurance Co. v. COPE*, 2015 CanLii 87698 (BC LA)

The issue in *Canadian Northern Shield Insurance Company v. Canadian Office & Professional Employees' Union, Local 378 ("Canadian Northern")* arises with more frequency than might be expected. A benefit program (in this case, a defined benefit pension plan) is provided by the employer for decades. It is from time to time the subject of bargaining, but usually for relatively minor changes. The plan is referred to in the applicable collective agreements in a paragraph or two. This language has rarely required renegotiation or update, but has from time to time been negotiated, and over the years changes to the plan are brought to bargaining or a memorandum of agreement during the life of a collective agreement.

However, the details of the benefit program are contained in a plan text, a lengthy document drafted by the employer with its service providers, which is rarely or never used in bargaining. In this case, it is not even incorporated into the collective agreement by reference. The plan text contains a term that the union would never accept in a collective agreement – the right of the employer to unilaterally amend the plan or terminate it anytime. For some reason (usually a desire to cut the cost of deferred compensation) the employer now wishes to rely on that unilateral right to make fundamental changes to the benefit program – in this case to replace a defined benefit plan with a defined contribution plan, and not to bargain such changes.

That is the essence of the situation. It is an attempt to go around the union and avoid bargaining the desired change, perhaps recognizing that there will be strong resistance.

There are variations in facts in other cases: a benefit change is bargained, but fails to reach a resolution, perhaps strike or lockout threats are used, and so is abandoned (*St. Marys*), some collective agreement promises are more specific (*Finning*), and seemingly small variations in collective agreement language have often become the focus of the jurisprudence on this issue (*Nexen*).

It can be frustrating for employees who believe they have (repeatedly) essentially agreed to maintain or defend a long-standing benefit plan only to find out that language in a document rarely seen or negotiated can determine the issue. Employers maintain that they have always retained exclusive rights – and these are very common reservation-of-rights clauses in pension plans – and that as times have changed, so will their commitment to defined benefit plans, and they do not wish to bargain alternatives.

As noted, the matter often comes down to one of contractual interpretation: does the negotiated collective agreement language displace or constrain the employer's reservation of rights in the plan text. And so the issue turns on the specific collective agreement language.

Here is the clause in the *Canadian Northern* case:

17.11 Pension Committee

- a) All regular bargaining unit employees will be covered by the Pension Plan described as the Retirement Plan for Bargaining Unit Employees of the Canadian Northern Shield Insurance Company.
- b) One member of the Pension Committee to oversee the Pension Plan noted above shall be appointed by the Union and shall be an actively employed member of the Office and Technical Employees' Union, Local 378.

A union might argue that reference to "the Pension Plan" means the plan as it was configured at the time of bargaining. An employer might argue that configuration included its unilateral rights to amend or terminate. The two views are not easily reconciled.

One of the interesting features of this conflict is that the text containing the employer's unilateral right to terminate was not incorporated by reference into the collective agreements, so it would not be the primary evidence (the collective agreements) of the contract being considered, but extrinsic evidence. According to principles of contractual interpretation, only if there were some unresolvable ambiguity or conflict in the collective agreement language is it necessary or appropriate to refer to extrinsic evidence.

The arbitrator in this case decided that the language quoted above was insufficient to be considered a specific promise to maintain a defined benefit plan. In reviewing case law he noted that more specific language had been used in other cases and collective agreements, such as "maintain this defined benefit plan" or variations on this formula. From a contractual interpretation point of view, ideal language to displace the plan text provision would expressly displace the other terms, so a formulation using a "notwithstanding any other term"

That, at least, is the preventative measure that can be taken to eliminate the potential for conflict: express language in the collective agreement term. It may not be possible to achieve, or achieve easily, although this case demonstrates that it should be sought because even where the plan text is not part of the collective agreement and the bargaining history and extrinsic evidence is, at least, not contradictory to the union's position, arbitrators will nevertheless have a more difficult time filling the phrase "maintain the pension plan" with a plain and simple meaning that the existing plan remains the same during the collective agreement and changes must be bargained.

In the Canadian Northern case, an additional issue arose: the plan text and summary plan document were not incorporated into the collective agreement by reference. The employer took the position that the matter of interpretation was not therefor arbitrable. The arbitrator had little difficulty in finding that the essential character of the dispute arose from the collective agreement and it needs no more comment.

11. ***Watt v. Health Sciences Association of British Columbia, 2016 BCCA 325***

Last summer the British Columbia Court of Appeal allowed an appeal in part from the certification decision in *Watt v. Health Sciences Association of British Columbia*. We reported on the certification decision in the January/February, 2016 issue. The case was brought by two disabled members of the Health Sciences Association of B.C. ("HSA") in connection with the reduction of their long-term disability ("LTD") benefits, alleging breach of contract and breach of fiduciary duty against their representative union, and the trustees who oversaw the employee-funded trusts established to provide the benefits. Although the case will continue as a class proceeding, the scope of issues to be decided at trial has been restricted to exclude claims which the Court of Appeal held had no chance of success.

The HSA is a union and the certified bargaining agent for over 17,000 employees in healthcare and social services in B.C. Prior to 1986, LTD benefits for HSA members were fully funded by employer contributions. In 1987 the HSA decided to assume responsibility for LTD through employee contributions and instead of receiving employer contributions, the union secured a wage increase for its members. Initially LTD benefits were provided to claimants via an insurance policy, but this soon became too expensive to be sustainable.

