LEGISLATIVE DEVELOPMENTS AND THE

TOP 20 CASES OF 2017 – 2018

51ST ANNUAL CANADIAN EMPLOYEE BENEFITS CONFERENCE

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LEGISLATIVE DEVELOPMENTS 4

COURTS AND TRIBUNALS 6

ONTARIO DECISIONS 8

1. *Austin v. Bell Canada*, 2018 ONSC 4018 8

2. *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014 10

3. *FSCO Notice of Intended Decision re Nortel Pension Plan Wind Up* 11

4. *Hiscocks v. Financial Services Commission of Ontario Tribunal*, 2017 ONSC 5456 .. 11

5. *Labatt Brewing Company Limited v. Service Employees International Union, Local 2*, 2017 CanLII 56274 14

6. *Talos v. Grand Erie District School Board*, c. 2018 HRTO 680 16

BRITISH COLUMBIA 19

7. *Barker v. Molson Coors Breweries*, 2017 BCHRT 208 19

8. *Denluck v. The Board of Trustees for the Boilermakers' Lodge 359 Pension Plan*, 2018 BCSC 1109 22

9. *Duncan v. Retail Wholesale Union Pension Plan*, 2017 BCSC 2375 24

10. *ITB Marine Group Ltd v. Northern Transportation Company Limited*, 2017 BCSC 2007 27

11. *Re Walter Energy Canada Holdings, Inc*., 2017 BCSC 1968 28

12. *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 170 v. British Columbia (Information and Privacy Commissioner)*, 2018 BCSC 1080 31

QUEBEC 33

13. *Arrangement relatif a Bloom Lake*, 2017 QCCS 4057 33

14. *Threlfall v. Carleton University*, 2017 QCCA 1632 35

15. *Union of Canadian Correctional Officers - Syndicat des agents correctionnels du v. Canada (Attorney General)*, 2018 QCCS 2539 36

ALBERTA 39

16. *International Brotherhood of Electrical Workers, Local No. 1007 v. Epcor Utilities Inc.*, 2017 ABCA 314 39

NEWFOUNDLAND AND LABRADOR 41

17. Reference re Section 32 of the *Pension Benefits Act*, 2018 NLCA 1 41

NOVA SCOTIA 43

18. *Canadian Elevator Industry Welfare Trust Fund v. Skinner*, 2018 NCSA 31 43

FEDERAL JURISDICTION 45

19. *Bemister v. Canada (Attorney General)*, 2017 FC 749 45

20. *Scott v. The Queen*, 2017 TCC 224 47

LEGISLATIVE DEVELOPMENTS AND COURTS AND TRIBUNALS

LEGISLATIVE DEVELOPMENTS

The last year has seen a variety of changes to the pension and benefits landscape in Canada. Some of the most important developments have not yet come into force, and some reflect the continuation of trends that have been occurring across the country.

Several jurisdictions continue to seek out solutions to funding issues that have been affecting plan sustainability since the 2008 financial crisis. To that end, perhaps the most impactful change in the past year has been Ontario's move away from solvency funding, following a similar initiative in Quebec. In April of 2018, the Government of Ontario filed long anticipated amendments to the general regulations under the Pension Benefits Act, which significantly change the funding requirements for single employer defined benefit pension plans. For actuarial valuations with an effective date on or after December 31, 2017, defined benefit plans will no longer be required to fund to a 100% solvency funding target. Plan sponsors will only be required to make special payments on account of solvency deficiencies when the plan's solvency funded status falls below 85%.

While solvency funding has been relaxed, going concern funding provisions have been strengthened and the assumptions and methodology that must be utilized by a plan's actuary have been made less discretionary. Going concern unfunded liabilities will now have to be amortized over a ten year period rather than the current 15 years and a the funding of a plan's annual normal cost and going concern liabilities now requires a provision for adverse deviation ("PfAD"). The PfAD will require a plan's normal cost and special payments in respect of any going concern unfunded liability to be increased according to a formula which takes into account a number of factors, including whether the plan is open or closed to new members and the nature of the plan's asset allocation. Ontario also introduced restrictions on benefit improvements and contribution holidays in the context of the new funding provisions. As expected, these new funding requirements will not apply to jointly sponsored pension plans that are exempt from solvency funding requirements under the general regulations, nor to specified Ontario multi-employer pension plans. As a companion to these changes to solvency funding, Ontario announced that the Pension Benefits Guarantee Fund would begin covering benefits of up to $1,500 per month, up from $1,000.

Other provinces are also considering changes to their funding frameworks. In September of 2017, the Nova Scotia government released a discussion paper entitled Pension Funding Framework Review and other issues affecting pension plans. In April of 2018, the Nova Scotia Government issued a document entitled Pension Funding Framework Review: What We Heard, which - perhaps unsurprisingly - showed that attitudes are somewhat polarized across pension-industry stakeholders with respect to issues such as solvency funding, the introduction of target benefit plans and the possibility of the conversion of past service benefits.

Ontario also took steps to create a new framework for the funding of target benefit multi-employer pension plans that will replace the current rules for specified Ontario Multi-Employer Plans ("SOMEPPs") and ensure a permanent exemption from solvency funding for collectively bargained MEPPs. The following are key features of the proposed TB MEPP framework, which as of writing is not yet in force:

- A permanent exemption from solvency funding;
- Lengthening the amortization period from 12 to 15 years for funding a plan's going concern deficiency and the inclusion of a PfAD;
- A new basis for calculating benefits paid when a member terminates participation in a plan or when a plan is wound up and Rules to ensure plan benefits are appropriately reduced when funding requirements are not met;
- A requirement for plans to develop policies on funding and governance;
- Opportunities for retirees to participate in plan governance; and,
- Enhanced disclosure to plan beneficiaries regarding the status of their plan.

These provisions are not yet in force, and during the consultation period many stakeholders made submissions to the government which raised concerns about the proposed framework, especially with respect to the inflexible nature of the proposed PfAD requirements. The change in government in Ontario may also impact the target plan rules going forward.

