LEGISLATIVE DEVELOPMENTS AND THE

TOP 20 CASES OF 2016 – 2017

50TH ANNUAL CANADIAN EMPLOYEE BENEFITS CONFERENCE

KOSKIE MINSKY LLP
20 Queen Street West
Suite 900, Box 52
Toronto, ON   M5H 3R3

Prepared by:

Mark Zigler and James Harnum

LEGISLATIVE DEVELOPMENTS 4

BOARDS AND TRIBUNAL 6

Ontario Decisions 11

1. Alexander v. Ontario, 2016 ONSC 7059 11

2. Coco Paving Inc. v. International Union of Operating Engineers, Local 793, 2017 CanLII 8326 12

3. Labatt Brewing Company Limited v. Service Employees International Union Local 2 (BGPWU), 2016 CanLII 82630 (ONLA) 12

4. Re Nortel Networks Corporation et al, 2017 ONSC 700 13

5. North Eastern Ontario Family and Children's Services v. Ontario Public Services Employees Union, 2016 CanLII 75012 (ON LA) 14

6. Oakland Construction Services Inc v. Labourers' International Union of North America, Local 183, 2016 CanLII 88446 (ONLA) 15

7. Tibbett & Britten Group Canada Inc. v. Sobeys Inc., 2016 ONCA 861 16

8. Victorian Order of Nurses for Canada (Re), 2016 ONSC 5540 17

9. Webb v. TD, 2016 ONSC 7153 17

British Columbia 18

10. Feldstein v. 364 Northern Development Corporation, 2017 BCCA 174 18

11. Office of the Superintendent of Pensions (Re), 2017 BCIPC 17 19

12. Teck Coal Limited v. United Steelworkers, Local 7884, 2016 CanLII 62603 20

13. Walter Energy Canada Holdings, Inc. (Re), 2017 BCSC 709 22

Alberta 24

14. Calder v. Alberta, 2017 ABQB 162 24

15. Certainteed Gypsum Canada Inc. v. Cement, Lime, and Gypsum and Allied Workers, International Brotherhood of Boilermakers Lodge D345, 2016 CanLII 31212 (AB GAA) 25

16. International Brotherhood of Electrical Workers, Local 1007 v. EPCOR Utilities Inc., 2016 ABQB 574 27

Other 29

17. Saskatoon (City) v The Amalgamated Transit Union, Local No 615, 2017 CanLII 37003 (SK LA)...29

18. Arrangegement relatif à Bloom Lake, g.p.l.0, 2017 QCCS 284 31

19. Plourde v. Brookfield Asset Management Inc., 2016 NBQB 171 32

20. Skinner v. Board of Trustees of the Canadian Elevator Industry Welfare Trust Fund, 2017 CanLII 3240 33

LEGISLATIVE DEVELOPMENTS AND COURTS AND TRIBUNALS

LEGISLATIVE DEVELOPMENTS

Pension legislation across Canada continued to develop in the last year, although there are no changes of great significance. The issues created by solvency funding requirements and restructuring pension regulators continue to dominate much of the legislative developments across the country.

A widely discussed legislative development occurred in the Federal jurisdiction, where a legislative framework for target benefit plans was tabled in Bill C-27. The Bill, currently at first reading, would amend the *Pension Benefits Standards Act* to allow federally regulated employers to establish target benefit plans for their employees and to convert their plans to target plans if certain criteria are met. Bill c-27 takes an approach to benefit security that most closely resembles the controversial "shared risk model" in New Brunswick. The model focuses on joint governance and a prescribed funding policy to help ensure that targeted benefit levels are reached. The Bill has not yet become law and has faced significant criticism from employee and labour-side advocates.

Ontario has made a series of important legislative amendments and other statutory developments. A consultation on solvency funding has concluded and while there is not yet any legislation, the government has proposed a radically different system where solvency funding will be relaxed and the level of Pension Benefit Guarantee Fund protection for individual plan members of insolvent employer pension plans will be improved from $1,000 per month to $1,500.

Ontario also has new rules for Pension Advisory Committees (PACs) for single-employer plans which came into force on January 1, 2017. Under the new rules, Plan Administrators have a more active role in promoting the establishment and continued operation of PACs. There are also new requirements for the makeup of a PAC in terms of member representation.

At the end of June, the government issued its plans with respect to implementing a new framework for target benefit multi-employer pension plans (MEPPs). The idea is that the framework will replace the time-limited funding regulations currently in place for specified Ontario multi-employer pension plans (SOMEPPs), although the SOMEPP funding exemptions have also been extended for another year. The following are the funding highlights under the proposed framework:

- A permanent exemption from funding the plan on a solvency basis;
- Going concern funding requirements with any deficiencies amortized over 15 years, rather than the current 12 years;
- Requirements to fund a reserve called a Provision for Adverse Deviation (PfAD) which will assist in protecting benefits without having the uncertainty associated with solvency funding; and
- Rules to ensure that plan benefits are appropriately reduced when funding requirements are not met.

As with the federal Bill C-27, the Ontario target framework will require retired member participation in governance and the creation of funding and governance policies. There will also be enhanced disclosure requirements to plan beneficiaries.

Another significant legislative amendment came in Ontario's provincial budget implementation act. On December 8, 2016, the *Building Ontario Up for Everyone Act (Budget Measures), 2016* received Royal Assent. Among other things, the omnibus budget legislation enacted the *Financial Services Regulatory Authority of Ontario Act, 2016,* (the "FSRA Act") setting out the framework for the creation of the new Financial Services Regulatory Authority ("FSRA"). By way of background, the Minister appointed an expert advisory panel to review the mandates of both FSCO and the Financial Services Tribunal. In a final report released to the public in June 2016, the panel concluded that "radical change" was necessary to establish a world-class financial services and pensions regulator in Ontario, and made 44 recommendations which focused on the creation of a single integrated organization that would replace FSCO. Under the FSRA Act, the FSRA will consolidate various regulatory functions related to pensions, insurance, trust companies, credit union, caisses populaires, co-operatives, and mortgage brokers into one body, just as FSCO did. This structure is in stark contrast to what was proposed by the 2008 expert commission in Ontario, which urged the creation of an independent single-purpose pension regulator. It is expected that the FSRA will have an independent division which regulates pension administration, as well as separate divisions which regulate market conduct and prudential oversight. Subject to the approval of the Minister, the FSRA Act provides the board of directors of the FSRA with powers to make by-laws governing the management of the FSRA, among other administrative and structural issues. It is intended to be a self-sufficient entity which generates its operating costs from its constituents.

The final Ontario legislative development of significance relates to the proposed imposition of administrative penalties for breaches of the PBA. The 2016 budget provides for general and summary administrative penalties for breaches of the PBA and for deriving economic benefits from such breaches. The maximum penalties proposed are set at $10,000 for individuals and $25,000 for others such as corporations. There are no appeals from summary penalties, although general penalties can be appealed to the Financial Services Tribunal. The proposed legislation also mandates that the administrative penalties cannot be paid from plan assets. Trustees would be wise to remember that errors and omissions insurance will not generally cover such fines and penalties and thus they should seek indemnities from the parties who appointed them if the legislation goes forward.

In terms of other provinces, Manitoba has passed a special regulation, in force as of December 31, 2016, that permits plan sponsors to amortize their solvency deficiencies over a ten year period. In order to make the election, the employer must provide notice to the members, beneficiaries and any relevant trade union. The employer is only allowed to utilize the ten-year amortization period if less than one third of plan members, retirees and other beneficiaries object to the election. A similar regulation was passed in British Columbia, extending the solvency amortization period from 5 to 10 years. Notice to members is also required, but there is no member consent requirement as in Manitoba. In Newfoundland, a regulation was also passed allowing for the extension of MEPP solvency funding exemptions until 2020.

Finally, numerous jurisdictions passed legislation and regulations that will assist in fostering pooled retirement pension plans.

BOARDS AND TRIBUNAL

This was an especially quiet year for developments in pension jurisprudence. There were no Supreme Court of Canada cases dealing with pension law issues, and the provincial appellate courts also heard very few pension cases.

In Ontario, the Nortel saga is almost at a close. On February 9, 2017, the Court sanctioned the Canadian debtors' plan of arrangement under the *Companies Creditors' Arrangement Act* and ordered release of escrowed sale proceeds in accordance with the plan, which, after an eight year wait, will see distributions to employees made this year.[1] Objections to approval of the plan by two long-term disability beneficiaries were dismissed, as were their leave to appeal applications to the Ontario Court of Appeal and the Supreme Court of Canada.

Another interesting case from this year that arose during a CCAA proceeding was in *Re Victorian Order of Nurses for Canada.*[2] In that case, the Ontario Nurses Association ("ONA") sought an order under section 11 of the CCAA: (i) requiring VON Canada to restructure its pension plan by transferring all assets and liabilities associated with the employees of VON Canada, VON Ontario and VON Nova Scotia to a new pension plan; and (ii) declaring that VON Ontario is not jointly and severally liable to fund any solvency deficiency arising as a result of VON East, VON West, VON Canada or VON Nova Scotia failing to meet their contribution obligations. The Ontario Superior Court dismissed ONA's motion as the requested order would prejudice VON Canada's going concern restructuring efforts.

While not an insolvency, another interesting case involving trying to determine which party should be responsible for funding a specific pension plan was dealt with by the Ontario Court of Appeal in *Tibbett & Britten Group Canada Inc. v. Sobeys.*[3] Sobeys was party to a contract undertaken by a predecessor under which it had certain obligations regarding a Tibbet & Britten pension plan. The contract was terminated and plan was wound up. Tibbet & Britten claimed that Sobeys had undertaken by agreement to take over both administration of plan and the obligation to fund deficit. The trial judge ordered that Sobeys was to reimburse Tibbet & Britten for the amount required to fund the deficit that arose on wind-up, and that the parties had reached agreement pursuant to which Sobeys had agreed to be responsible for directly funding plan deficit. The Court of Appeal upheld the trial judge's decision.

The Victorian Order of Nurses pension plan was also the subject of another case this year. In *Alexander v. Ontario*[4], as part of a transfer by Ontario of certain home care services, employees who had been members of OMERS or the Victorian Order of Nurses Pension Plan became members of HOOPP. The assets and liabilities, however, were not transferred from the old plans to HOOPP and as a result, the affected employees were entitled to two separate pensions. The unions representing the employees commenced class actions, arguing that the government had promised that there would be “no loss” to affected employees’ pensions. In this case, the Court approved a settlement that was reached between the parties.