In 1989 The HSA established a trust (Trust #1), funded solely by employee contributions, to provide the LTD benefits. Claim rates under Trust #1 were higher than projected and in 1995 benefits had to be reduced. A second trust (Trust #2) was established for claimants who became disabled after February 28, 1999, in an effort to isolate and satisfy the liabilities under the initial trust. Although Trust #2 and its related LTD Plan were designed differently, both it and Trust #1 continued to be underfunded. In 2006, a third trust was established (Trust #3), to hold and disseminate grant funds to Trusts #1 and #2, and to continue payments to beneficiaries once the liabilities in Trusts #1 and #2 were satisfied.

In 2008, actuaries estimated that the unfunded liability in all three Trusts was about \$7 million; and by 2010 the Board of Trustees decided that serious action was necessary to avoid bankruptcy of the LTD Plans. In 2012 a motion was put before the members at HSA's general meeting, to approve an increase in union dues to preserve LTD benefits at January 2012 levels. The HSA Board of Directors, which included Trustees of the Trusts, was opposed to the proposed increase in dues, as it viewed alternative measures as fairest and in the interests of all members, and not just those in receipt of LTD benefits.

The HSA membership did not pass the motion, and instead the LTD Plans were amended to reduce benefits and impose mandatory early retirement for LTD members.

Two disabled members commenced a proposed class proceeding against the HSA and the Trustees of each of the three Trusts (who are also members of the HSA's Board of Directors), seeking recovery of damages suffered as a result of the reduction of LTD benefits. On the motion for certification, the most contentious issues concerned the causes of action pleaded against the defendants. A number of legal issues were certified, and the appeal concerned whether the pleadings disclosed reasonable causes of action that are not bound to fail.

Three causes of action were pleaded against the HSA: breach of contract, breach of fiduciary duty as a result of acting as de facto trustee of the Trusts; and breach of fiduciary duty as a result of trustee de son tort in relation to the Trusts.

The breach of contract claim against HSA is based upon an agreement allegedly entered into with its members to provide a promised level of LTD benefit to disabled members, in exchange for premium payments through automated deductions from pay, and that coverage would continue as long as the group policy was in place (the "Alleged Agreement"). It is pleaded that the HSA breached the Alleged Agreement when it reduced LTD payments and imposed mandatory early retirement on disabled members.

With respect to the breach of fiduciary duty claim, the plaintiffs allege that the HSA had de facto control over the Trusts, and failed to ensure that they were adequately funded to pay the benefits owed to disabled members under the Alleged Agreements.

The Court of Appeal analyzed the documents supporting the Alleged Agreement, and the role and status of HSA as collective bargaining agent for its members, which was not historically viewed as a contractual relationship. On behalf of a unanimous bench, the Court noted there were "many serious obstacles" to the plaintiffs succeeding in the breach of contract claim. Notwithstanding this caution, the Court was not prepared to conclude that the breach of contract claim is certain to fail, as the law on the capacity of unions to sue and be sued is evolving. Rather, it will be necessary to examine the allegations in the context of the facts adduced at trial before the plaintiffs' claim for breach of contract against the HSA can be dismissed.

With respect to the claim for breach of fiduciary duty, the Court of Appeal overturned the lower court decision, finding that the plaintiffs had not pleaded a viable cause of action and that these claims could not proceed. The facts pleaded showed that HSA was at all times fulfilling its duties to all members, and had not undertaken a heightened fiduciary-like duty toward disabled members through its communications. Moreover, the HSA did not have possession and control of the assets to be able to exercise its discretion to the detriment of beneficiaries. The Court of Appeal concluded that a reasonable cause of action based on HSA's having effectively become the Trustee of the Trusts was not made out in the pleadings.

The plaintiffs' claim against the Trustees was framed as failing to ensure that the Trusts were fully funded. The substantive powers of the Trustees under the Trust Agreements did not, however, grant any authority or duty to seek and obtain additional Trust funds. In light of this, it was plain and obvious that the claim for breach of fiduciary duty would fail.

The plaintiffs also claimed that the Trustees were negligent, which the Court of Appeal upheld as uncertain to fail.

In the result, the plaintiffs' claims against the HSA and Trustees were substantially narrowed, leaving only the breach of contract claim against the HSA, and a general negligence claim (as well as conflict of duty) against the Trustees. The court noted that the HSA and/or Trustees have commenced legal proceedings against past actuaries of the LTD Plans seeking damages for negligence, which will undoubtedly prolong and complicate the proceedings, and any relief for members in the future.

12. ***Provincial Health Services Authority and BCGEU (Bower), Re, 2015 CarswellBC 3224***

This case addressed an employer's preliminary objections to five grievances on the basis of timeliness. The grievances alleged errors in an employee's compensation between 2006 - 2011 and in the calculation of pensionable service. While the employer argued that the union flouted the grievance procedure timeframes set out in the collective agreement, the union maintained that the grievances were "continuing" in nature and thus timely.

The arbitrator held the first of the five grievances to be ongoing in nature. It related to recurrent issues concerning pay grade, pay rate, and their impact on pension benefits spanning five years. Although the union had missed the deadline to refer this grievance to arbitration, the employer had agreed to an extend it. That grievance was therefore timely.