Another significant change that is not yet in force relates to the Federal Government's announcement in the 2018 Budget that Health and Welfare Trusts will be phased out by 2020 and transitional rules will be added to the Income Tax Act which will allow for the conversion of existing HWTs to Employee Life and Health Trusts ("ELHTs"). The Budget proposes that the CRA will no longer apply its administrative policy with respect to existing HWTs after the end of 2020 and will not apply the administrative policy with respect to any trusts established after Budget Day. The CRA will announce transitional administrative guidance relating to winding up of existing HWTs and the Ministry of Finance will provide transitional rules to facilitate the conversion of existing HWTs to ELHTs. In general, the ELHT tax rules are in many ways more favourable than the health and welfare trust rules, including greater clarity on surplus, broader scope of tax deductions from the trusts' income, and the ability to carry forward and back non-capital losses. However, there are unresolved issues pertaining to eligibility for coverage and transitional rules.

The 2018 Federal Budget included several other items of interest to the pension and benefits community, including the creation of an Advisory Council on the Implementation of National Pharmacare and the commencement of a consultation process to address concerns related to underfunded pension plans, particularly associated with insolvencies such as Sears Canada.

In addition to the large-scale changes described above, there were numerous minor amendments to pension legislation in various provinces. Ontario added provisions allowing for the discharge of an administrator upon the purchase of a buy-out annuity, created a missing beneficiaries registry and passed several company specific regulations that deal with special funding arrangements for the Algoma and Stelco legacy pension plans. It also took further legislative steps which will shape the ultimate nature of the Ontario's new pension regulator, FSRA. British Colombia, Manitoba, Ontario, New Brunswick and the Federal Government took various legislative and regulatory action with respect to Pooled Registered Pension Plans. Quebec passed

legislation that provides for the restructuring of municipal and university pension plans. Several provinces also took extended various existing solvency relief provisions.

COURTS AND TRIBUNALS

The past year also saw numerous developments of note within pension and benefits jurisprudence. Particular themes from the past year involve the interaction of human rights and pension and benefit plans, the status of pension claims in insolvency proceedings, and continuing fallout from the demise of Nortel.

With respect to the Top 20 cases that we have selected, many cases arose in the human rights context. In Canadian Elevator Industry Welfare Trust Fund v. Skinner, 2018 NSCA 31, the Nova Scotia Court of Appeal overturned an earlier decision of Nova Scotia's human rights tribunal with respect to the provision of medicinal cannabis. At issue was whether the cost of marijuana that the Applicant required for a workplace accident should be covered by the Elevator Industry health and welfare plan. The court ultimately held that Skinner had not been denied coverage based on his disability and therefore that he was not entitled to coverage.

In *Talos v. Grand Erie District School Board*, 2018 HRTO 680, the Ontario Human Rights Tribunal considered whether the Human Rights Code's provision which allows pension or benefit plans to discriminate against those over 65 even if there is no actuarial justification was in violation of the non-discrimination provisions of the Canadian Charter of Rights and Freedoms. Talos' group benefits were terminated by his employer when he continued working past age 65. Talos' wife was gravely ill and had no access to benefits other than through Talos' plan. Talos filed a human rights complaint, arguing age discrimination. Upon learning that his claim could not succeed under the terms of the current Human Rights Code, he applied for a declaration that the relevant provisions were unconstitutional. The Tribunal found that there were less intrusive and more proportionate alternatives to the current approach, and found that s. 25.1 of the Human Rights Code, which permitted age discrimination for those over 65, was unconstitutional.

Barker v. Molson Coors, 2017 BCHRT 208, similarly dealt with denial of equal treatment to active employees over 65. In that case, Barker, an employee of Molson, complained he was denied certain health and welfare benefits and/or provided inferior benefits because he was over 65 years of age. The benefits were governed by a letter of understanding (LOU) that provided that employees who worked past 65 would receive less. The Tribunal held that there was no evidence establishing that the LOU was part of the pension plan and therefore held that it could not be a bona fide plan and that this exemption could not be used to defeat the claim, which was allowed to proceed on the merits. *In International Brotherhood of Electrical Workers, Local No. 1007 v. Epcor Utilities Inc*., 2017 ABCA 314, the Alberta Court of Appeal considered what bona fide means in relation to an LTD plan. In *Duncan v. Retail Wholesale Pension Plan*, 2017 BCSC 2375, the same question was dealt with in respect of a plan providing a greater benefit to married members.

In *Bemister v. Canada*, 2017 FC 49, the Federal Court determined that the Charter did not restrict the government's ability to increase the cost of employee benefit plan premiums. In *Union of Canadian Correctional Officers - Syndicat des agents correctionnels du v. Canada (Attorney General)*, 2018 QCCS 2539, the Quebec Superior Court explored the question of when statutes excluding certain pension and benefit matters from the collective bargaining process may

violate employees' constitutional right to collective bargaining pursuant to section 2(d) of the Canadian Charter of Rights and Freedoms. The Court declared that the relevant provisions prohibiting collective bargaining on the pension regime were constitutionally invalid.

In the insolvency context, several cases explored the nature of the legislative deemed trust that exists in pension legislation across the country. In *Arrangement relatif Bloom Lake*, 2017 QCCS 4057, the Quebec Superior Court determined in a controversial decision that the doctrine of federal paramountcy renders the deemed trust generally unenforceable in CCAA proceedings, which would be an expansion of the holding in the Supreme Court’s decision in Indalex. This decision was appealed, but the matter settled prior to a hearing. Prior to settlement, the Newfoundland and Labrador Court of Appeal released a decision which related to the proceedings in the Bloom Lake matter in Reference re Section 32 of the *Pension Benefits Act*, 1997, 2018 NLCA 1. In the Reference, the Court of Appeal held that the deemed trust applied to the entire wind up deficit and created a valid secured claim in favour of the Plan administrator. Although unrelated to the Bloom Lake proceeding, the decision in ITB Marine Group Ltd. v. Northern Transportation Company Limited also concerned the viability of a provincial deemed trust in the context of a CCAA proceeding. In that case, the court held that by the time the deemed trust arose, the lender had perfected its security interest in the assets and therefore the deemed trust did not get priority.