---

[1] 2017 ONSC 700.
[2] 2016 ONSC 5540.
[3] 2016 ONCA 861.
[4] 2016 ONSC 7059.

While not necessarily of great significance to pension jurisprudence, the facts in *Webb v. TD*[5] are somewhat interesting. The plaintiff alleged that he had been induced to withdraw the commuted value of his pension and invest it with TD where he alleged he had been told it would outperform his pension. Plaintiff commenced action against TD after his investments performed poorly on the basis of misrepresentation, undue influence and negligence of a TD employee and failure to require plaintiff to obtain independent legal advice. The Ontario Superior Court found that the action was barred as a result of being launched after the applicable limitations period. The Court nevertheless offered an analysis, in the alternative, of whether the plaintiff's claim would have succeeded on the merits, and found that it would not have. The Court placed significant weight on the plaintiff's experience as someone who had spent decades as a relatively senior bank employee as indicating he knew, or ought to have known, the risks associated with the decision to invest his commuted pension payout as he did rather than electing to receive his pension payments according to the schedule set out by the plan.

The key remaining cases from Ontario all involved the interaction of pensions and labour law issues. In *Coco Paving Inc. v. International Union of Operating Engineers*[6], the Ontario Labour Relations Board declined jurisdiction with respect to an overpayment issue. The employer had made contributions for a group of workers on the basis of the wrong geographical contribution rate. This occurred over several years, and led the employer to make a significant overpayment. The employer brought the matter to the OLRB, seeking repayment, but the Union responded that the Board was not the appropriate forum for the matter to be dealt with. The OLRB held that the Union was correct and determined that the Superintendent had exclusive jurisdiction over the issue.

Oakland Construction Services Inc v Labourers' International Union of North America, Local 183[7] also dealt with the capacity of a labour adjudicator to deal with a specific proceeding. In that case, the Union launched a grievance arguing that for 24 years the employer had failed to make contributions to the MEPP as required by the expired collective agreements. The arbitrator concluded that the right to have the employer make its contributions to the MEPP had vested, and that he had jurisdiction to consider whether the employer had violated its obligations under the current and expired collective agreements.

Labatt Brewing Company Limited v. Service Employees International Union Local 2[8] dealt with a dispute between the employer and the union over the unilateral imposition of a certain service provider for all of its employees. The employer was required under the collective agreement to provide a health and welfare plan to its unionized employees and was required to reimburse the cost of prescriptions. The union launched a grievance in relation to the imposition of the mandatory service provider, on the basis that the employer was still required to reimburse the prescription costs for those that did not use the service provider. The arbitrator allowed the grievance, holding that the employer could not deny reimbursement on that basis.

---

[5] 2016 ONSC 7153.
[6] 2017 CanLII 8326.
[7] 2016 CanLII 88446.
[8] 2016 CanLII 82630.

Finally, in terms of cases from Ontario, *North Eastern Ontario Family and Children's Services v. Ontario Public Services Employees Union*[9] concerned the amalgamation of three public sector employers and the harmonization of benefits across each. The extended health care benefits of one of the organizations included a clause terminating coverage for disabled employees at the earlier of 12 months from the date of any disability or the date they ceased to be eligible under the benefit plan. A letter was sent to the affected employees advising them that their health and dental benefits coverage would be discontinued if they remain on LTD for another 6 months. OPSEU launched grievance on behalf of the affected employees, arguing that the clause did not apply to previous disabled employees prior to the clause's introduction. The grievance was allowed, with the arbitrator holding that "clear and specific language" was required in order to terminate a long-standing benefit.

A restructuring CCAA proceeding involving multiple pension regulators and employees in several provinces may have been Quebec's most significant case of the past year. In *Arrangement relatif à Bloom Lake, g.p.l.,*[10] the company's CCAA Monitor (an accounting firm that supervises the proceeding as a court officer) brought a motion for direction from the court on pension claims in the CCAA proceedings. The relevant pension plans were registered both in Newfoundland and federally with OSFI. The deemed trust provisions in Newfoundland's pension legislation had never been interpreted by any court. In this case, there was a preliminary issue of whether the Quebec court should request the aid of the Newfoundland Court with respect to the interpretation of the deemed trust provisions in the NPBA. The Quebec Court concluded that it would retain jurisdiction of the pension issues related to the present case, including the interpretation of the NPBA. Subsequently, the Newfoundland legislature instituted a reference to the Newfoundland Court of Appeal on a related issue, which has yet to be argued.

British Columbia and Alberta also had several cases of note in the past year. In *Feldstein v. 364 Northern Development Corporation,*[11] The B.C. Court of Appeal upheld a lower court decision allowing the plaintiff's misrepresentation claim against his employer when he accepted a position based on its representations regarding entitlement to long-term disability (LTD) benefits. The plaintiff suffered from cystic fibrosis and when he became disabled due to his chronic condition, he was told that he did not in fact qualify for the LTD benefits. The appellate court upheld the award of LTD for 40 months, but overturned the aggravated damages award.

In *Office of the Superintendent of Pensions (Re)*[12], an association of British Columbia-based construction businesses requested access to information that 16 union-sponsored pension plans had filed with the B.C. regulator. The Superintendent withheld some of the requested information under s. 21 (harm to third party business interests) and s. 22 (harm to personal privacy) of the *Freedom of Information and Protection of Privacy Act*. The British Columbia Information and Privacy Commissioner found that neither s. 21 nor s. 22 applied and ordered that the Superintendent disclose the information to the applicant.

The last year also saw another example of a foreign regulatory body attempting to use its own "long-arm" legislation to make claims against an insolvent Canadian enterprise. In *Walter*

---

[9] 2016 cANlii 75012.
[10] 2017 QCCS 284
[11] 2017 BCCA 174.
[12] 2017 BCIPC 17.

Energy Holdings Inc. (Re)[13], a U.S. pension plan asserted claims under an American statute known as the *Employee Retirement Income Security Act of 1974* (ERISA), which imposes joint and several liability on a plan sponsor and any members of its controlled group for pension plan liabilities, against the employer's Canadian insolvent subsidiary. The B.C. Superior Court rejected the claim and held that Canadian law governed the plan's claim, not ERISA.

The final case of interest out of British Columbia was *Teck Coal Limited v. USW, Local 7884.*[14] In that case, post-retirement benefits were provided to certain employees on a unilateral basis, with no specific agreement. The employer's position was this it was only those employees who retire after reaching age 65, or who retire after reaching age 55 with at least 20 years of service, that would be eligible for the benefits. The union grieved on the basis that the employees' entitlement to the benefits had vested and even those who elected to receive statutory early retirement pension benefits should be entitled. The arbitrator dismissed the grievance.

In Alberta, the Court of Queen's Bench dealt with a claim for compensation against the province in the case of *Calder v. Alberta*.[15] In 1994, the Alberta government closed a pension plan for managers (Closed Plan) and started a new pension plan – Management Employees Pension Plan (MEP). A small group of employees who had left their employment with the Alberta government prior to the MEP coming into effect, and then returned to such employment as public service managers after 1994 were entitled to pensions under both plans (the Returning Managers). The administrator of both the plans determined in 2009 the basis for the calculation of the Returning Managers' pensions under the Closed Plan. A subsequent review in 2012 determined that the 2009 interpretation was incorrect. Between 2009 and 2012, a number of Returning Managers were advised of their pension entitlements based on this incorrect interpretation. Their pensions were reduced when they were advised of the error. One of the Returning Managers (Calder) sued the administrator and the province. The Court agreed with the administrator's 2012 interpretation of the Closed Plan, rejected Calder’s arguments on the basis of vested rights, estoppel, and breach of fiduciary duty, but found that there had been negligent misrepresentation, entitling Calder to damages.

In *International Brotherhood of Electrical Workers, Local 1007 v. Epcor,*[16] the same court in Alberta dealt with a judicial review of a labour arbitration award concerning an employer's LTD policy which expressly terminated access to LTD benefits when the employee became entitled to full pension by reason of age and service years. The union grieved, alleging discrimination on the basis of age or disability and failure to accommodate when the grievor was forced to resign and access his pension instead of being able to access LTD benefits was dismissed. The Panel determined that LTD plan was discriminatory based on age but that it was saved under s. 7(2) of Alberta Human Rights Act, which allowed such discrimination if it was part of bona fide group or employee insurance plan. The union's application for judicial review was dismissed.

The final case from Alberta concerned the interaction of insurance contracts, administrative-service-only (ASO) agreements and collective agreements. In *Certainteed Gypsum Canada Inc. v. Cement, Lime, and Gypsum and Allied Workers, International Brotherhood of Boilermakers*

---

[13] 2017 BCSC 709.
[14] 2016 CanLII 62603.
[15] 2017 ABQB 162.
[16] 2016 ABQB 574.

Lodge D345[17], after elective eye surgery, the grievor filed a claim for weekly indemnity insurance with the employer's group insurance benefits provider. The grievor's claim was denied and the union grieved. The union argued that the company had unilaterally changed the weekly indemnity insurance plan from an Administrative Services Only ASO arrangement with the benefits provider (Sun Life) to a Sun Life insurance plan during the term of the collective agreement, without providing notice or consulting with the union. The arbitrator held that the employer's decision to move from an ASO arrangement to full insurance did not violate the collective agreement, but held that the employer had failed to fully meet its obligations to provide weekly indemnity for "ill health or injury".

The issue of unilateral changes and collective agreement requirements was also the focus of a case from Saskatchewan. In *Saskatoon (City) v The Amalgamated Transit Union, Local No 615*[18], a Saskatchewan Labour Arbitration Board prevented the City of Saskatoon from implementing amendments to a Pension Plan without the consent of one of the affected unions, Amalgamated Transit Union Local 615. The Board relied on language in the Collective Agreement between the Union and the Employer that stated that the parties shall negotiate from time to time regarding the Plan.