The arbitrator held the remaining four grievances to be untimely but nevertheless allowed grievances two and three on the basis of equitable relief. The arbitrator found the timing and nature of the parties' communications favoured the union's request for discretionary relief. She reached this conclusion on the basis of email correspondences showing the union actively denying that it had abandoned the second grievance despite its late filing. She further found some evidence that the employer agreed to grant the union an extension on the timeliness of the third grievance. In response to the employer's concern that granting relief against timeliness would prejudice its case, the arbitrator noted that the employer had carried out investigations when the allegations first arose, which mitigated potential prejudice to some extent.

The arbitrator found that grievances four and five could not be saved from timeliness objections. By then, communications had broken down and there was no evidence of the union attempting to move the issues forward.

The arbitrator also addressed the scope of the employer's liability, since the recurring errors dated back to 2006. In determining the reach of a retroactive remedy, arbitrator held the relevant question to be when the employee knew or ought to have known about the alleged violation and whether there was delay in raising the issue. In this case, the arbitrator found that the employee had access to her pay rate and the terms of the collective agreement as they applied to her. Finding that she could have availed herself of material information, the arbitrator limited the employer's liability to the period of time from September 22, 2011 to the date she retired.

13. ***Feldstein v. 364 Northern Development*, 2016 CarswellBC 159**

The Plaintiff claimed damages against 364, his former employer, on the basis of negligent misrepresentations relating to statements concerning the long-term disability plan ("LTD plan") available to employees. The plaintiff, a software engineer, had been diagnosed with cystic fibrosis at age 9. When seeking employment, disability benefits were a major consideration for him.

According to the Plaintiff, during pre-employment discussions with 364, he had inquired about the specifics of the Proof of Good Health requirement mentioned in a benefits summary provided to him by 364. The Plaintiff also claimed that he had disclosed his diagnosis to 364. The Chief Information Officer ("CIO") stated that the Proof of Good Health requirement was a three-month waiting period, after which time the LTD Plan took effect. Following this conversation, the Plaintiff accepted an offer of employment.

Within a year of employment with 364, the Plaintiff required a double-lung transplant. Although there was some initial uncertainty about impact of a pre-existing condition, the Plaintiff was ultimately told he would be covered under the LTD Plan. Shortly thereafter, 364 terminated the Plaintiff but informed him that the termination would not affect his LTD entitlement. However, the insurance company subsequently determined that the Plaintiff was only eligible for a limited benefit of \$1,000 per month rather than the full \$4,669 monthly benefit.

The judge found that all elements of negligent misrepresentation were made out: a duty of care was owed by 364 to the Plaintiff during the pre-employment discussions; the CIO's statement about Proof of Good Health was inaccurate and led the Plaintiff to believe in error that he would receive more coverage than he was entitled to; the CIO was in charge of the hiring process and as such this negligent statement fell below the standard of care required of him in that capacity; and the Plaintiff had reasonably relied on those statements. In finding that the last element had been met, the judge rejected the argument that the Plaintiff should have verified the accuracy of the CIO's statements.

The judge awarded the Plaintiff damages equivalent to 40 months of LTD coverage that he would have received at his previous job less CPP benefits. The Plaintiff was also awarded \$10,000 in aggravated damages for mental distress.

Quebec

14. ***Carleton University v. Threlfall*, 2016 CarswellQue 592**

Carleton University (Carleton) brought an action in November 2014 seeking reimbursement of nearly \$500,000 in allegedly overpaid pension benefits. A pensioner of the Carleton University Retirement Plan ("Plan") had gone missing. During his disappearance, Quebec law presumed that the pensioner was alive. This presumption would last for seven years from the date that he became absent unless his death could be established. Carleton continued paying the pensioner's benefits to a Tutor (trustee) appointed pursuant to s. 86 of the *Civil Code of Quebec (Code)*. However, the pensioner's death was confirmed mere weeks before the expiry of the seven-year period, effectively refuting the presumption of life. Accordingly, the Quebec Superior Court ordered the

Tutor to repay the pension benefits paid after the pensioner's deemed date of death of December 31, 2007.

George Roseme ("Roseme") was a Professor at Carleton University ("Carleton"). Upon his retirement in 1996, he elected a single life pension that expired upon his death. He later disappeared in September of 2007. He was 77 years old at the time and was suffering from Alzheimer's disease. Following his disappearance, The Quebec Superior Court designated Lynn Threlfall (Threlfall) as his tutor (trustee) in February of 2008. In this capacity, Threlfall would continue to receive Roseme's pension benefit payments.

Carleton eventually learned of Roseme's disappearance from an article published in the Ottawa Sun in 2009. Following this revelation, Carleton notified Threlfall that it intended to cease paying Roseme's \$7,122.23-a-month pension benefits. Additionally, it sought reimbursement for the benefits that had already been paid since January 1st 2008. However, s. 85 of the *Code* provides that an "Absentee" is presumed to be alive for seven years following his or her disappearance. Accordingly, Roseme was "alive" in the eyes of Quebec law and was still entitled to collect his pension. A notary acting on behalf of Threlfall notified Carleton of this rule and demanded that the payments be reactivated. Accordingly, Carleton continued to remit the payments.