While much of the jurisprudence arising from insolvency proceedings in the past year have represented losses for employees and pensioners, some of the decisions arising from courts and tribunals have been more encouraging for those groups. In Ernst and Young Inc. v. Essar Global Fund Limited, the Court of Appeal for Ontario upheld a decision empowering the use of the oppression remedy against an insolvent but operational company where actions had been taken which hindered its ability to restructure and were thus harmful to its creditors, including a major pension plan claimant. In *Re Walter Energy Holdings,* 2017 BCSC 1968, the BC Supreme Court dealt with a case about settling a dispute over the use of long-arm provisions under the United States’ pension legislation (ERISA) to access funds in Canada.

In *Scott, Kennedy, Ellis & McCann v. The Queen*, 2017 TCC 224, concerned the taxation of certain payments made to former employees of Nortel as a result of the cancellation of life insurance due to Nortel’s insolvency, with the Tax Court concluding that payments in respect of lost retiree life insurance benefits should not be subject to tax. The Nortel insolvency also generated another decision this year, or, more accurately, a Notice of Intended Decision. In *Notice of Intended Decision re Nortel Pension Plan Wind Up*, the Ontario Superintendent of Financial Services announced its intention to allow repayment to the PBGF of amounts that had been recovered from the Nortel estate for lost indexing for Ontario members. The NOID has been challenged by certain former employees and a hearing has been scheduled for March of 2019.

Beyond those described above, there were a series of cases that fit into what might be called the "miscellaneous" category. In *Labatt Brewing Limited v. Service Employees International Union, Local 2,* 2017 CanLII 56274, the company had a plan whereby employees retiring early would receive the benefit of any plan increases between their actual retirement date and normal retirement date. Since 1992 the employer, when recalculating the spousal pension, had deducted the cumulative value of the Consumer Price Index based indexation payments received by

members during their early retirement period. The union filed a grievance which was allowed because there was no basis in the collective agreement or pension plan for the deduction.

In *Hisckocks v. Financial Services Commission of Ontario*, 2017 ONSC 4057, the Ontario Superior Court held that there is no duty on an employer to remind an employee of their right to join a pension plan. In *Threlfall c. Carleton University*, 2017 QCCA 1632, the Quebec Court of Appeal, confronted with the case of a pension plan member missing for almost 7 years, considered the interaction of Quebec's rules around deemed death and pension overpayments. In *Austin v. Bell Canada*, 2018 ONSC 4018, a class action plaintiff successfully fought off an attempt by Bell Canada to transfer the matter to OSFI prior to the certification application for the class action.

Finally, in perhaps the most impactful of the "miscellaneous" cases, the decision of the BC Supreme Court in *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 170 v. British Columbia (Information and Privacy Commissioner)*, 2018 BCSC 1080, considered whether to order disclosure of certain information that 16 union-sponsored pension plans had filed with FICOM, which had been requested by the Independent Contractors and Business Association. In that case, the pension trustees and unions argued that such disclosure could be reasonably expected to harm third party business interests and was thus exempt from disclosure under B.C.'s Freedom of Information and Protection of Privacy Act (FIPPA). The Court concluded that the disclosure of the relevant information would harm the unions' competitive and negotiating position or cause financial loss. The Court remitted the matter back to the OIPC for determination consistent with the reasons of the court.

CASE SUMMARIES

ONTARIO DECISIONS

1. *Austin v. Bell Canada,* 2018 ONSC 4018

Facts

This case concerned a scheduling issue in a proposed class action. The proposed representative plaintiff, Austin, was a member of the Bell Canada Pension Plan (the “Plan”). In January 2018, Austin issued the proposed class action. The claim arises out of the alleged improper calculation of the rate of indexation under the Plan. Austin claims that the defendants breached (i) fiduciary and trust duties, and (ii) contractual obligations, which Austin claims the defendants owed to him and other members of the proposed class. The Plan is regulated by the Office of the Superintendent of Financial Institutions (“OSFI”) and all parties agreed that both the Court and OSFI have jurisdiction to interpret the Plan.

In this case, the Court dealt with the scheduling of a stay motion brought by the defendants, seeking an order that the matter be dealt with by OSFI. At a case conference on April 20, 2018, the defendants asked the court to direct that the Stay Motion be heard before the certification motion. Austin opposed that request and asked the court to direct that the Stay Motion be heard together with the certification motion. The scheduling issue raised at the case conference was adjourned so that counsel could make oral and written submissions at a hearing before the court.

Prior to the case conference, the defendants' counsel contacted counsel at OSFI without notice to the Plaintiff and shared the statement of claim and asked OSFI to confirm that it would take jurisdiction over the issue raised in the Statement of Claim if asked to do so.

OSFI provided a letter in response which stated the following:

(i) OSFI is willing to decide "whether indexing is being calculated in accordance with the terms of the pension plan";

(ii) If the plaintiff would "submit a complaint to the Superintendent detailing their concerns", "the Superintendent would initiate a process to determine whether the complaint has merit"; and

(iii) "If the Superintendent were to decide that the pension plan was not, in fact, being administered in accordance with its terms, the Superintendent could ask the parties to remedy the situation informally, or, if necessary, could issue a direction of compliance against the administrator, the employer, or any other person".

Decision

The issue before the Court was whether the Stay Motion should be scheduled before the certification motion, or heard with the certification motion. The Court went through the jurisprudence on when a proposed preliminary motion should be heard before the certification motion, including the following:

(i) "[T]he question of scheduling and the order of proceedings must of necessity be decided on a case by case basis depending on the peculiar circumstances of the matter".

(ii) "As a matter of principle, the certification motion ought to be the first procedural matter to be heard and determined" […] "That said, however, there are circumstances where it is useful, indeed in some cases necessary, that preliminary motions be heard in advance of the certification motion" (*Attis*, at paras. 7 and 8);

(iii) In a class action, litigation by instalments should be avoided whenever possible, in order to avoid multiple rounds of proceedings in court.