The final two cases in this year's top 20 come from the East Coast. In *Plourde v. Brookfield Asset Management Inc.*[19], the New Brunswick Court of Queen's Bench dealt with a claim by a retiree whose pension was reduced as a result of the CCAA restructuring proceedings of Fraser Papers. As part of the CCAA proceedings, the company sold the pulp mill where the plaintiff used to work to Twin Rivers Paper Company Inc. Plourde sought to make up for his losses by commencing an action against Twin Rivers and Brookfield Asset Management Inc., one of Twin Rivers' shareholders. The Court dismissed the action on the basis that there was no contract between the Plaintiff and Twin Rivers and on the basis that Twin Rivers had not administered the pension plan.

Finally, the decision in *Skinner v. Board of Trustees of the Canadian Elevator Industry Welfare Trust Fund*[20] may have attracted the most attention of all cases this year, although it has limited jurisprudential relevance. In that case, the Nova Scotia Human Rights Commission has confirmed that denying access to medical marijuana can be discriminatory in certain contexts. Mr. Skinner was involved in a motor vehicle accident while working at ThyssenKrupp Elevator Canada in August, 2010. Afterwards he developed chronic pain, anxiety, and depression disorders and was unable to work. After seeking to manage his medical conditions by way of more conventional drugs, he was prescribed medical marijuana. The marijuana was initially covered by his motor vehicle insurance, but when that was depleted he sought coverage for the drug under the Canadian Elevator Industry Welfare Trust Plan. His claim was rejected, and he filed a human rights complaint alleging discrimination on the grounds of disability. The adjudicator determined that this denial of coverage was a disadvantage which, coupled with the fact that the Trustees had considered the complainant's disability, was sufficient to amount to a *prima facie* finding of discrimination. The respondents had little evidence to refute this finding

---

[17] 2016 CanLII 31212.
[18] 2017 CanLII 37003.
[19] 2016 NBQB 171.
[20] 2017 CanLII 3240.

and the adjudicator determined that the Trustees were required to accommodate the complainant's request for coverage of his medical marijuana prescription.

Case Summaries

Ontario Decisions

1. ***Alexander v. Ontario*, 2016 ONSC 7059**

   In this class proceeding, members of two pension plans who were transferred to another plan during administrative restructuring sued the Province of Ontario for compensation for a drop in benefits that flowed from the transfers to the new plan. The representative plaintiff reached a settlement with the Province, which the Court approved, along with an amendment to the class definition and approval of class counsel fees.

   The affected individuals – estimated to number 365 – were employees of municipalities or service providers associated with municipalities who provided homecare and co-ordination placement services, who were transferred to Community Care Access Centres in 1996-7 when the Province restructured the community care sector. The majority of class members had been members of the Ontario Municipal Employees Retirement System ("OMERS"), but had to leave OMERS once they were no longer municipal or municipal-affiliated employees, and were transferred to what is now the Health Care of Ontario Pension Plan ("HOOPP"). A minority of class members had been with the Victorian Order of Nurses ("VON") Pension Plan rather than OMERS, and were also transferred to HOOPP – the class definition was amended such that these persons could take part in the settlement.

   The alleged damages giving rise to the claim flowed from the failure of the Province to ensure that it met an alleged binding commitment to CUPE that affected employees would see no loss to their pension benefits as a result of the transfer to HOOPP.

   The approved settlement paid each class member $2,500.00 in compensation for the loss flowing from the pension plan transfer. This was a similar amount to two related, but much earlier settlements for other groups of employees whose pension benefits were negatively affected by the CCAC restructuring process, where each member received $2,700.00. In the case at bar, the Province also intended to rely upon a defence that the claims were beyond the limitation period, which had not arisen in the earlier actions, and increased risk for the class. While two class members objected on the basis that their claimed losses were much higher than the settlement amount, the Court found the settlement was appropriate given the risk involved.

   Class counsel fees of $75,000.00 were also approved, being much less than class counsel's actual fees and disbursements of at least $331,113.79.

2. ***Coco Paving Inc. v. International Union of Operating Engineers*, *Local 793,* 2017 CanLII 8326**

The Ontario Labour Relations Board in *Coco Paving Inc.* confirmed that the proper place for an employer to seek reimbursement of an overpayment of pension plan contributions is before the Superintendent of Financial Services.

Upon discovering that it had been making overpayments into a jointly sponsored plan for a four-year period, the Employer brought a grievance against the Union. The Union brought a motion to dismiss the grievance on the grounds that the alleged overpayment of contributions is within the exclusive control of the Superintendent of Financial Services. The Union relied on section 62.1 of the *Ontario Pension Benefits Act*, which expressly required the Superintendent's consent before any monies can be taken out of the pension fund to reimburse an employer for an overpayment. In response, the Employer first argued that the subject matter of the grievance is fundamentally about the interpretation and application of the collective agreement. The Employer also asserted that any alleged overpayments should be dealt with by the Board since unions appear regularly before the Board to seek redress for any underpayments by the employer to the pension plan.

The Board agreed with the Union that the legislature has created a specific statutory process to address the precise issue of overpayments. The Board also acknowledged that the Superintendent had specific expertise in pension issues, which is something that the Board does not possess on an institutional level.

The Board did not dismiss the grievance, but concluded that it should be held in abeyance until the final decision from the Superintendent is issued.

3. ***Labatt Brewing Company Limited v. Service Employees International Union Local 2 (BGPWU)*, 2016 CanLII 82630 (ONLA)**

In 2016, Labatt entered into a contract with Express Scripts Canada ("ESC") for the provision of certain medications under employee benefit plans, and made its use compulsory for all employees. According to Labatt, the ESC is a low cost pharmacy that sources drugs from the same wholesalers used by regular retail pharmacies, and offers free delivery, online refills, and auto-refill services. The ESC program was implemented as a cost-saving measure, directed at "maintenance" drug prescriptions, which treat chronic medical conditions.

The collective agreement provided that bargaining unit employees were entitled to the reimbursement for the cost of prescription medication, subject to dispensing fees. The union argued that Labatt breached the collective agreement by unilaterally making use of the ESC mandatory, and refusing to reimburse employees who obtained their prescription drugs at retail pharmacies.

According to an agreed statement of fact between the union and company, certain employees faced major issues with the ESC, including, among other things: difficulty receiving deliveries of medication due to work schedules; issues with temperature or light-sensitive medication being left in mailboxes in the heat of the summer; having to

wait for delivery of medication when a dosage is adjusted; and, general issues with the wrong dosage of medication being delivered.

The arbitrator held that the grievance was not about the utility or merits of the ESC program, but whether, under the collective agreement, the Company could implement the ESC program on a mandatory basis and deny reimbursement for the cost of prescription maintenance medication to employees who do not use the ESC program to obtain that medication.

The arbitrator held that while the Company can adopt any prescription medication program it wishes, it cannot unilaterally adopt a program which denies a bargaining unit employee compensation for their prescribed medicine. In other words, the Company could encourage the use of the ESC program, but could not deny claims from employees who obtained medication at regular retail pharmacies, as that violated the broad wording in the collective agreement entitling employees to "reimbursement" for their medications.

4. ***Re Nortel Networks Corporation et al*, 2017 ONSC 700**

After nearly eight years of litigation, both the Ontario Superior Court of Justice (Commercial List) and the United States Bankruptcy Court released decisions from the bench sanctioning the Plans of Compromise and Arrangement effecting a settlement between all major stakeholders in respect of the allocation of $7.3 billion held in escrow.

The cross-border sanction hearing followed a meeting of the affected unsecured creditors to consider and vote on the Plan. In its reasons approving the Plan, Justice Newbould of the Ontario Superior Court of Justice noted that the Plan was approved by an overwhelming majority of the affected creditors, with 99.97% in number and 99.24% in value voting to approve the Plan. In the circumstances, Newbould J. was satisfied that the Plan is fair and reasonable. The Plan represented a compromise reached among all of the parties after extensive negotiations. Justice Newbould recognized the hardship faced especially by former employees, pensioners, LTD Beneficiaries, surviving spouses of former employees and their beneficiaries in the length of time it has taken to get to a settlement and the depletion of assets following successful asset recoveries. Under the Plan, payments to creditors are made on a *pari passu* basis, which Newbould J. noted, is the bedrock of Canadian insolvency law.

However, two self-represented long-term disability beneficiaries ("**LTD Beneficiaries**") objected to the sanctioning of the Plan and requested that $44 million be set aside, while the Court reconsiders the 2010 Employee Settlement Agreement, which they alleged violated their sections 7 and 15 *Charter* rights. In accordance with the 2010 Employee Settlement Agreement, the LTD Beneficiaries are bound to the provision that their claims are to rank as unsecured claims that share *pari passu* with other unsecured claims and that any claim for priority treatment is to be released. Therefore, Justice Newbould found that the LTD Objectors had no basis to make the request. He held that the LTD Beneficiaries have been treated in the same manner as all similarly situated creditors, without discrimination, and will receive the same *pari passu* treatment under the Plan. Justice Newbould also noted that the LTD Objectors did not raise any *Charter* challenge to the 2010 Employee Settlement Agreement and issue estoppel would prevent the Objectors from now raising a *Charter* challenge to those provisions.

5. ***North Eastern Ontario Family and Children's Services v. Ontario Public Services Employees Union, 2016 CanLII 75012 (ON LA)***

OPSEU had filed five grievances requiring the interpretation of a new clause in the insured benefits plan, stating that benefits coverage for disabled employees would terminate on the earlier of 12 months from the date of disability or the date that eligibility ceased under the plan. The issue before the labour arbitrator was whether this clause should terminate the coverage for employees who were already off work on LTD benefits, and the arbitrator found that it should not.

In 2012, the employer North Eastern Ontario Family and Children's Services was created as a result of an amalgamation of three unionized entities, each with different benefit plans. During negotiations with OPSEU, the combined language of the plans was used to develop the language of the clause. Although the clause was discussed in bargaining, parties did not discuss how it would affect disabled members receiving long term disability benefits. A year after ratification of the new collective agreement, the employer sent letters to a number of bargaining unit employees advising them that, should they remain on LTD until June 2015, their health and dental benefit coverage would be discontinued.

OPSEU filed on behalf of four grievors on sick leave and one on long term disability who had resigned. The union argued that the plain and ordinary meaning of the clause referred only to employees who had become disabled after the clause was introduced. Alternatively, the notions of "vested" rights and general fairness supported the continuation of benefits to those who bore their premium payments. The employer argued that, in the absence of language to the contrary, the clause applied to all employees. It also argued that the loss of benefits to these employees was a fair trade-off in bargaining, and that because the union's attention was drawn to it in bargaining, the union was now estopped from claiming it did not apply.