In an unusual turn of events, a dog discovered the remains of human bones on the property of Roseme's neighbor during the summer of 2013. The bones were later determined to be Roseme's. The discovery took place a mere 55 days prior to the expiration of the seven-year period during which Roseme was presumed to be alive. A Coroner report determined that Roseme's death occurred sometime in 2007.

On November 17, 2015, Carleton commenced proceedings against Threlfall claiming reimbursement of \$497,332.64 in pension benefit payments. Carleton took the position that it was legally required to remit Roseme's pension benefits during his disappearance because he was presumed to be alive by Quebec law. However, in Carleton's view, because Roseme's death had occurred in 2007, payments made after January 1, 2008 became undue payments and ought to be restituted. For her part, Threlfall argued that the date the death was established is what mattered. In her view, she was not liable to reimburse anything because Roseme's death had only been established in April 2014 and she had not received any payments since that date. Additionally, Threlfall took the position that s. 1491 of the *Code*, which requires mandatory reimbursement of payments *made in error*, was inapplicable because Carleton had not erred in remitting the pension benefit payments.

Justice Martin Bedard disagreed with Threlfall's position. He found that Carleton made the payments because it was under a legal obligation to do so. According to s. 85 of the *Code*, Carleton was obliged to maintain Roseme's pension benefit payments during his absence because he was presumed to be alive. The presumption of life deems the default date of death to be seven years following the disappearance of the Absentee. The Plan provided benefits until the pensioner died. Accordingly, the payments were owed until the expiry of the presumption of life, unless the presumption was refuted.

Justice Bedard was satisfied that the presumption of life was refuted prior to the expiry of the seven-year period. In her view, the wisdom of the Legislator established the absence period as a full seven years, "not almost seven (7) years". Therefore, the discovery of Roseme's remains a mere 55 days before the expiration of the seven year period effectively refuted the presumption of life, causing the payment of the pension benefits to become an "error" within the meaning of s. 1491 of the *Code*. Accordingly, the payments made following the established date of death had to be repaid. Had Roseme's remains been found just six weeks later, Threlfall would not have been liable to repay nearly half a million dollars in overpaid pension benefits. Unfortunately for her, the Judge explained, "*it is what it is*".

Justice Bedard also found that Threlfall was personally liable to Carleton's claim against Roseme's estate. Threlfall received the benefits payments in her capacity as Tutor of the Absentee Roseme. However, upon the establishment of Roseme's death, Threlfall's role as Tutor ended and her status as liquidator and beneficiary began. Threlfall had admitted to using \$106,000.00 from the estate to pay her personal debts. Section 801 of the *Code* provides that if a beneficiary mingles estate money with their personal money, he or she becomes liable for the debts of the estate. Accordingly, Justice Bedard found Threlfall personally liable for the claim and ordered her to (re)pay Carleton \$497,332.60 retroactively to December 31, 2007 (with interest).

This decision highlights an important consideration with respect to pension benefit entitlement in Quebec. Where a pension plan provides benefit entitlement until the date of one's death, merely being "absent" does not affect entitlement. The missing pensioner is presumed to be alive for seven years following their disappearance. Accordingly, the entitlement to pension benefit payments continues. However, this case confirms that, should evidence come to light establishing that the pensioner had died prior to the expiration of the seven-year period; the payments made after the established date of death become an "error". Consequently, the pension plan is entitled to recovery of such overpaid pension benefits.

Another critical finding in this case is the effect of Threlfall's personal use of the funds. Once Roseme's death had been established, Threlfall's status as tutor ended, and her status as liquidator and beneficiary of Roseme's estate began. According to s.801 of the *Code*, if a beneficiary mingles the estate money with their own personal money, the beneficiary becomes liable for the debts of the estate. Accordingly, once it was established that Carleton was entitled to recover the overpaid pension benefits, Threlfall became personally liable to repay all of the pension benefit payments made after the established date of death in December of 2007.

Other

15. *Industrial Alliance Insurance v. Brine*, 2015 NSCA 104

The plaintiff Brian Brine (the "Insured") worked as a police officer for a number of years and later became the Director of Ports Canada Police in Halifax. As part of his employment, he was provided long term disability ("LTD") coverage through an insurance policy (the "Policy") between Industrial Alliance Insurance and Financial Services Inc. (the "Insurer") and the Board of Trustees of the Public Service Management

Insurance Plan. His employment with Ports Canada Police was terminated in 1995, and shortly after he was diagnosed with depression. He applied and was approved for LTD benefits under the Policy, which required the Insurer to pay such benefits until the Insured reached age 65. At the Insurer's discretion, rehabilitation services were also covered.

The Policy provided that any disability benefits payable by the Canada Pension Plan ("CPP") or through the Insured's public service pension plan would be directly deducted and offset from the LTD benefits. Specifically, the *pro rata* clause in the Policy provided that if the Insured received a lump sum payment of CPP or other benefits, this lump sum was to be divided equally and offset over the remaining term of the Policy.