(iv) the court should consider "all factors relevant" to scheduling issues, including "the three underlying policy objectives of the *CPA* in addressing the sequencing of events in the proceeding", *i.e.* ensuring that, by hearing a pre-certification motion, (a) "facilitating access to justice for claimants is not compromised", (b) "the objective of judicial efficiency is furthered" and (c) "the modification of otherwise wrongful behaviour is not compromised" (*Holmes*, at paras. 10, 11, 14, and 15);

(vi) In *Cannon v. Funds for Canada Foundation*, 2010 ONSC 146 (CanLII) ("*Cannon*"), Strathy J. (as he then was) set out a list of "non-exhaustive" factors relevant to the exercise of the court's discretion to direct the hearing of a pre-certification motion (*Cannon*, at para. 15) (quoted *verbatim*):

(a) whether the motion will dispose of the entire proceeding or will substantially narrow the issues to be determined;

(b) the likelihood of delays and costs associated with the motion;

(c) whether the outcome of the motion will promote settlement;

(d) whether the motion could give rise to interlocutory appeals and delays that would affect certification;

(e) the interests of economy and judicial efficiency; and

(f) generally, whether scheduling the motion in advance of certification would promote the 'fair and efficient determination' of the proceeding (s. 12); and

(vii) There is no case law before the court supporting the pre-certification scheduling of a stay motion when the stay sought is not based on whether a court has jurisdiction, but instead based on whether the court in a class action is the preferable jurisdiction in comparison to a regulatory proceeding. To the contrary, the preferability of jurisdiction issue has been decided in the context of the certification motion.

In analyzing these factors, the judge ultimately determined that those factors supported scheduling the Stay Motion together with the certification motion.

2. *Ernst & Young Inc. v. Essar Global Fund Limited,* 2017 ONCA 1014

Facts

In November 2014, Essar Steel Algoma Inc. ("Algoma") entered into a transaction with Port of Algoma Inc. ("Portco") that saw the port in Sault Ste. Marie transferred to Portco, which was designed to generate cash proceeds on Algoma's Assets. Both Portco and Algoma were subsidiaries of Essar Global Limited Fund ("Essar Global"). A year later, in November 2015, Algoma commenced proceedings under the *Companies' Creditors Arrangement Act*, R.S.C 1985, c. C-36 ("CCAA").

It was a finding of fact that Algoma ceased making independent decisions. Its three independent directors resigned as a result of this, and the only remaining directors were those affiliated with Essar Global, making decisions under the instruction of Essar Global's Chief Investment Officer. As a result, the Portco transaction was found not to have been entered into to recapitalize the struggling Algoma, but instead to generate cash proceeds for Essar Global.

The Monitor in the CCAA proceedings sought and was granted permission from the CCAA Judge to pursue an action for oppression under s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. The oppression action was successful.

Essar Global and other related parties appealed the decision. They argued that the Monitor lacked standing to bring an oppression claim. They also argued that since the alleged harm was to Algoma, the appropriate action was a derivative action and not an oppression claim.

Decision

The Ontario Court of Appeal found that the Monitor could be a complainant under the CBCA, but that this was limited to rare circumstances at the CCAA supervising judge's discretion. This was found to be justifiably granted in the circumstances. The Monitor had reviewed and reported the related party transactions to the court and established a prima facie case for oppression. The oppression remedy facilitated the purposes of restructuring. The Monitor was also found to be the best party to bring the claim on behalf of the stakeholders who were not organized as a single group.

The Court of Appeal also found that oppression and derivative actions are not mutually exclusive remedies and may overlap where harm was done to the corporation and to stakeholders in their separate stakeholder capacity. The question of whether the oppression remedy applies is whether the conduct was oppressive and whether the stakeholder suffered harm in its capacity as a stakeholder.

Comment

This case is important because it affirms the Monitor's power to bring claims against related third parties in appropriate circumstances outside of those explicitly delineated under the CCAA. In the context of the CCAA proceedings where there is little remaining value in the estate, it may be difficult for creditors with small claims to justify bringing actions against third parties who may have committed wrongs against the company on the eve of insolvency. In these circumstances, it is important that the Monitor have the power to claim on behalf of the insolvent estate and, therefore, all creditors.

3. *FSCO Notice of Intended Decision re Nortel Pension Plan Wind Up,* March 12, 2018

On January 14, 2009, Nortel Networks Corporation and several of its affiliated companies (together, "**Nortel**" or the “**Canadian Debtors**”) were granted protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c, C-36 ("**CCAA**").

Nortel sponsored two pension plans (together, the "**Plans**"). Each of the Plans provided pension and other benefits to employees in Ontario and other jurisdictions in Canada. The Plans provided for most post-1988 pension benefits to be partially indexed to inflation.

The Pension Benefits Guarantee Fund (the "**PBGF**") is a public insurance plan that guarantees the first $1,000 of monthly pension entitlements in plans that are wound up in deficit for all credited service completed in the province of Ontario (NB: the guarantee is now for the first $1,500, but remains at $1,000 for members of the Nortel Plans). The PBGF provides lump sum payments directly to the plan administrator to ensure that it is able to meet this obligation.

On March 8, 2011, the Ontario Superintendent of Financial Services ("**Superintendent**") issued orders winding up each of the Plans in full under section 69 of the PBA. The effective date of

the wind ups, as specified in such orders, was October 1, 2010. In the course of a pension plan wind-up, the appointed administrator may reduce pensions to the level funded by the pension plan after taking into account the amount estimated to be guaranteed by the PBGF. An administrator may also apply for an interim allocation of funds from the PBGF.

After the plan was wound up in deficit, the Superintendent issued orders on May 26, 2011 declaring that the PBGF applied to the Plans, and then approved interim distributions of $383,977,000. These interim distributions were made on condition that funds not required for settlement of member benefit entitlements would be returned to the plan administrator.

On October 12, 2016, after several years of litigation, the Canadian Debtors announced they had entered into a Global Settlement and Support Agreement with other Nortel entities in other countries and significant creditor constituents, which, among other things, provided for the Canadian Debtors to receive approximately 57% of the sale proceeds that were then held in escrow, the release of additional sale proceeds to the Canadian Debtors and payment to the Canadian Debtors of amounts on account of reimbursement of various costs incurred in connection with the asset sales.