The arbitrator disagreed with the employer and upheld the grievances. On a basic interpretation of the collective agreement, the arbitrator reasoned that coverage for the four grievors would have terminated a long time ago if it were to terminate 12 months after each grievor's disability occurred. However, it did not terminate at that time because the clause was not in force. The language "from the date of any disability", refers only to employees that have not yet reached the 12 month mark, and there was no need for grand-parenting language to make this clear. The arbitrator dismissed the employer's argument that simply drawing the union's attention to the clause was determinative of the clause's effect. Since the union did not make any representation as to how the clause applies, it was not estopped from arguing it did not apply to these employees.

As a corollary to the principle that clear and express language is required to establish a monetary entitlement, the arbitrator highlighted that the clear and specific language would also be required in order to terminate a monetary benefit that employees have long enjoyed. Since the language in this clause did not clearly terminate the benefit, the arbitrator declared it did not apply to the grievors – with the exception of the fifth grievor whose benefits were terminated upon resignation, according to the agreement.

6. ***Oakland Construction Services Inc v. Labourers' International Union of North America, Local 183*, 2016 CanLII 88446 (ONLA)**

In *Oakland Construction*, the arbitrator asserted jurisdiction to hear a grievance regarding collective agreements dating back to 1990, confirming arbitral jurisdiction over previous collective agreements in some scenarios where rights have accrued under those previous agreements.

LIUNA Local 183 brought grievances alleging that the employer failed to make pension payments in the amounts required by the collective agreements between 1990 and 2014. This decision was a preliminary determination by the arbitrator, Larry Steinberg, as to whether he had jurisdiction to hear the issue extending back to the 1990-1992 collective agreement, as the union asserted, or whether his jurisdiction only extended to the first day of the collective agreements under which the grievances were filed, being May 1, 2013, which the employer asserted.

The day-to-day administration of the Labourers' Pension Fund of Central and Eastern Canada (the "Pension Fund") is administered by the Pension Fund Office ("PFO"). PFO discovered the employer was failing to properly remit pension benefits under the collective agreement in 2014, after a random check revealed the employer's hourly pension rate had not gone up since 1994, and that contributions may have owed dating back to 1990.

The arbitrator followed *Huntsville District Nursing Home and ONA (Chipperfield) (Re)*, [2011] OLAA No. 15, which outlined the pre-conditions for arbitral jurisdiction over claims which arose under previous collective agreements:

1. The employment right must have accrued, vested, or crystallized under the previous collective agreement;

2. The arbitrator must determine whether the grievance has been filed under the previous collective agreements where the claim in question "crystallized" – in other words, the claim must make direct reference to language in the previous collective agreements;

3. The grievance must satisfy procedural or timeliness provisions in the collective agreement, subject to their modification by statute.

The arbitrator followed the Supreme Court of Canada decision *Dayco (Can.) Ltd. v. CAW*, 1993 CarswellOnt 883 (SCC), holding that promises to pay retirement benefits are in the nature of accrued rights, which survive the expiration of a collective agreement. The arbitrator further held that there was no "meaningful difference" between retirement benefits and the employer's promise in this case to make payments to the Pension Fund.

The arbitrator held he was "strengthened" in his view that the right to the contributions was a vested, or crystallized, right due to provisions of the *Pension Benefits Act*, which state that funds not paid by the employer into the plan are held in trust by the employer for the beneficiaries of the plan, and such funds accrue on a daily basis. These provisions

reinforced the argument that violations of the collective agreement relating to pensions may be remedied retroactively.

With regard to the second pre-condition in *Huntsville*, the arbitrator held that the grievances were clearly brought under the previous collective agreements under which the claim had crystallized.

Finally, regarding the third pre-condition, the arbitrator refused to address the timeliness issue as the parties had agreed to address the issue in a future hearing, including the application of the *Limitations Act*.

7. ***Tibbett & Britten Group Canada Inc. v. Sobeys Inc*., 2016 ONCA 861**

In *Tibbett & Britten Group Canada Inc. v. Sobeys Inc.*, the Ontario Court of Appeal considered whether Sobeys was contractually obligated to fund the deficit in an employee pension plan following the wind-up of that plan.

Oshawa Foods and Surelink entered into parallel asset sale and warehouse and transportation agreements (WTA) with Surelink. Ottawa sold its warehousing and distribution assets to Surelink and Surelink agreed to provide warehousing and transportation services to Oshawa. The WTA agreement provided that Surelink would be responsible for former Oshawa Foods' employees; assuming responsibility for employee benefits under the existing pension plan.

Following Sobey's acquisition of Oshawa, Sobeys terminated both agreements with Surelink, which resulted in the termination of Surelink employees and subsequently triggered a wind-up of the pension plan.

The application's judge assessed the extent to which Surelink's pension plan obligations reverted to Oshawa's successor upon termination of the agreement and wind up of the pension plan. The judge ultimately found that the WTA terms required Sobeys to reimburse the amount required to fund the deficit of the plan upon wind up, and that Sobeys and Tibbett, Surelink's successor, had reached a new agreement wherein Sobeys was responsible for funding the deficit.

Sobeys challenged these findings on the basis that it was only obligated to reimburse reasonable costs rather than the entire plan deficit, and that there was no agreement for them to assume responsibility for funding the plan deficit. Sobeys also argued, in the alternative, that any claim under either agreement was statute-barred pursuant to the *Limitations Act*.

The Court concluded that the application's judge did not err in finding Sobeys responsible to reimburse Tibbett for the amount to refund the plan deficit given that this conclusion was supported by both the business context in which the agreements had been made and the post-contractual conduct of the parties. The Court also upheld the judge's finding that the parties, after finalizing matters relating to the WTA, entered into a new agreement wherein Sobeys was responsible for the ongoing administration of the plan. Lastly, the Court found Tibbett's claim was not statute-barred because Tibbett was entitled to

assume, without any indication or notice to the contrary, that Sobeys was fulfilling their obligations in regards to the plan deficit. As such, the appeal was dismissed.

8. ***Victorian Order of Nurses for Canada (Re)*, 2016 ONSC 5540**

In *Victorian Order of Nurses for Canada (Re)*, the ONSC dismissed a motion by the Ontario Nurses Association ["ONA"] for an order directing VON Canada to restructure its pension plan in order to shield members employed at VON Ontario from potentially having to subsidize other regional VON entities.

VON Canada had a multi-jurisdictional pension plan with members drawn from VON East, VON West, VON Ontario, VON Nova Scotia, and VON Ontario. VON East and VON West were no longer financially viable. VON Ontario members were concerned that unless steps were taken to segregate the VON East and VON West members, VON Ontario could, in the future, be required to subsidize VON East and Von West members' participation in the pension plan going forward, particularly with regard to shares of pension plan deficits.

The ONA brought a motion seeking an order under s. 11 of the *Companies' Creditors Arrangement Act* ["*CCAA*"], directing VON Canada to initiate a process by which all of the assets and liabilities of the pension plan attributable to VON Ontario's present and former employees would be transferred out of the VON Canada pension plan into a new pension plan for VON Ontario employees. ONA also sought a declaration that VON Ontario was not jointly and severally liable to fund any solvency deficiency or funding shortfall that had or might arise as a result of the other entities failing to meet their contribution obligations under the VON Canada pension plan.

The motion followed the withdrawal of a pension plan restructuring motion by VON Canada. VON Canada had withdrawn the motion because it had become clear that it could not be implemented, as had been hoped, in a quick or cost-effective manner with minimal opposition and minimal disruption and claims against the continuing VON entities.

The Court dismissed the ONA's motion, framing the question in the following way: "should the proposal of a party with a limited, and undeniably self-interested, stake take precedence over the considered business judgment of the applicant, acting in conjunction with the court-appointed Monitor, creditors and other stakeholders?"

The Court concluded that the ONA motion was, in substance, an attempt to invoke the discretion of the court under s. 11 of the *CCAA* to affect a result which was not consistent with the policy objectives of the *CCAA*, and which was contrary to the business judgment rule, given that the VON Canada board had already given careful consideration to the pension plan restructuring option and rejected it.

9. ***Webb v. TD*, 2016 ONSC 7153**

In this case, a former Toronto Dominion Bank branch manager sued his former employer's investment arm, TD Waterhouse Canada Inc. ("TD"), for alleged misrepresentation, undue influence, and negligence, following his decision to withdraw

the commuted value of his pension following his termination and invest it with TD on advice of a TD investment advisor he consulted. The value of the plaintiff's investment dropped due to market conditions, leaving him with much less money than he expected.

The defendant brought a summary judgment motion on the basis the plaintiff's claim was statute barred because the limitation period had expired. The Court agreed, and granted the defendant's motion on that basis.

The Court nevertheless offered an analysis, in the alternative, of whether the plaintiff's claim would have succeeded on the merits, and found that it would not have. The Court placed significant weight on the plaintiff's experience as someone who had spent decades as a relatively senior bank employee as indicating he knew, or ought to have known, the risks associated with the decision to invest his commuted pension payout as he did rather than electing to receive his pension payments according to the schedule set out by the plan. On the facts, the Court also found the TD employee advising the plaintiff had done her due diligence, and the plaintiff was therefore responsible for his own loss.

British Columbia

10. ***Feldstein v. 364 Northern Development Corporation*, 2017 BCCA 174**

Recent jurisprudence from British Columbia confirms that pre-employment discussions made to a prospective employee can affect their entitlement to benefits, despite their otherwise medical ineligibility.

In 2012, Cary Feldstein, who suffers from cystic fibrosis, accepted an offer of employment from 364 Northern Development Corp. ("364"). Knowing that he would not likely qualify for benefits if a medical examination was required, Mr. Feldstein disclosed his condition to his interviewer, 364's Chief Information Officer (the "Officer"). Additionally, he inquired about eligibility for LTD coverage under 364's benefit plan. Specifically, Mr. Feldstein asked the Officer what was meant by the "proof of good health" that was required to become eligible for benefits under the plan. He was advised by the Officer that there was a 3-month waiting period prior to the benefits becoming effective. Mr. Feldstein understood this to mean that working at 364 for 3 months, without illness, would qualify him for benefits. He accepted the offer of employment on the basis of this impression.