After three years of being on LTD benefits, the Insured was approved for disability benefits under both CPP and his pension plan. In 1998, the Insured received lump sum payments for both retroactive CPP and pension benefits. Under the terms of the Policy, since the Insured received the lump sum payments when he was 49 years old, the Insurer was required to divide these lump sum payments and apply an offset over the remaining 16 years of the Policy. Instead, to recover the overpayments, the Insurer completely stopped payment of LTD benefits to the Insured until the amount was repaid. As a result, the Insured's financial circumstances deteriorated, forcing him to make an assignment in bankruptcy in 1999, from which he was later discharged. At the time of the filing of bankruptcy, the alleged overpayment was \$62,036.81. Even after the Insured's discharge, the Insurer refused to recognize that the overpayment had been discharged and continued to reduce his monthly disability benefits by the balance of the overpayments. The Insurer also discontinued the rehabilitation services and failed to inform the Insured that such services were ending.

Moreover, between 1995 and 1998, the Insurer withheld tax and issued T4 statements for the Insured's LTD benefits, despite the fact that his benefits were non-taxable. Even after two Tax Court of Canada rulings which held that the Insured's LTD benefits were non-taxable, the Insurer continued to issue T4 statements for the Insured's LTD benefits.

In a June 2014 decision, the Supreme Court of Nova Scotia awarded to the Insured \$62,036.81 in damages for breach of contract, \$30,000 in mental distress damages, \$500,000 in punitive damages, and \$150,000 in aggravated damages as a result of the Insurer's breach of its duty of good faith.

The trial judge concluded that the Insurer breached the contract by clawing back the LTD benefits, rather than pro-rating the overpayment over the life of the Policy, as required under the terms. The trial judge also held that the Insured's obligation to reimburse the Insurer for the overpayment was a pre-bankruptcy debt, such that a portion of the overpayment had been extinguished by the Insured's discharge from bankruptcy and ought not to have been collected by the Insurer.

Furthermore, the trial judge held that the Insurer had breached its duty of good faith when it arbitrarily discontinued the Insured's rehabilitation benefits and continued to treat the disability benefits as taxable, notwithstanding the Tax Court of Canada rulings. While the terms of the Policy did not require provision of rehabilitation benefits, the trial judge held

that once the Insurer decided to provide such services, it was obligated to act in good faith in providing the rehabilitation benefits.

The Nova Scotia Court of Appeal upheld the trial judge's findings that the Insurer had breached the terms of the Policy and the duty of good faith. The Court agreed with the trial judge that the duty of good faith is an implied contractual obligation derived from the existence of the contract. As such, the Insurer's breach of its duty of good faith is not predicated on the condition that the Insurer breached an explicit provision of the Policy. The Insurer's arbitrary suspension of rehabilitation benefits was therefore a breach of the Insurer's duty of good faith, even though the terms of the Policy did not require provision of such benefits.

While the Court agreed that the Insured was entitled to punitive and aggravated damages, the damages award was substantially reduced. To overturn a lower court's damages award, the appeal court must find that the trial judge applied a wrong principle of law, or that the quantum of the award was inordinately high or low.

The Court dismissed the Insurer's submission that the separate awards for mental distress and aggravated damages were duplicative. However, the Court noted that aggravated damages required a separate cause of action and emphasized that the Insurer's breaches of its duty of good faith was impliedly contractual. In assessing the appropriate quantum, the Court reclassified the aggravated damages award as mental distress, since both awards were aimed primarily at compensating the Insured for the exacerbation of his diagnosed depression. The Court reviewed a number of awards that have been issued for mental distress in the insurance context and reduced the quantum from \$180,000 to \$90,000 damages for mental distress.

The Court also substantially reduced the award for punitive damages from \$500,000 to \$60,000, after a review of such awards across Canada. According to the Court, punitive damages of \$100,000 or more have been awarded in cases where the defendant's misconduct was much more blameworthy than the Insurer's conduct in this case. The Court noted that the Insurer did not deny coverage and was not trying to profit from the Insured's vulnerability. However, the Insured was still entitled to punitive damages as a result of the misconduct in the Insurer's management of a "peace of mind" contract.

In the result, the Court of Appeal reduced the overall quantum of damages for mental distress and punitive damages from \$680,000 to \$150,000

16. ***Mumby v. General Motors of Canada Limited*, 2015 HRTO 1470**

In *Mumby v. General Motors of Canada Limited*, the applicant plan member alleged discrimination with respect to employment because of disability contrary to the *Human Rights Code*, R.S.O. 1990, c. H.19 (the "Code"). Mr. Mumby argued that the provisions of his pension plan that permitted WSIB benefits to be deducted from his early retirement benefits was discriminatory under section 5(1) of the Code, as other early retirees could retain significant earnings from employment.

Mr. Mumby began working for General Motors of Canada Limited (“General Motors or GM”) in 1977. As a result of a workplace injury in 1998, he qualified for benefits under the *Workplace Safety and Insurance Act, 1997*. He was able to work with modified duties until 2003. The applicant was referred for labour market re-entry (“LMR”) on March 17, 2004. At that time, he was able to return to some form of work, although he had significant restrictions. The WSIB determined that he should be re-trained in customer service, and the applicant performed well in the LMR program. Despite this, Mr. Mumby decided not to return to work.

The WSIB determined that the applicant was entitled to partial loss of earnings (“LOE”) benefits equal to 85% of the difference between his pre-accident earnings at General Motors (\$29.35/hr at 40 hrs/week) and the accepted rate for a customer service representative (\$10.35/hr at 30 hrs/week). Around this time, he also elected to take an early retirement pension under GM's pension plan. That pension plan provided that certain payments were to be deducted from the early retirement benefits, including most WSIB benefits for which GM has contributed.