The Global Settlement and Support Agreement was approved by courts in Canada and the U.S. and the Plan of Compromise and Arrangement pursuant to the *Companies' Creditors Arrangement Act* concerning, affecting and involving the Canadian Debtors dated November 30, 2016 was sanctioned by the Court in Canada on January 24, 2017. The CCAA Plan Implementation Date was May 25, 2017.

On or about July 6, 2017, the Plans' funds received an interim distribution from Nortel's estate with respect to each Pension Claim. The Superintendent issued a Notice of Intended Decision ("**NOID**") on March 12, 2018 for a recovery of $221,220,000 from the Nortel Pension Plans. In the NOID, the Superintendent is seeking refunds from the Nortel Pension Plans on behalf of the PBGF.

Comment

On April 4, 2018, certain former employees and retirees with Ontario pension claims (the "**Ontario Pensioners**") filed a request for a hearing with regards to the NOID. The dispute relates to indexation. The PBGF does not guarantee indexation as part of the scheme. The Nortel Pension Plans do provide for indexation.

The Ontario Pensioners believe that amounts recovered from the Nortel CCAA exclusively for lost indexation should be used exclusively for plan members, meaning the refund should be $121,618,000 from the two plans. The Superintendent disputes this position, as does the Plan's wind-up administrator, Morneau Shepell, who was appointed by the Superintendent.

The dispute is to be heard by the Financial Services Tribunal in March of 2018.

4. *Hiscocks v. Financial Services Commission of Ontario Tribunal,* 2017 ONSC 5456

In *Hiscocks v. Financial Services Tribunal,* Ontario's Divisional Court was recently presented with the opportunity to clarify the appropriate interpretation of several provisions of the PBA,

including the remedial jurisdiction of the Financial Services Tribunal ("Tribunal"). Unfortunately, the case was ultimately determined on a technicality, and these important questions were left unanswered.

Facts

Chris Hiscocks, was an employee of Spar Aerospace Limited from 1979-1997. During that time he declined enrollment in that company's pension plan. In late 1997, Spar was purchased by DRS Technologies Canada Ltd. and Hiscocks' employment transferred to DRS. Again he was presented with an opportunity to join his employer's pension plan and he again declined to do so. However, Hiscocks finally decided to enroll in the DRS Plan, effective January 1, 2004.

In 2013 Hiscocks seemingly regretted his earlier decisions and sought retroactive membership covering the period prior to his enrollment back to 1997. DRS denied his request. Intent on achieving his desired result, Hiscocks sought an order from the Superintendent of Financial Services requiring DRS to allow him to retroactively purchase membership in the DRS plan for the 1997-2003 time period.

Hiscocks founded his claim on an allegation that DRS contravened s. 25 of the PBA. He claimed that it contravened that provision by failing to provide him with written information about the plan. That provision uses mandatory language to indicate that the plan administrator "shall provide" information about the plan to persons eligible for enrollment. The suggestion was that Hiscocks would have enrolled in the pension plan earlier but for DRS' failure to comply with the s.25 notice requirements.

Owing to this purported breach of the PBA, Hiscocks requested a remedy under s. 87 of the PBA. Section 87 grants the Superintendent broad discretionary authority to require an administrator to take "any action" in respect of a pension plan if the Superintendent is of the opinion that the plan is not being administered in accordance with the PBA. Hiscocks insisted that this provision gave the Superintendent the authority to grant him his desired relief.

Unfortunately for Hiscocks, the Superintendent issued a Notice of Intended Decision indicating that it would refuse to exercise its discretion under s. 87 to make the requested order. The Superintendent was of the view that Hiscocks was aware of the DRS plan and his right to join it at the relevant time, notwithstanding any potential breach of the s. 25 notice requirements. In other words, the Superintendent was not convinced that the lack of notice had any bearing on Hiscocks' decision not to enroll in the DRS plan prior to January 2004.

Not satisfied with the Superintendent's decision, Hiscocks brought his claim before the Tribunal. He sought to persuade the Tribunal to exercise its discretionary power under s. 89 of the PBA to direct the Superintendent to order his retroactive membership in the DRS Plan. However, after receiving evidence from Hiscocks and an agent of DRS, the Tribunal declined to order the relief sought. It held that s. 25 was not breached because it did not apply to Hiscocks, and even if it had been breached, it would not have exercised its discretion in his favour.

The Tribunal found as a fact that Hiscocks had knowledge of the plan at the relevant time, and knowingly declined to participate in it. Consistent with the decision of the Superintendent, the Tribunal found that there was no evidence that Hiscocks would have joined the plan in 1997 if he had been given s. 25 notice. In any event, even if the Tribunal had found in Hiscocks' favour, it

would not have granted his desired relief. The Tribunal held that it lacked jurisdiction to grant retroactive membership in a pension plan. Hiscocks subsequently sought review of the Tribunal's decision.

The Decision

Hiscocks took to the Division Court seeking judicial review of the Tribunal's decision. There he raised a variety of issues, although the most pertinent amongst them was whether the Tribunal's interpretation of s. 25 was correct, and whether the Tribunal in fact had jurisdiction to grant the requested remedy. However, Hiscock's application was summarily dismissed as a result of his failure to exercise his statutory right to appeal within the prescribed time. Despite this, the Divisional Court proceeded to briefly outline its reasons for dismissing the application on its merits.

Unfortunately, the Divisional Court did not provide any clarity on the issues raised by Hiscocks. In fact, the Court expressly declared that there was "no need" to deal with either issue. Instead, it deferred to the findings made by the Tribunal with respect to whether s. 25 was breached, and declined to analyze the issue of the Tribunal's remedial jurisdiction because Hiscocks had not established that he would have succeeded on the application.

Comment

In this case, the Divisional Court missed its opportunity to clarify the law. The Tribunal had concluded that s. 25 had not been breached. However, that provision ostensibly creates an obligatory procedural requirement for plan administrators to provide eligible persons with written information about the plan. The administrator in this case had clearly failed to perform this purportedly mandatory duty. Notwithstanding this, the learned members of the Court declined to interrogate the Tribunal's interpretation of this provision. In addition, the Court did not comment on whether it was even relevant for the Tribunal to consider Hiscocks' knowledge of the pension plan, given that there is no exception for compliance with s. 25 notice.