Mr. Feldstein's condition caused his health to decline dramatically the following year. At that time, he discovered that he was not in fact eligible for full LTD benefits because he had failed to fill out a medical questionnaire upon enrolling in the benefits program. Mr. Feldstein subsequently proceeded against 364 in tort for negligent misrepresentation and was successful at trial. The trial judge awarded him his outstanding benefits as well as $10,000.00 in aggravated damages. 364 appealed the trial judge's decision.

364 made a variety of arguments on appeal. Firstly, 364 argued that the "entire agreement" clause contained in the Mr. Feldstein's employment agreement extinguished his right to bring his action. However, the Court of Appeal was satisfied that the entire agreement clause did not exclude 364 from liability for negligent misrepresentation. The

Court found that because the matter of eligibility for LTD benefits was not an express term in the contract itself, the entire agreement clause could not preclude the claim for negligent misrepresentation. Additionally, the Court found that the exclusion clause had to be strictly construed against 364 because Mr. Feldstein was not a "commercially sophisticated actor". As such, the clause could not be read liberally to address an issue such as LTD eligibility, which was not expressly mentioned.

Secondly, 364 argued that the trial judge erred by misapplying the legal test for negligent misrepresentation. It argued that the statement made to Mr. Feldstein regarding eligibility for LTD benefits was not misleading, that 364 did not breach its standard of care, and that Mr. Feldstein's reliance on the statement was not reasonable. The Court of Appeal unanimously disagreed, finding that the eligibility requirements were not accurately communicated to Mr. Feldstein when he made his inquiry. In addition, the Court found that the Officer had a positive duty of care to be honest and to take reasonable care in ensuring that pre-employment representations to prospective employees were accurate. The Court found that the officer breached this duty to Mr. Feldstein. Finally, the Court of Appeal was satisfied that Mr. Feldstein's reliance on the officer's statement was reasonable given the Officer's position, experience, and apparent confidence with which he responded to Mr. Feldstein's inquiry.

With respect to damages, the Court of Appeal was reluctant to interfere with the lower court's award of 40 months of lost LTD benefits because Mr. Feldstein's losses were reasonably foreseeable and because the lower court was entitled to deference on the question of quantum. However, the Court reversed the lower court's decision to award aggravated damages because 364 did not act in a high-handed, dishonest, or offensive manner towards Mr. Feldstein.

11. ***Office of the Superintendent of Pensions (Re)*, 2017 BCIPC 17**

In Office of the Superintendent of Pensions (Re), 2017 BCIPC 17, the British Columbia Office of Commissioner of Information and Privacy ("OIPC") dealt with a case in which The Independent Contractors and Business Association ("IBCA") had requested recent pension plan filings for 16 union-sponsored pension plans from Office of the Superintendent of Pensions at the Financial Institutions Commission ("FICOM"). Prior to 2012, FICOM had granted similar requests without considering the application of s.21 (harm to third party business interests) of the Freedom of Information and Privacy Act ("FIPPA"). In a 2012 decision, FICOM withheld a portion of the records citing s.21, and in a 2015 decision it withheld all of the requested information.

OIPC Adjudicator Elizabeth Barker reviewed FICOM's decisions. She found that s.21(1)(a) of FIPPA applied to the information in dispute—all of the information is financial information of or about the pension plans, and the $/hour contribution rates are of or about the unions. She also found that s.21(1)(b) applied to all the information except $/hour contribution rates—all of the information was supplied to FICOM in confidence, except the $/hour contribution rates which are generally recorded in publically accessible collective agreements. Ms. Barker was not persuaded, however, that disclosing the information could reasonably be expected to result in the harms in either ss.21(1)(c)(i) (harm to competitive position) or (iii) (undue financial loss or gain).

Ms. Barker determined that the decision in Bricklayers and Stonemasons Union, Local 2 Ontario Pension Plan (Trustees of) v Ontario, 2016 ONSC 3821, was not persuasive because it did not reveal what evidence was before the Information and Privacy Commissioner of Ontario to establish a "clear and direct" connection between the disclosure of particular information and the harms alleged.

Ms. Barker also considered the application of s.22 of FIPPA (disclosure harmful to personal privacy). She found that the aggregate data requested constituted information about a group and not about any specific individual, and also that the groups were not sufficiently small to allow someone to determine a particular individual's age, annual hours worked, pension entitlements, etc. As such she determined that s.22 did not apply.

Ms. Barker ordered that FICOM provide access to the information in dispute.

12. ***Teck Coal Limited v. United Steelworkers, Local 7884,* 2016 CanLII 62603**

A British Columbia labour arbitrator has dismissed a Union's grievance claiming that the Employer violated the collective agreement covering its employees by unfairly altering retiree benefits, where the distinction in treatment among differently situated "retirees" and the provision of post-retirement benefits was always intended, and the practice had never changed.

The controversy in this grievance arose because of the discrepancy in treatment among the four categories of retired workers of Teck Coal Limited ("Teck"). Specifically, because Post Retirement Benefits ("PRBs") were not mentioned in the Collective Agreement, Teck denied PRBs to those who did not strictly classify as "retiree," despite those employees' early retirement.

The employer classified its employees as eligible for retirement under one of the following four groups:

- Normal Retirement (after age 65);
- Unreduced Early Retirement (after age 55 with over 30 years of service);
- Reduced Early Retirement (after age 55 with over 20 years of service); or
- Statutory Early Retirement (after age 55 with a minimum 2 years continuous plan membership).

Upon retirement, the first three categories of employees become "retirees" who were eligible for PRBs. Those employees who chose Statutory Early Retirement were deemed to be "terminated" and were allowed to select either a deferred pension, an actuarially reduced pension, or the commuted value of their pension. Retired employees in this fourth category were not eligible for PRBs, and the Union asserted that those who elected a reduced pension rather than cashing out of the pension plan ought to be eligible for PRBs as they meet the requirements of being "55 and vested."

Teck established the PRBs and set the eligibility requirements. PRBs include provincial health care premiums, an extended health plan, and life Insurance. The only information

the Union had received on the PRBs over the last 23 years was an internal Teck document from 1993 ("the 1993 Memo").

Part of the disagreement was due to the dearth of information: though the pension plan was incorporated into the Collective Agreement, PRBs were not referred to directly in the Collective Agreement and were not historically brought to the bargaining table. However, since receipt of the 1993 Memo the Union had bargained some details of the PRBs, and negotiations in 2011 resulted in a raise to the maximum level of extended health plan coverage.

The Union used this prior negotiation as evidence to imply an enforceable commitment, as it accepted the terms of the 1993 Memo on its face and had negotiated the benefit level based on its understanding of the benefit eligibility. When the Union's current President began in 1993, the then Superintendent of Employee Relations who provided the 1993 Memo to the Union referred to the document as the "Bible on the interpretation of retiree benefits," and the Union had since treated it as such. The Union also noted that Teck is required under the Collective Agreement to provide it with current and "descriptive information relating to pension and welfare plans," implying that it is Teck's obligation to clarify any descriptions.

The 1993 Memo read in part:

> When an employee terminates full-time employment with Fording, and is eligible for early retirement, or regular retirement, in accordance with the respective pension plan text, he/she is transferred to our retiree roll, accordingly...
>
> Whether an employee commences early retirement (i.e.: age 55-65) or normal retirement (i.e.: age 65); he/she is eligible for additional retiree benefits [PRBs] ...

Given that the PRBs were set out only in the 1993 Memo, the Arbitrator's analysis considered the basis for that document. The following evidence was found useful:

1. **Statute:** The Union based their interpretation of the 1993 Memo on the fact that at the time, the British Columbia *Pension Benefits Standards Act* (the "PBSA") had recently been changed to allow those over age 55 with five years of continuous service to retire. The vesting period has since been reduced and then eliminated, and the Union believed that PRB eligibility tracked the PBSA.

   However, witnesses for Teck were clear that in practice, the Statutory Early Retirement category had never been considered an eligible class for receiving PRBs regardless of which option the employee chose upon termination.

2. **Pension Plan:** The Arbitrator found that the 1993 Memo should be interpreted first "in accordance with the respective pension plan text." Though there was evidence of a pension plan that was amended and restated effective in 1992, and which specifically provided for the PBSA-required election, it was not signed

until 1997. The Arbitrator thus found that the 1993 Memo relied on a 1989 restatement of the pension plan, which had no such statutory early retirement but did allow for a vested benefit after 7 years of continuous service. Only the three classes were thus deemed to be incorporated into the 1993 Memo.

3. **Employee Letter:** There was also evidence to clarify the view of the author of the 1993 Memo. Two years earlier, she had provided an estimated calculation of employee's pension. The employee was over 55 and had less than 20 years of service. The employee was advised that unless he worked the six more months and reached 20 years of service, he would retire with a pension but would not be eligible for PRBs.

4. **General Explanatory Documents:** There were also a number of other documents, including plan booklets, which refer to "eligibility requirements" or "eligible classes" but which do not define those terms. Teck agreed that there was no explanation available to the Union on who was eligible.

5. **Past Practice:** There were 14 employees who had elected Statutory Early Retirement between 1993 and 2014 and who were receiving PRBs without the 20 year service requirement, but the Arbitrator found that all but 3 were isolated circumstances rather than a change in practice, and one of the three was a clear mistake. There were also at least three employees who had retired over the same time period and who were not receiving the PRBs.

The Arbitrator applied the strict standard for reliance on past practice established in prior case law. The lack of a clear past practice and the fact that the Union had not been relying on this past practice for their interpretation of the 1993 Memo meant that this evidence was disregarded.

As the eligibility requirements had never been discussed or reduced to writing, the Arbitrator was unable to find that the 1993 Memo could be deemed an "ancillary agreement." He also noted that even if it could be raised to that level, the Union's interpretation is not "clearly and unequivocally expressed" on its face, and was not supported by any other document in the record. Finally, according to the Union's view of the rules expressed in the 1993 Memo, employees would have been entitled to the full amount of PRBs after a single day of service and despite the fact that the rest of their pension benefits were to be reduced on an actuarial basis. Not quite an "absurd" outcome, but enough to defeat the Union's reasonable reliance on its interpretation.

13. ***Walter Energy Canada Holdings, Inc. (Re)*, 2017 BCSC 709**

In *Walter Energy Canada Holdings*, the Supreme Court of British Columbia refused to apply the "controlled group" provisions of *ERISA* legislation to find a Canadian group of companies (Walter Canada Group) liable with respect to a "withdrawal liability" of a U.S. Pension Plan arising in the course of a Chapter 11 proceeding.