Although GM could have deducted his WSIB benefits from his early retirement pension, GM had not historically done this. Unfortunately for the applicant, on June 30, 2011, GM gave notice that it would begin enforcing the deduction provisions of the pension plan. The applicant's union grieved this matter and alleged the employer was estopped from changing its administrative practice. The matter settled, GM provided a longer notice period before the change would take effect, and this agreement was memorialized in a Memorandum of Understanding (“MOU”).

The first deduction from the applicant's pension was made on August 1, 2012, in the amount of \$2,278.88. That deduction was intended to continue until the applicant reaches the age of 65.

Prior to turning to the discrimination analysis under the Code, Vice-Chair Scott dealt with a request by GM to dismiss the application under section 45.1 of the code. That section allows for dismissal where a matter has been dealt with in another proceeding. GM argued that the settlement of the union's grievance had disposed of Mr. Mumby's complaint. This argument was rejected, and Vice-Chair Scott found that in the absence of any reference to discrimination, human rights, or the *Code* in the grievance or in the Memorandum of Understanding, there was no basis upon which to conclude that the issues in this Application were appropriately dealt with.

She then turned to deal with the substantive question of whether Mr. Mumby had been discriminated against, relying on the test set out by the Court of Appeal in *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593 (CanLII), 2010, ONCA 593. In *Tranchemontagne*, the Court determined that to establish discrimination, an applicant must prove:

- a. He is a member of a group protected by the *Code*;
- b. He was subjected to adverse treatment; and
- c. The *Code* ground was a factor in the alleged adverse treatment.

The crux of the applicant's case was his allegation that he experienced adverse treatment when his WSIB benefits were deducted from his early retirement benefits and other early retirees were permitted to keep significant earned income without deduction. The applicant alleged that this distinction is discriminatory on the basis of disability because his WSIB income is deducted and income that is not owing due to disability is not.

The Union argued that there was no adverse treatment when Mr. Mumby was compared with other similarly-situated retirees, noting that after the deduction, he was in the same position as an identically-situated retiree in that his total income is the same as those who are not working. The Union further argued that employees who work after early retirement are differently situated because their employment earnings are not obtained from GM. GM made a similar argument, noting that only GM-funded benefits are deducted from the early retirement benefits and income received from other parties is not deducted.

Vice-Chair Scott accepted this argument, holding that the basis for the difference in treatment between the applicant and early retirees who retain their employment income is based on the fact that the other retirees are working after retirement. Vice-Chair Scott held that this meant that the distinction between deducting WSIB but not earned income is not based on disability, but rather on whether the early retiree is working post retirement. She referenced the fact that it is well-established law that "treating employees differently because they are working is not discriminatory."

She then looked at whether the treatment of the applicant was discriminatory in comparison to those early retirees who do not work. She found that both groups receive the same amount until the age of 65, at which point government-funded pensions commence, with the only distinction being that the applicant receives some of his compensation from the WSIB.

She reasoned that this means that there was no adverse treatment and thus no discrimination. She also found that prior to GM deciding to deduct his WSIB payments, he had been advantaged as compared to other similarly situated individuals. She noted that "While the *Code* protects against adverse treatment, it does not protect against the removal of an advantage, the result of which places the applicant in the same position as every other member in his group."

The applicant also made an alternative argument, which was that the provision allowing retirees to earn income from employment adversely impacts him because he is unable to work because of his disability. Vice-Chair Scott rejected this argument for two reasons. First, she noted that the applicant is in fact able to work, as the WSIB concluded he was able to earn \$16,146.00 in a customer service position. If the applicant chose to work in the years leading up to his 65th birthday, his paid income from employment would not be deducted. Second, she held that "the disadvantage experienced by the applicant is not tied to the provisions of the pension plan or to General Motors. It is linked to the applicant's disability." She specifically found that "the fact that the applicant has a limited capacity to work post retirement is not something for which General Motors is responsible....employers cannot be held responsible for workplace injuries after an employee retires from the workforce."

As a result of these findings, Vice-Chair Scott dismissed the applicant's complaint in its entirety.

This case illustrates the difficulty of advancing a human rights-based claim in the context of pension plans. At first glance, it is easy to see how Mr. Mumby would consider himself to have been discriminated against as a result of the deduction to his early retirement pension. He is in receipt of WSIB benefits because of a workplace injury. There was no contention that he was able to work in a job that would pay him anything close to what he had received beforehand. Other plan members who had commenced their pensions were entitled to receive much of their employment income.

In finding that there was no differential impact despite the appearance of such, Vice Chair Scott appears to have focused on pensions as an instrument of social policy rather than as a proprietary entitlement of the member. She notes that early retirees who are in receipt of bridging benefits "have a reduced need for bridging income, when compared with other early retirees who are not in receipt of these benefits, because they are already receiving benefits to compensate for lost income". This finding assisted her in finding there was no adverse treatment or discrimination towards Mr. Mumby. To a certain extent, she appears to have justified the differential treatment of Mr. Mumby on the basis that it was logically tied to the goal of providing adequate income on early retirement. There is scant treatment of the fact that Mr. Mumby had earned his benefit through his years of service to GM, and had the issue been conceptualized in that way, it is interesting to consider whether the result would have been the same.