Finally, the Court was disinclined to review the Tribunal's position on its remedial jurisdiction under the PBA. Sections 87 and 89 are broadly drafted to seemingly provide the Superintendent and the Tribunal, respectively, with authority to fashion any remedy they see fit in the appropriate circumstances. It may have been useful for the Court to have grappled with the appropriate contours of the Tribunal's jurisdiction in this regard. This may have been because Hiscocks was self-represented and fulsome submissions capable of assisting the Court's determination may not have been made.

Ultimately, this case leaves unanswered questions related to the appropriate interpretation of the aforementioned provisions of the PBA. Nevertheless it raises important issues for plan administrators to consider, and important questions for future cases to decide.

5. *Labatt Brewing Company Limited v. Service Employees International Union, Local 2,* 2017 CanLII 56274

An Ontario arbitrator corrected an employer's decade-long practice of issuing deficient payments under a pension plan to the surviving spouses of employees who retired early.

Facts

The Labatt Retirement Plan provides that, if certain conditions are met, an employee who retires early will qualify to be treated as if he or she retired at age sixty-five for the purposes of their monthly benefit entitlement. This is achieved by way of an adjustment to the employee's monthly entitlement under the Plan. The adjustment ensures that early retirees will receive the benefit of any Plan increase that accrues between their actual retirement date and their "normal" retirement date at age sixty-five. The object of the adjustment is to guarantee that employees who retire early receive the same monthly pension entitlement as someone who retires at age sixty-five. This is intended to act as an incentive for employees to retire early.

The adjustment to the monthly pension entitlement is achieved by way of a recalculation of the employee's benefit entitlement on the day he or she attains age 65. The recalculation is referred to as a "Crossover" and the date that this recalculation occurs is referred to as the "Crossover Date". On this date, a Crossover pension entitlement recalculation is performed in order to ensure that the early retiring employee receives the same monthly pension that he or she would have received if the employee had retired at age 65. If a qualifying employee elects a spousal survivor pension, that pension is also recalculated on the Crossover Date. Since the Crossover provisions were first bargained for by the SEIU and Labatt in 1988, there have been 31 employees who qualified for and had their monthly pension entitlement adjusted according to the Crossover provisions of the Plan.

During the interim years between an employee's actual retirement date and their normal retirement date (age 65), an employee's pension is "indexed". This means that their pension increases annually to account for the rising cost of living. The amount that their pension increases is based on the annual change in the Consumer Price Index ("CPI"). Labatt omitted the accumulated amount of indexing received by an employee during his or her early retirement period when it recalculated the survivor spousal pension at the Crossover Date. Labatt had been disregarding the pensioners' accumulated indexing payments in the Crossover recalculation for decades. The result is that surviving spouses were denied the benefit of the indexing increases in their monthly entitlement under the Plan.

The SEIU grieved this practice. It took the position that the indexing amounts that accumulated during the period between the employee's actual retirement date and the normal retirement date were to be included in the Crossover calculation. Labatt took the opposite position. It argued that neither the collective agreement nor the Plan compelled it to include the subject indexing amounts in the Crossover recalculation. In the alternative, the employer argued that the SEIU was now *estopped* from challenging the employer's open, notorious and longstanding practice of excluding such indexing amounts in its Crossover calculation.

The Decision

Arbitrator Surdykowski, sitting alone, allowed the SEIU's grievance. He based his decision on the clear and unequivocal language of the Plan which, in his view, was incorporated into and formed part of the collective agreement. Despite such "clear" language, however, the Arbitrator admitted that it was easy to "get lost in the verbiage and mechanics" of the Plan. Nevertheless, Arbitrator Surykowski was satisfied that there was nothing in the Plan or in the collective agreement that permitted Labatt to omit the subject indexing amounts from the Crossover

calculation. As such, Labatt had simply misinterpreted its express contractual obligations. As a result, it had been "shortchanging" spousal pension recipients.

In addition, the learned Arbitrator rejected Labatt's *estoppel* argument. He acknowledged that the union had neglected its obligation to "police" the application and administration of the collective agreement. However, Arbitrator Surdykowski was ultimately not satisfied that Labatt had relied on the union's gross inactivity to its detriment. To the contrary, omitting the disputed indexing amounts in the Crossover calculation was actually to its benefit. As such, absent the necessary *detrimental* reliance required to establish an *estoppel*, the Arbitrator concluded that the equitable doctrine did not apply to bar the claims made by the SEIU in this case.

Comment

The circumstances in this case illustrate the potential prejudice that can accrue to retirees and their spouses with respect to deficient pension entitlement. It highlights the importance of negotiating clear language in pension documents to ensure that the employer calculates and distributes pension entitlement accurately while avoiding getting "lost" in the verbiage and the mechanics of the plan. Had the Labatt Retirement Plan expressed a clear formula that included the accumulated indexing amounts in the calculation of the Crossover, the spouses who received entitlement under a spouse's survivor benefit may not have been "shortchanged" for decades before the union finally grieved Labatt's erroneous practice. This should signal to employer's the need to carefully review their obligations pursuant to the pension plans to which they are bound.

Perhaps more importantly, this decision signals to trade unions the requirement to actively police the provision of pension entitlements by employers under negotiated pension plans. Pension plans are often negotiated with, and form part of the collective agreements between trade unions and employers. Trade unions may view this decision as a reminder that an employer's duties and obligations under the pension plan should be scrutinized as closely as those provided under the other provisions of the collective agreement.

6. *Talos v. Grand Erie District School Board,* c. 2018 HRTO 680

In *Talos v. Grand Erie District School Board,* 2018 HRTO 680, the Human Rights Tribunal of Ontario considered whether a provision of Ontario's Human Rights Code (the "Code") that permits employers the discretion to terminate benefits for employees over the age of 65 was an infringement of the equality protection contained in section 15 of the Canadian Charter of Rights and Freedoms.