The plan at issue, the UMWA 1974 Pension Plan (the "Plan"), was resident and administered in Washington D.C. The Trustees of the Plan were U.S residents, as were all participating employers. At the time of the hearing, for the purposes of ERISA, there was

a "withdrawal liability" of the Plan estimated to be almost one billion dollars. For the purposes of its claim, the Plan asserted that the *ERISA* legislation imposed liability for the withdrawal liability on all of Walter Canada Group, even though the group was composed of Canadian corporations and entities conducting their business entirely in Canada.

By way of background, ERISA legislation would generally impose a withdrawal liability on the contributing employer, but also on each member of that employer's "controlled group" – the purpose of this rule being to pierce the corporate veil in circumstances of multiple incorporations. In this case, there was no dispute the Canadian corporations met the test for being included in the U.S. parent's controlled group, as described by the Court:

> Under ERISA, a parent-subsidiary "controlled group" is a group consisting of entities connected through a controlling interest with a common parent where stock ownership of at least 80% of the voting power or value (other than the parent) is owned by one or more corporations and the common parent corporation owns stock with at least 80% of the voting power of at least one of the corporations.

Under the plain meaning of *ERISA*, the Canadian group would have been a member of the "controlled group" and liable. However, the key issue was whether *ERISA* applied to the claim against the Canadian corporations as a matter of choice of law.

The Court reviewed the choice of law issue and rejected the assertion of the Plan characterizing the claim as a matter of the law of obligations, and in particular, contract – which would have led to the conclusion to apply U.S. law, and therefore *ERISA*, as the "proper law of the obligation". The Court agreed with Walter Canada Group that the proper characterization of the claim was as a matter of the law of corporations, or an issue of legal corporate or partnership status.

Particularly, the Court commented that the claim centered around the applicability of *ERISA* to collapse the corporate structure of the group. In the view of the Court, a claim which purported to impose liability arising purely as a result of corporate relationships should be properly characterized as a claim concerning the status and legal personality of those corporations. Such a claim would, in the normal course, be subject to the Canadian choice of law rule that the status and legal personality of a corporation is governed by the place in which the entity was incorporated – in this case British Columbia or Alberta. The Court's review of other connecting factors did not alter this conclusion on choice of law. The Court therefore refused to apply ERISA to find the Canadian group liable.

This is the first case in which a Canadian court has considered the application of ERISA in such circumstances. The decision appears to indicate an unwillingness of Canadian courts to give force to U.S. "long arm" ERISA legislation with respect to the application of that legislation Canadian entities.

Alberta

14. ***Calder v. Alberta*, 2017 ABQB 162**

In *Calder v. Alberta*, the Alberta Court of Queen's Bench determined a negligent misrepresentation had been made by a public pension plan administrator when it incorrectly calculated and paid pensions for a specific class of managerial employees at a much higher amount then the statutory entitlement under the governing legislation.

In 1994, the Province of Alberta replaced an employer funded pension plan for managers (the "Closed Plan") with a new Management Employees Pension Plan (the "MEP"). The plaintiff, Dr. Calder, had left his employment prior to the MEP coming into force, but later returned. He was part of a group of approximately 25 similarly situated employees (the "Returning Employees").

In 2009, an internal legal opinion was done by APSC (the administrator) as to how to calculate benefits for these Returning Employees under the Closed Plan. This opinion (the "2009 Interpretation") calculated the pension on the basis of: 1) the highest 5 years of pensionable salary with the provincial public service at any time, 2) a COLA, and 3) an actuarial adjustment. The effect was to use relatively recent earnings to establish base pension entitlement in respect of pre-1994 service, and then further top-up those benefits with a COLA and actuarial adjustment, resulting in substantial pension entitlements for some members.

In 2012 a concern was raised as to this method of calculation, triggering a legal and actuarial review. The result was that APSC determined the pensions had been calculated incorrectly under the 2009 Interpretation. Under the new interpretation (the "2012 Interpretation"), salary after the 1994 transition period would not be taken into account in calculating benefits. The result of this change, communicated to Dr. Calder in 2014, was that his monthly pension would decrease from approximately $8,000 per month to approximately $2,000 per month.

While the Court determined that the 2012 Interpretation was correct based on its reading of the *Public Service Pension Plans Act*, the Court also considered the claims of the plaintiff relating to the original miscalculation of the pension.

Specifically, the Court dismissed the plaintiff's argument that he had a **vested right** to the original pension amount, finding that neither the law of trusts nor of contract could be stretched so as to require the ASPC to continue to indefinitely apply an incorrect statutory interpretation.

The Court similarly dismissed the plaintiff's argument on **estoppel**, finding both that the principal did not apply and that the doctrine of estoppel could not be used to compel the crown to perpetuate a mistaken interpretation of the law.

The Court also found that there was no breach of **fiduciary duty** on the basis that, in the context of a public pension plan, neither the Province nor ASPC owed a fiduciary duty to individual pension plan beneficiaries in these circumstances.

However, the Court agreed with the plaintiffs on the issue of **negligent misrepresentation**. In the Court's view, the misrepresentation as to the pension amount was communicated to the plaintiff on a number of occasions, and reasonably relied on to Dr. Calder's detriment.

With respect to damages, the Plaintiff had attempted to argue that the measure of his damages was the difference between his entitlement under the 2009 Interpretation and his entitlement under the 2012 Interpretation. However, in the Court's view the quantum of damages was not the damages that would put Dr. Calder in the same position had the original estimate been true, but the damages flowing from the communication of the misleading statement. The Court instead determined the measure of damages on the basis an alternative scenario, outlined by an actuary retained by the government, in which Dr. Calder waited until he was 68 to retire. The Court awarded $265,017.00.

This case provides a useful example of a negligent misrepresentation case in the context of a public pension. It provides clarity as to how damages can be calculated where an incorrect pension entitlement is communicated to a member.

15. ***Certainteed Gypsum Canada Inc. v. Cement, Lime, and Gypsum and Allied Workers, International Brotherhood of Boilermakers Lodge D345*, 2016 CanLII 31212 (AB GAA)**

In this grievance arbitration, the Grievor was absent for two weeks following elective eye surgery. When the Grievor filed a claim for weekly indemnity insurance with Sun Life, the Employer's insurance company for weekly indemnity and other group insurance benefits, Sun Life denied the claim.

Article 9.03 of the collective bargaining agreement ["CBA"] between his Union and Employer provided:

> 9.03 (a) The Company shall provide a Weekly Indemnity Insurance Plan for all employees covered by this Agreement. The benefits commence on the first day of continuous absence due to ill health or injury and shall extend to a maximum of twenty-six (26) weeks. The benefit payment shall be equal to seventy (70) percent of the employee's hourly rate as per Article 17.01 at time of absence times the number of regularly scheduled hours in the work week exclusive of overtime hours.

The Union submitted that the CBA had been violated when the Grievor was not reimbursed for the time he had been unable to work due to surgery. The Union argued that the company had unilaterally changed its weekly indemnity insurance plan from an administrative agreement to a pure insurance plan without consulting or giving notice to the Union – a contract violation. It argued that the ultimate responsibility for payment lay with the Employer and was subject to the grievance and arbitration procedure.

The Employer's position was that its obligation under the CBA was simply to maintain and bear the cost of a weekly indemnity plan, that Sun Life's decision-making was not subject to the grievance and arbitration process, and that the Grievor's only redress with

respect to the denial of benefits coverage by Sun Life was through the courts. This was based on a four category framework that had been adopted in previous cases to analyze benefit provisions under collective bargaining agreements:

> Category 1: A benefit plan or policy exists, but it is not mentioned in the collective agreement. There is no basis for employer liability under the agreement, and the matter is inarbitrable.
>
> Category 2: The collective agreement specifically provides for the payment of a benefit in certain circumstances. A grievance can be brought against the employer for failing to provide the benefit, whether or not the employer has taken out an insurance policy to cover the cost of the benefit.
>
> Category 3: The collective agreement stipulates that the employer must provide a particular type of benefit plan, and that the employer will pay the requisite premiums. This limits arbitrable claims to those in which it is alleged that the employer has failed to provide the specific insurance policy or plan contemplated by the agreement.
>
> Category 4: An insurance policy or benefit plan is incorporated by reference into the collective agreement.

The Employer argued that its indemnity obligations in this case fell into Category 3.

After a lengthy review of the case law, the arbitrator found:

1. The four category framework for classifying CBA benefit schemes continues to be widely adopted by arbitrators but, given the wide variety of language used, each CBA must be read carefully in determining into which category a particular plan best fits (Weyerhaeuser2; AHS).

2. Claim denials under benefit plans that fall into Category 1 (no mention at all in the CBA) or Category 3 (simply specifies that employer must provide and pay for a particular type of plan) are not arbitrable. Challenges to the claim disposition must be sought against the insurer not the employer (Dubreuil2; Coca Cola; PSAC).

3. Claim denials under benefit plans that fall into Category 2 (CBA provides for payment of benefits in certain circumstances) or Category 4 (insurance plan incorporated by reference into CBA) are arbitrable under the CBA and claim denials can be grieved against the employer (Canadian Labour Arbitration (4th); Weyerhaeuser2).

4. Clear language is required to incorporate an insurance plan by reference into a CBA (Collins & Aikman; Coca Cola).

5. Some benefit plans may be considered "hybrid" of Category 2 and Category 3 plans in that the CBA requires the employer to provide and pay for a benefit plans and also specifies certain details of the plan (Dubreuil2; Chromolax; Green Valley; Weyerhaeuser1).

6. Hybrid insurance plans are not arbitrable unless the employer has purchased an insurance plan that fails to provide the benefits specified in the CBA (West Fraser Mills; Green Valley; Coca Cola; Dubreuil2).

7. Arbitrators must exercise caution in converting claim denials by an insurer under hybrid benefit provisions into an "underinsurance" case in which liability for the claim denial falls on the employer (Weyerhaeuser1).

8. Employers have the right to change insurers or move from a self-insured to fully insured benefit plan unless the CBA says or can be interpreted to mean otherwise. Such changes can occur during the life of the CBA (Weyerhaeuser2).