17. ***Johnston v. Vancouver, 2015 BCHRT 90***

The British Columbia Human Rights Tribunal has dismissed the complaint of an employee against her employer who claimed that the termination of long-term disability benefits at age 65 was discriminatory, contrary to B.C.'s *Human Rights Code* (the "Code").

Kristine Johnston filed a representative complaint against her employer, the City of Vancouver, on her own behalf and on behalf of all City employees over age 65 who no longer have access to disability insurance benefits. She alleged that the City deprives employees over the age of 65 from receiving the same benefits available to employees under that age, and that this difference in treatment is discriminatory.

Under their collective agreement, City employees are provided with a variety of health and welfare benefits, one of which is a long term disability plan (the "LTD Plan"). The LTD Plan is funded by premium payments by both employees and the City. LTD benefits are provided to eligible employees, but cease once they reach age 65.

The City filed expert evidence of an actuary who deposed that it is a common, accepted and established practice to terminate LTD benefits coverage at age 65. This is because extending benefit coverage past age 65 generally increases the cost of the coverage provided, and would require substantial increases in contribution rates.

Ms. Johnston argued that the difference in treatment between those over and under age 65 for purposes of the LTD Plan imposes financial hardship; and that the practice of

terminating benefits for those over 65 was tied to mandatory retirement and should be reformed. Before 2008 there was no need to offer benefits to a group that was no longer present in the workforce, but the abolition of mandatory retirement renders this assumption outdated.

Section 13(1) of the *Code* prohibits discrimination in employment on the basis of age:

13(1) A person must not

(a) refuse to employ or refuse to continue to employ a person, or

(b) discriminate against a person regarding employment or any term or condition of employment

because of the ... age of that person ...

...

Subsection 13(3) of the *Code* carves out an exception to the prohibition on age discrimination in employment where it relates to the operation of *bona fide* pension or benefit plans:

13(3) Subsection (1) does not apply

...

(b) as it relates to...age, to the operation of a *bona fide* retirement, superannuation or pension plan or to a *bona fide group* or *employee insurance plan*, whether or not the plan is the subject of a contract of insurance between an insurer and an employer.

The City took the position that the LTD Plan is a *bona fide* plan within the meaning of ss. 13(3)(b) of the Code, and that the complaint should be dismissed pursuant to s. 27(1)(b).

Under the Code, "age" is defined at an age of 19 years or more. Prior to 2008, when mandatory retirement was eliminated the definition of "age" specified "19 years of more and less than 65 years."

Section 27(1)(b) of the Code provides for the early dismissal of a human rights complaint if the acts or omissions complained of do not contravene the Code:

(1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:

...

(b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;

The Tribunal asked the parties to make submissions on whether the LTD Plan constitutes a "bona fide group or insurance plan."

Relying on the test set out by the majority of the Supreme Court of Canada in *Potash Corp. of Saskatchewan Inc. v. Scott*, the Tribunal considered whether the LTD Plan is "a legitimate plan adopted in good faith and not adopted for the purpose of defeating protected rights under the Code."

The Tribunal noted that there was no material before it which supported a finding that the LTD Plan was *not* legitimate, and in fact the applicant did not submit that this was the case. On the contrary, the evidence established that the LTD Plan was adopted in good faith by the City and the Union, and not to defeat protected rights.

The panel was satisfied that the LTD Plan is a "bona fide group or insurance plan" within the meaning of s. 13(3)(b) of the Code and therefore is exempt from the prohibition on age discrimination in employment, and does not contravene the *Code*.

18. ***Frame v. Mancinelli, 2014 NSSC 461***

In a conflict between Nova Scotia's PBA and the beneficiary definitions in the Labourers' Pension Fund of Central and Eastern Canada, the PBA controlled whether or not a separated spouse received the benefit because the LPF's more restrictive definition did not trump the PBA's by virtue of being more beneficial to LPF members. This conflict would arise in a very limited number of situations (only Nova Scotia)

19. ***Rein v. Alberta HRC, 2016 CarswellAlta 1370***

The Alberta Court of Queen's Bench affirmed the original decision of Chief Commissioner of the Alberta Human Rights Commission as reasonable. The Chief Commissioner had concluded that a benefit plan which ceased providing benefits at age 65 was bona fide and not discriminatory.

Gloria Rein was a unionized employee of the Alberta Union of Provincial Employees. Her employment was governed by the terms of a collective agreement, which included the provision of comprehensive group insurance. As per the terms of the plan, the employee group health benefits and life Insurance plan ceased upon the employees 65th birthday.

Ms. Rein turned 65 in 2011, and subsequently sought to challenge the cessation of those benefits.

Ms. Rein first made a complaint to the Alberta Human Rights Commission ("AHRC") alleging that she was discriminated against on the basis of age due to the fact that her compensation was reduced by the benefit cut-off. The Director of the AHRC dismissed the complaint.

The Director concluded that there was no reasonable basis for proceeding to the next stage with the complaint. The jurisprudence reviewed by the Director supported the position that the plan in question fit the exception for bona fide benefit plans.

Ms. Rein then filed a request for review of that AHRC decision. The Chief Commissioner upheld the Director's decision and refused to refer the complaint to a panel for review.