Background

In the case, Mr. Talos had been provided with health, dental and life insurance benefits by the Grand Erie District School Board (the "Board") which were terminated when he reached age 65 despite the fact that he continued to work on a full-time basis. While Mr. Talos was eligible for retirement, he wished to continue to work both because he enjoyed doing so and because his wife was gravely ill and had no employer-sponsored benefits of her own. As Mr. Talos' wife was not yet 65, she did not qualify for various government income supports like Old Age Security and the Ontario Disability Drug Benefits Plan. Before the Human Rights Tribunal, Mr. Talos sought compensation of $160,000 for lost benefits and compensation for injuries to his dignity, feelings

and self-respect. The case dragged on for more than five years before a final decision was released by the Tribunal.

The provisions of the Human Rights Code which are at issue stem from a time in Ontario when mandatory retirement at age 65 had not yet been prohibited. The relevant provisions of the Code were described by the Tribunal as a "hold over from that era which continued to permit employers to provide age differentiated benefits to workers 65 years and older".

History of the Complaint

In his complaint, Mr. Talos alleged that his employer had violated section 5(1) of the code which prohibits discrimination in employment. At the start of the hearing the allegation of discrimination was limited to the termination of his membership in group health, dental and life insurance plans, and did not concern his entitlements to disability insurance, superannuation and pension plans.

In August of 2013, Mr. Talos filed a notice of constitutional question with the Tribunal, where he provided notice that he intended to argue that section 25(2.1) of the code contravened section 15 of the charter. Subsection 25(2.1) of the *Code* provides that:

> (2.1) The right under section 5 to equal treatment with respect to employment without discrimination because of age is not infringed by an employee benefit, pension, superannuation or group insurance plan or fund that complies with the *Employment Standards Act, 2000* and the regulations thereunder.

Subsection 44(1) of the *Employment Standards Act, 2000*, SO 2000, c 41 (the "*ESA*"), in turn, provides that:

> Except as prescribed, no employer or person acting directly on behalf of an employer shall provide, offer or arrange for a benefit plan that treats any of the following persons differently because of the age, sex or marital status of employees:
>
> 1. Employees.
>
> 2. Beneficiaries.

Under section 1 of Ontario Regulation 286/01, *Benefit Plans*, for the purposes of subsection 44(1) of the *ESA*, "age" means age of between 18 and 64 years. The *ESA* does not, therefore, prohibit differential treatment of employees or beneficiaries because of the age of an employee where that employee's age is greater than 64. As noted by the Tribunal, this appears to be a remnant of an era in Ontario where mandatory retirement was still a reality.

In 2013, after the Notice of Constitutional Question was filed, the Tribunal issued a decision which found that section 25(2.1) of the code was a complete defense to Mr. Talos' allegations that the code had been infringed. As a result, the only issue that remained was whether that section was unconstitutional such that it could not be relied on to defeat Mr. Talos' claim.

Decision

With respect to the jurisdiction of the Human Rights Tribunal of Ontario, the Tribunal noted that it does have jurisdiction to consider a charter challenge where there is a connection to the Code, but cannot issue a general declaration of invalidity of legislation. However, it can refrain from applying the impugned section of the Code if in the Tribunal's view it offends the charter. As a result, if the Tribunal determined that section 25(2.1) was unconstitutional, the employer would not be able to use it as justification for having cut off Mr. Talos' benefits. The Ontario Human Rights commission and the Ontario Attorney General both intervened in the case as did the Ontario Confederation of University Faculty Associations, the Elementary Teachers' Federation of Ontario and the Ontario English Catholic Teachers Federation. The hearing lasted for 14 days, 11 of which were devoted to hearing evidence.

The Tribunal ultimately determined that Mr. Talos' claim that the section was unconstitutional should be allowed. It noted that Mr. Talos had experienced disadvantage on the basis of age and that his section 15(1) charter right had been infringed, and further that the respondent had not discharged its onus to justify this infringement under section 1 of the Charter.

The Tribunal determined that section 25(2.1) of the Code, in conjunction with the *Employment Standards Act,* 2000 and the *Benefit Plans* Regulation, creates a distinction between workers under the age of 65 and those who are 65 and older who perform the same work and are vulnerable to losing a portion of their remuneration package. The Tribunal further held that the workers under 65 are protected by the Code from age-differentiated workplace group benefits unless those distinctions are made on an "actuarial basis", which is defined in the *Benefit Plans* Regulation provide as follows:

> “actuarial basis” means the assumptions and methods generally accepted and used by fellows of the Canadian Institute of Actuaries to establish, in relation to the contingencies of human life such as death, accident, sickness and disease, the costs of pension benefits, life insurance, disability insurance, health insurance and other similar benefits, including their actuarial equivalents; O. Reg. 286/01, s. 1.

For those under 65, age-based distinctions must have an "actuarial basis", but for those over 65, there is no protection at all and such individuals are thus vulnerable to not being rewarded equally for performing the same work as those less than 65 years of age.

The Tribunal noted that it was evident that employees who work after age 65 provide the same labour as they did when they were 65 years of age and as a result in the typical course should be guaranteed equal compensation, including access to benefits. The Tribunal also held that that without section 25(2.1) as a defense, a benefit differential of this type that is only explained by the age of the employee would be a *prima facie* case of age discrimination under the Code. Importantly, the Tribunal rejected the respondent's argument that Mr. Talos had suffered no disadvantage because of the generous nature of his pension or the fact that he can lead an economically viable life during his senior years because he benefited from being a member of a union, and that his transition to government funded programs at age 65 would have the effect of adequately substituting for benefits that he would have otherwise enjoyed. The Tribunal determined that these considerations were irrelevant.

With respect to justifying the infringement of section 15(1) under section 1 of the *Charter*, the Tribunal determined that after considering all of the evidence, workplace benefit plans can continue to have financial viability without making workers who are age 65 and older vulnerable to the loss of employment benefits. It also found that the impugned provisions did not minimally impair the right of these workers, as the employer had no obligation to demonstrate that the loss of employment benefits was reasonable or bona fide or justified on an actuarial basis, or because their inclusion in the relevant benefit plans would cause undue hardship.