9. In purchasing an insurance plan, an employer is only obligated to purchase a standard industry plan unless the CBA says otherwise (Weyerhaeuser1; Green Valley).

10. Given the long and mostly settled case law with respect to CBA insurance plans, the parties are presumed to understand the aforementioned principles when negotiating their collective bargaining agreements (PSAC; West Fraser Mills).

After applying these principles to the facts of the case, the Arbitrator found that this was a hybrid Category 3 insurance plan in which the responsibility of the Employer was limited to purchasing an insurance plan that met its specified contractual obligations. Its purchase of a fully insured weekly indemnity plan was not a violation of the CBA, but it was responsible for any shortfall that resulted from its weekly indemnity insurance plan failing to provide the benefits specified in the collective agreement. There was a shortfall in this case, and the Grievor was entitled to the difference.

16. ***International Brotherhood of Electrical Workers, Local 1007 v. EPCOR Utilities Inc.*, 2016 ABQB 574**

IBEW Local 1007 had filed a grievance on the application of EPCOR's employer LTD policy, which expressly excluded access to LTD benefits for those who reached pensionable age. The issue was whether this provision was discriminatory on the basis of age, and if it was, whether it was saved as a bona fide provision under section 7(2) of the *Alberta Human Rights Act (the Act).*

In 2011, the grievor had resigned from work in his physically demanding position due to back problems. He started receiving STD and LTD benefits. In 2012, when he reached pensionable age, his LTD benefits ended and he went on two unpaid leaves of absence. Although the employer looked for a different position suitable for him, he was advised one could not be found. The option to extend benefits while on unpaid leave had to be approved by the third party insurer Sun Life, but converting to an individual plan upon retirement did not require approval. Therefore, the grievor retired in 2013, transferred his

benefit coverage to an individual plan, and began receiving a full pension, but was no longer eligible for the LD benefits, which were more than his employer and CPP pension benefits combined.

The union filed a grievance on his behalf, arguing that the exclusion provision was discriminatory on the basis of his age, according to section 7 of the Act. The employer argued that the provision was a contractual term of "a *bona fide* group or employee insurance plan" and was therefore exempted from the anti-discrimination legislation under section 7(2) of the *Act*.

The arbitration panel confirmed that an LTD plan provision that only allows benefits until pensionable age is discriminatory on the basis of age. However, it held that the plan provision is saved as "a *bona fide* group or employee insurance plan" under section 7(2) of the *Act*. The panel's interpretation was guided by two Supreme Court of Canada decisions. In *Zurich Insurance Co v Ontario (Human Rights Commission)*, [1992] 2 SCR 321 (*Zurich*) the Court imposed a higher burden upon an employer by also requiring that the plan be "reasonable". In *Potash Corp of Saskatchewan Inc. v. Scott*, [2008] SCJ No 46 (SCC) (*Potash*) the Court only required that the employer establish the overall bona fides of the plan, and not each component part. It held that this burden will be met where the plan is not a sham, but legitimate, adopted in good faith, and not for the purpose of defeating protected rights. The panel was not satisfied that the LTD plan in this case met the higher standard imposed by *Zurich*, but it was satisfied that the plan was bona fide and thus protected by section 7(2) of the *Act*. The grievance was dismissed.

The union applied for judicial review of the panel's decision. The issue before the Alberta Court of Queen's Bench was whether the arbitration panel applied the correct test under the saving provision, and whether it correctly applied the test to the evidence. The union argued that there should be a distinction between the two cases relied on by the arbitration panel, in that the lower burden test from Potash only applies to pension plans, while the higher burden test from *Zurich* applies to insurance policies.

The Court disagreed with the proposition that the instrument at issue should determine the test, and instead relied on the wording of the legislation that each case was interpreting. It did not apply the higher burden from *Zurich* because that case decided what the phrase "reasonable and *bona fide*" meant under the saving provision in Ontario human rights legislation. It applied the lower burden from *Potash* because that case was more recent and decided what *bona fide* meant in Alberta's saving provision, which was the one at issue in arbitration. Since section 7(2) of the *Act* did not use the word "reasonable", the applicable test required only that the plan be legitimate, adopted in good faith, and not for the purpose of defeating protected rights.

The Court also rejected the union's contention that the panel did not have sufficient evidence to determine if the plan should be saved, because there was no evidence of reasonableness. The Court found the evidence of EPCOR's senior pension and benefits manager as sufficient. She described the LTD policy as covering eighteen months starting after the end of the six month STD plan. She also described a Joint Benefits Advisory Committee between IBEW and EPCOR. Therefore, the Court concluded that the panel

correctly applied the evidence to the test set out in *Potash*, determining that the policy was indeed *bona fide*, and therefore saved despite its discriminatory nature.

Other

17. ***Saskatoon (City) v The Amalgamated Transit Union, Local No 615*, 2017 CanLII 37003 (SK LA)**

In a recent decision, a Saskatchewan Labour Arbitration Board (the "Board") prevented the City of Saskatoon (the "Employer," or the "City") from implementing amendments to a Pension Plan (the "Plan") without the consent of one of the affected unions, Amalgamated Transit Union Local 615 (the "Union," or "ATU 615"). The Board relied on language in the Collective Agreement between the Union and the Employer that stated that the parties shall negotiate from time to time regarding the Plan.

This decision highlights that even where detailed, substantive pension provisions are not set out in the text of a collective agreement, a clause providing a union with a right to negotiate with respect to a pension plan can be sufficient to prevent an employer from acting unilaterally to modify a plan. This can be so even where the language of the provision does not expressly state that the union has a veto over plan changes.

The Union's members are part of the Plan, along with other employees represented by six other unions and two employee associations. On January 15, 2014, five of the unions involved in the Plan, not including ATU 615, and the two involved employee associations, signed an Agreement in Principle with the Employer agreeing to make certain changes to the Plan, including increasing contribution rates, and permitting the Employer to withdraw from the Plan up to $250,000 annually to cover administrative expenses.

The Union refused to sign the Agreement in Principle, either at the time of its creation or following attempts by the Employer to convince it to sign in the months after the initial signing of the other unions and employee associations. After receiving communications from the Employer that seemed to indicate the Employer would implement certain changes set out in the Agreement in Principle for all Plan members even without ATU 615's signature, the Union filed a grievance that the Employer was violating, among others, the following provision in its Collective Agreement:

> ***ARTICLE A21 – SUPERANNUATION***
>
> Superannuation Plan negotiations shall take place from time to time which may be separate from negotiations for the Collective Agreement. The appropriate forum for such negotiations shall be as agreed between the parties and may involve other members of the Pension Administration Board.

By the time the grievance reached arbitration, the Union was only grieving the Employer's intent to implement the charge against the Plan for administrative expenses of up to $250,000 per year – an intent that was carried out after the filing of the grievance.

The central substantive issue the Board had to determine was whether, on the language of the Collective Agreement suggesting negotiation between the parties with respect to the Plan, the Employer could make changes to the Plan without the consent of the Union.

The Union asserted that the Collective Agreement clearly contemplated changes being undertaken by negotiation. According to the Union, negotiation must reasonably mean not only that some discussions would take place between the parties prior to the Plan being modified, but that modifications could not be made without the consent of the Union.

The Employer responded that whatever rights to consultation the Collective Agreement may provide the Union had been satisfied. The parties had been in discussions for months regarding the Agreement in Principle, but had been unable to reach a mutually satisfactory resolution. The employer argued that absent clear, express contractual language giving the Union a veto over Plan changes (as could be found in the Employer's collective agreement with one of the other unions involved in the Plan), it would be unreasonable for the Board to constrain the Employer's ability to proceed with changes agreed to by all the other involved unions and employee associations.

The Board held that based on the wording of the relevant Collective Agreement provisions, it was clear the parties intended that the Plan be modified only by mutual agreement following negotiations, and that such an interpretation was also supported by the past practice of the parties reaching negotiated agreements prior to proceeding with Plan modifications.

In assessing the language of the centrally relevant Collective Agreement provision, Article A21, the Board took note of the fact that the word "negotiations" appeared three times. The Board conducted a lengthy analysis of interpretive principles, which it held could only support one interpretation of the meaning of "negotiate" – namely, that an inherent feature of negotiations is that they can only conclude with an agreement between the involved parties. The Board was unconvinced that the Employer had proposed any reasonable, coherent alternative argument as to what the parties intended "negotiations" to mean, having only argued Article A21 fell short of requiring the Union's consent to Plan modifications.

Further, the Board found that in the past, the parties had always treated the language of Article A21 as meaning the parties would modify the Plan only once they had agreed on the changes that would be made. The Employer had not tried to push through Plan modifications in the past without the Union's consent.

The Board held that the new provision for administrative expense deduction by the Employer was for its benefit, and was therefore contrary to the Plan's existing language, which prevented the diversion of funds for any purpose other than for the exclusive benefit of the Plan's members.

As a remedy, the Employer was ordered to repay to the Plan any administrative expenses it had taken for itself following its unilateral implementation of the new administrative expense charge.

18. ***Arrangegement relatif à Bloom Lake, g.p.l.0*, 2017 QCCS 284**

In May 2015, Wabush Iron Co. Limited, Wabush Resources Inc., Wabush Mines and other related entities (collectively, the "**Wabush CCAA Parties**") filed proceedings under the Companies' Creditors Arrangement Act (the "**CCAA**"). Since the head office of Wabush Mines is located in Montreal, the Wabush CCAA Parties filed for creditor protection in the Québec Superior Court.

The Wabush CCAA Parties provided two pension plans to salaried and unionized employees, which contained defined benefit schemes. The Wabush pension plans are registered in Newfoundland and Labrador and regulated by the Newfoundland & Labrador Superintendent of Pensions (the "**NL Superintendent**") in accordance with the Newfoundland & Labrador Pension Benefits Act (the "**NLPBA**"). Because some of the unionized employees covered by the plans work in federally regulated industries, the Union Plan is also subject to regulatory oversight by the federal pension regulator, the Office of the Superintendent of Financial Institutions ("OSFI").

Both the Salaried and the Union Plans are underfunded. Morneau Shepell, the actuarial consulting firm appointed by the NL Superintendent as the replacement pension plan Administrator, estimated the wind-up deficits as at December 16, 2015 to be approximately $26.7 million for the Salaried Plan and approximately $27.7 million for the Union Plan.