The Chief Commissioner considered whether there was a reasonable basis in evidence for proceeding to the next stage. The Chief Commissioner determined that the plan in question is bona fide, and was adopted in good faith. This finding was based on the Commissioner's interpretation and application of the Supreme Court's decision in *Potash Corp. of Saskatchewan Inc. v Scott*, in which the majority held that a *bona fide* pension plan is simply "a legitimate plan, adopted in good faith and not for the purpose of defeating protected rights".

Ms. Rein subsequently sought judicial review of this administrative decision made by the Chief Commissioner.

Ms. Rein did not attempt to put forward the argument that the Chief Commissioner's decision was to be reviewed on the stricter "correctness" standard. The parties agreed the decision was to be tested on the "reasonableness" standard. After reviewing *Dunsmuir* the Court agreed the decision of the Chief Commissioner could only be overturned if it did not fall within a range of possible, acceptable outcomes. The Court adopted a deferential approach, as the Chief Commissioner was adopting her home statute.

Ms. Rein challenged the decision as unreasonable on the basis that the Chief Commissioner misapprehended her function, erred in conclusion, disregarded evidence and erred in her interpretation of the law.

The Court noted that Ms. Rein did not launch a constitutional challenge to the *Alberta Human Rights Act* or the specific provisions providing the bona fide exception. The Court could not substitute its own interpretation of the Act or *Potash* decision, and it could only determine whether the decision was reasonable.

The Court concluded there was some evidence before the Chief Commissioner to establish the bona fides of the plan. The Chief Commissioner had the benefit of both Collective Agreements, the group benefits contract, a legal opinion on the merits of a human rights complaint or grievance, and an email from the union. Although the Chief Commissioner did not specify which information she relied on, the Court determined this was not fatal.

The Court described the details of some of the documents the Chief Commissioner relied on, which supported the conclusion that the decision was reasonable. The collective agreement disclosed that AUPE was required to pay the costs of the plan, and that the plan could only be altered by mutual agreement. According to the Court the plan provided a "full complement of benefits". Ultimately, it was reasonable on the information available to the Chief Commissioner to conclude that the plan is bona fide, and the cessation of benefits is not discriminatory.

20. ***Duncan v. Trustees: Retail Wholesale Union Pension Plan, 2016 BCHRT 22***

In *Duncan v. Trustees: Retail Wholesale Union Pension Plan*⁴, John Duncan (the "Complainant") filed a complaint with the British Columbia Human Rights Tribunal against the Trustees of the Retail Wholesale Union Pension Plan (the "Plan"), alleging that the Plan discriminated against him by applying a different subsidised benefit to him as a single plan member than is applied to a married plan member, contrary to subsection 13(1) of the *British Columbia Human Rights Code*, RSBC 1996, c. 210 (the "*Code*"). The Trustees submitted that the Plan is a *bona fide* pension plan under subsection 13(3)(b) of the *Code*, which exempted certain bans on discrimination where that discrimination arises out of the operation of terms or conditions of any *bona fide* retirement or pension plan and provides as follows:

(3) Subsection (1) does not apply

(b) as it relates to marital status, physical or mental disability, sex or age, to the operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan, whether or not the plan is the subject of a contract of insurance between an insurer and an employer.

The only issue to be determined by the Tribunal in this decision was whether the Plan is a *bona fide* pension plan within the meaning of subsection 13(3)(b) of the *Code*.

The Complainant suggested that subsection 13(3)(b) of the *Code* is ambiguous because of the words "*bona fide*" in the provision and as a result, submitted that the Tribunal must incorporate *Charter* values into their interpretation of subsection 13(3)(b). While the Tribunal acknowledged that it has jurisdiction to consider *Charter* values, it held that *Charter* values cannot be used to create ambiguity where none exists and ambiguity does not exist merely because courts have come to differing conclusions on the interpretation of a provision.

According to the Tribunal, the Supreme Court of Canada's decision in *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*⁵ clearly set out the applicable test for the meaning of *bona fide* under subsection 13(3)(b) of the *Code*:

The test to be applied to the interpretation of bona fides under s. 13(3)(b) of the Code is that set out in *Potash*. *Potash* requires that in order for a pension plan to be bona fide within the meaning of s. 13(3)(b) it must be a legitimate plan adopted in good faith and not adopted for the purpose of defeating protected rights under the *Code*.⁶

⁴ 2016 BCHRT 22.

⁵ 2008 SCC 45.

⁶ 2016 BCHRT 22, para. 60.

Applying the test set out in *Potash* to the facts of this case, the Tribunal concluded that Plan is a *bona fide* pension plan under subsection 13(3)(b) of the *Code*. The Tribunal found that the Plan is compliant with the old *Pension Benefits Standard Act*, R.S.B.C. 1996, c. 52 (the "old *PBSA*"), has been accepted for registration under the *Income Tax Act* and the old *PBSA*, and is regulated by the Financial Institutions Commission (FICOM). There was nothing in the evidence before the Tribunal which suggested that the Plan was put in place to defeat the protected rights under the *Code*. The Tribunal also noted that the provision of differing benefits for a member of a pension plan based on marital status is "a common, accepted and established practice which can be found in numerous pension plans registered in British Columbia and other provincial jurisdictions, as well as those registered federally."⁷

⁷ *Ibid.* at para. 81.