The Monitor filed a motion before the Québec CCAA Court for advice and directions with respect to the potential priority of the various aspects of the pension plan claims. The Monitor's motion sought to have certain questions about the interpretation of the NLPBA determined by the Québec CCAA Court.

As a preliminary matter, the NL Superintendent, the Representative Counsel of the salaried employees and retirees, and Morneau Shepell requested that certain issues concerning the scope of the deemed trust and of the lien and charge under Section 32 of NLPBA, as well as the interaction between the NLPBA and the federal and Québec pension statutes, be transferred to the Newfoundland & Labrador court (the "**NL Court**"). Pursuant to section 17 of the CCAA, a CCAA Court has jurisdiction to seek the assistance of another court. This approach has been approved in other insolvency proceedings where courts possessing nationwide jurisdiction under the Bankruptcy and Insolvency Act or under the CCAA have referred specific questions of provincial law to the courts of another province.

The Québec CCAA Court began by noting the general rule that issues arising in the context of insolvency proceedings are to be decided by a single court. However, pursuant to section 17 of the CCAA, there may be circumstances where it is more efficient for another court to deal with specific issues. The decision to refer certain issues to another court is therefore discretionary, based on factors such as cost, expense, risk of contradictory judgments, and expertise.

Despite the fact that questions on the scope of the deemed trust under section 32 of the NLPBA have not yet been considered by any court in Newfoundland & Labrador, the Québec CCAA Court declined to exercise its discretion to seek the aid of the

Newfoundland Court. The Québec CCAA Court concluded that there was nothing particular unique about section 32 of the NLPBA, since there are similar deemed trust provisions in the pension standards legislation of jurisdictions across Canada.

The Québec Court also rejected referring issues of Québec law or federal law to the Newfoundland Court. According to the CCAA Court, if those issues are too closely interrelated to the NLPBA issues, or if in the interests of simplicity and expediency they should all be decided by the same court, then the solution is not to refer any issues to the NL Court.

The Québec CCAA Court further examined the factual and practical considerations for referring specific issues to the Newfoundland Court. The CCAA Court rejected the submissions that this was a matter of purely local concern in Newfoundland & Labrador, given the equally large number of retirees currently residing in Québec, the location of certain facilities in Québec, and the Union's position that the case remains in Québec. Further, the CCAA Court expressed concerns over the possible delays that a referral might create.

While the Québec CCAA Court ultimately concluded that it would retain jurisdiction over the pension issues, including the interpretation of the NLPBA, it signaled an alternative way for such issues to be heard in Newfoundland & Labrador. Under section 13 of the province's Judicature Act, the government of Newfoundland & Labrador can refer a matter to that province's Court of Appeal. The government of Newfoundland was invited to do this by the CCAA judge, and as of the end of March 2017, it appears that the government will move forward with a reference to the Court of Appeal on this issue.

19. ***Plourde v. Brookfield Asset Management Inc.*, 2016 NBQB 171**

In *Plourde v. Brookfield Asset Management Inc.* the New Brunswick Court of Queen's Bench granted summary judgment dismissing the plaintiff's claim for breach of a pension plan agreement.

The plaintiff entered into a pension plan agreement with Fraser Papers Inc. to receive monthly pension benefits until his death. Fraser became insolvent and, while protected under *Companies' Creditors Arrangement Act (CCAA)*, sold certain assets to purchasers, including the defendants, with approval from the Court.

The plaintiff filed a claim for breach of contract against the defendant alleging that as former shareholders of Fraser's successor employer, Twin Rivers Paper, they were responsible for losses he incurred as a result of his benefits being reduced. The defendants filed a summary judgment motion to dismiss the action on the basis that Twin Rivers was not Fraser's successor because they only purchased some assets of the company.

The Court granted summary judgment, finding no genuine issue for trial. The asset sale agreement stated that Twin Rivers would not be liable with respect to Fraser's pension plans, and the CCAA Order barred any claim against the defendants relating to Fraser's pension plans. The CCAA Order also indicated that the defendants were not successors to Fraser, and section 99.92(1) of the *New Brunswick Pension Benefits Act* provided that,

notwithstanding the sale of all or part of the business of, or the assets of, Fraser Papers to Twin Rivers, Twin Rivers shall not be deemed to be a successor employer to Fraser Papers. As a result, the plaintiff's claim against the defendants was unmeritorious.

20. ***Skinner v. Board of Trustees of the Canadian Elevator Industry Welfare Trust Fund*, 2017 CanLII 3240**

The decision of *Skinner v. Board of Trustees of the Canadian Elevator Industry Welfare Trust Fund* reminds employers and administrators of health and welfare plans that reasonable accommodations for benefits requests can include medical marijuana under the right circumstances. This is in line both with recent jurisprudence on how to handle issues relating to medicinal marijuana in the workplace. This case is set in a specific legal and contractual context, but helpfully lays out a clear analytic framework for the different limitations on administrators when presented with a request for medical marijuana to be covered under a health and welfare plan.

Briefly, the complainant Mr. Skinner was involved in a motor vehicle accident while working at ThyssenKrupp Elevator Canada in August, 2010. Afterwards he developed chronic pain, anxiety, and depression disorders and was unable to work. He has been on long term disability and income replacement benefits since the accident.

For two years he was able to manage his medical conditions by way of more conventional drugs, but in the summer of 2012, he was prescribed medical marijuana. The drug was initially covered by his motor vehicle insurance, but when that coverage was depleted he approached the Board of Trustees for the Canadian Elevator Industry Welfare Trust Fund (the "Trustees") as they were responsible for the management of his health benefits through the Canadian Elevator Industry Welfare Trust Plan ("the "Welfare Plan").

Mr. Skinner contacted the administrator of the Welfare Plan after his initial application for coverage was denied by the Worker's Compensation Board. The Trustees considered Mr. Skinner's request twice, and both times denied it based on the fact that 1) medical marijuana was not an approved drug under the Welfare Plan terms as it did not have a drug identification number ("DIN"), and 2) that his medical expenses should be covered by a provincial medicare plan rather than by the Welfare Fund.

Mr. Skinner then appealed under the *Human Rights Act* (the "Act") to the Human Rights Commission, who referred the complaint to a board of inquiry.

The board first looked at whether medical marijuana could be deemed an eligible medical expense, though it admitted it did not have the jurisdiction to conclude that the Trustees misinterpreted the Welfare Plan. The board relied on two recent labour arbitration cases, one in which the benefits plan explicitly required a DIN for covered prescriptions and one in which, because the benefits plan allowed coverage for drugs *and* medication, the prescription was deemed to be eligible "medication." The board also concluded that the Welfare Plan lacked exclusionary definitions for key terms. A close analysis of the Welfare Plan text led to the conclusion that medical marijuana was a drug or a medicine under the plan, and that the Trustees were only limited in their authority to grant coverage by economic sustainability considerations.

The decision also recognized the current complexity of the legality of marijuana in Canada, citing numerous cases and legislation and acknowledging that none were "directly applicable" to the Human Rights arena. Previous cases, requests, and decisions had all been dealt with by an interpretation of the particular statutory or contractual provisions at issue. This case, on the other hand, dealt solely with the reasonableness of the complainant's request for coverage and prior cases on medical marijuana were of limited guidance.

In this context, the board took the time to analyse the importance of marijuana to the complainant. Both the complainant and respondent agreed it had "significantly improved" his functioning as well as reducing the other medications he had been taking beforehand. In the board's interpretation, all but one of the many medical and expert opinions presented to the board supported Mr. Skinner's use of medical marijuana and agreed that it improved his functionality. The board of inquiry ultimately concluded that medical marijuana was medically- necessary for the complainant.

The complainant in human rights cases must first establish that there is a *prima facie* case of discrimination, which in Nova Scotia requires 1) a distinction 2) based on a statutorily-listed characteristic 3) that imposed a burden, obligation, or disadvantage to the complainant compared with other individuals. This analysis is slightly complicated by the fact that Nova Scotia does not exclude bona fide benefit plans from the requirements of the Act, other than for age-based distinctions. The board's analysis of the exclusions in the Act led them to conclude that the Act could apply very differently to a public benefits plan, where the discrimination could be deemed to be "prescribed by law" and therefore exempt from scrutiny by the Human Rights Commission.

The board found no direct discrimination in the Welfare Plan, but concluded that as the Act prohibited adverse distinctions based on an enumerated ground which resulted in an unequal disadvantage, a *prima facie* case could be made out on the effects that the denial of the provision of marijuana had on the claimant.

The procedure for a broad and purposive analysis was based on the evaluation delineated by the Supreme Court of Canada in *Battlefords and District Co-op v. Gibbs*, 1996 CanLII 187 (SCC). The purpose of the Welfare Plan was determined to be to economically, efficiently, and sustainably maximize the pension and welfare benefits available to the beneficiaries of the plan. Relying on this purpose, the substantive treatment of beneficiaries was scrutinized: not on the basis of whether other beneficiaries had received coverage for medical marijuana, but rather on the basis of whether other beneficiaries had received coverage of specially-requested, medically-necessary prescription drugs. The denial of coverage was a disadvantage which, coupled with the fact that the Trustees had considered the complainant's disability, was sufficient to amount to a *prima facie* finding of discrimination.

The respondents had little evidence to refute the unreasonableness of their decision once the board had found that the initial decision was discriminatory. The Trustees led no evidence to establish that coverage of medical marijuana, on a case-by-case basis or as an amendment to the Welfare Plan, would result in undue hardship. The Trustees were deemed to have failed in their duty to accommodate the complainant's request for

coverage of his medical marijuana prescription. The matter of remedy was left to be settled between the parties, with the option of returning to the board of inquiry if an agreement could not be reached.

This thorough decision is a useful roadmap for dealing with the complex intersection of human rights complaints, private benefit plan analysis, and the status of medical marijuana coverage. The board was careful to clarify that this decision did not imply that other benefit plans must cover medical marijuana or other prescriptions, as well as reiterating that this decision was based on the specific lack of statutory or other limitations. Nevertheless, this case adds to the growing list of court and arbitrator decisions finding for an employee claiming a right to medical marijuana usage. Administrators of health and welfare plans would be well-served by abiding by the recommendations of the recently released report from the federal task force on Cannabis Legalization and Regulation and updating their policies and best practices to take into account the particular complexities of medical marijuana.