Comment

This decision will have significant implications for those employers in Ontario who continue to differentiate between employees on the basis of whether they are over or under 65 years of age. The case may have little relevance beyond Ontario, however, as the Ontario Human Rights Code section at issue created a distinction that it very different than the exemptions contained in other provinces, where such exclusions for benefit plans typically need to be justified on an actuarial basis or justified on the basis that the plan is reasonable or bona fide.

BRITISH COLUMBIA

7. *Barker v. Molson Coors Breweries,* 2017 BCHRT 208

In *Barker v. Molson Coors Breweries*, the British Columbia Human Rights Tribunal (the "Tribunal") considered an employee's claim of age-based discrimination against their Employer and Union. The employee complained that it was discriminatory that employees over the age of 65 received less favourable health, welfare, and pension benefits entitlements than employees under 65. The Respondent Employer and Union brought an application to have the complaint dismissed on a summary basis. The Tribunal refused to dismiss the application because it was not clear that the employee had no reasonable prospect of success. In denying the application, the Tribunal clarified the exemption contained in section 13(3)(b) of the *Human Rights Code* (the "Code"), including explaining that it only applies to provisions contained in a plan.

Facts

John Barker (68 years old), an employee of Molson Coors Breweries (the "Employer") and member of the Brewery, Winery and Distillery Workers Union, Local 300 (the "Union"), filed an age-based discrimination complaint against his Employer and Union under section 13 of the *Code*. Mr. Barker founded his complaint on an agreement between the Employer and Union, which provided less favourable health, welfare, and pension benefits entitlements to employees over the age of 65.[1]

The provision that formed the basis of the employee's complaint was agreed to by the Union and a predecessor employer, and contained in a letter of understanding entitled "Deferred Retirement" ("Deferred Retirement LOU"), which provided:

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[1] 2017 BCHRT 208 at paras 1-6.

> *"An employee who continues in the employ of the Company after his normal retirement date, as defined in the Pension Plan, shall be entitled to only the insured welfare benefits provided to employees on retirement as at his normal retirement date."* [2]

The parties agreed that the Deferred Retirement LOU would apply if the following occurred: "mandatory retirement at age 65 no longer be permitted by law in this Province", and "a regular employee continues in employment beyond normal retirement date", which is age 65.[3] The current version, in addition to containing the above provision, provides that pension benefits will not accrue after an employee reaches the age of 65.[4] Further, employees over 65 are entitled to health and welfare benefits that are less favourable to those available to employees under the age of 65, and employees who continue to work beyond age 65 are disentitled from certain insurance coverage, medical expense coverage, and disability benefits.[5]

The Employer and Union filed an application to dismiss Mr. Barker's complaint summarily under sections 27(1)(b) and (c) of the *Code,* which gives the Tribunal the authority to dismiss any claim that does not constitute a *Code* violation, or that has "no reasonable prospect of success."[6] Both Respondents argued that the impugned provision was not discriminatory since it was part of a "bona fide group or insurance plan" under section 13(3)(b) of the Code, which provides:

> *13(3)(b) Subsection (1) does not apply*
>
> *(b) as it relates to... age, to the operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan, whether or not the plan is the subject of a contract of insurance between an insurer and an employee.*[7]

Decision

The Tribunal denied the application to dismiss the complaint under section 27(1)(b), finding that, on the basis of the complaint alone, Mr. Barker had established a *prima facie* claim of discrimination.[8]

The Tribunal also denied the application to dismiss the complaint under section 27(1)(c), finding that the Respondents had not established that Mr. Barker's complaint had "no reasonable prospect of success."[9]

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[2] *Ibid* at paras 14, 21.

[3] *Ibid* at para 21.

[4] *Ibid* at paras 24, 38.

[5] *Ibid* at paras 39, 41.

[6] *Ibid* at para 7.

[7] *Ibid* at para 8.

[8] *Ibid* at para 72.

[9] *Ibid* at para 112.

To that end, the Tribunal first considered whether Mr. Barker's allegations were likely to be found *prima facie* discriminatory.[10] After finding that Mr. Barker was likely to establish a *prima facie* case, the Tribunal considered the Respondents' defence. The Tribunal found that the Employer and Union would only succeed in their application to dismiss if they could establish, to a degree of reasonable certainty, that the impugned provision was exempt from a discrimination claim under section 13(3)(b) of the *Code*.[11]

In clarifying the application of the exemption in section 13(3)(b), the Tribunal relied on an earlier decision of Justice Abella in *Potash Corp of Saskatchewan Inc. v. Scott.* In that case, Justice Abella considered a parallel provision in New Brunswick legislation, and found that the purpose of the provision was to avoid the destabilization of legitimate plans through age-based discrimination claims.[12] The Tribunal also relied on Justice Abella's decision for the following propositions: a plan must be considered in its entirety to determine whether it is *bona fide,* and a *bona fide* plan means "a legitimate plan, adopted in good faith and not for the purpose of defeating protected rights."[13]

The Tribunal found that the section 13(3)(b) exemption only applies to provisions that are part of a plan.[14] In this case, the impugned provision was contained in the Deferred Retirement LOU.[15] The Tribunal was not convinced that the Respondents would be able to establish a sufficient link between the provision and a plan, or satisfy the Tribunal that the provision was a plan on its own.[16] The Employer and Union were therefore unable to establish, to a degree of reasonable certainty, that the provision would be exempt from a discrimination claim under section 13(3)(b).[17]

The Tribunal was also not persuaded that the Respondents could establish that the impugned provision was *bona fide*, since it would be possible to conclude that it was intended to deprive employees of their rights under the *Code.*[18] The Tribunal considered the purpose of section 13(3)(b), stating: "It is not to provide a scheme for avoiding the protections of the legislation."[19] In this case, it was possible that the provision was not intended to do anything more than limit the benefits entitlements of employees over the age of 65.[20]

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[10] *Ibid* at para 76.

[11] *Ibid* at paras 77, 83.

[12] *Ibid* at para 90.

[13] *Ibid* at paras 91-92.

[14] *Ibid* at para 95.

[15] *Ibid* at para 96.

[16] *Ibid* at paras 96-97.

[17] *Ibid* at para 99.

[18] *Ibid* at para 102.

[19] *Ibid* at para 98.

[20] *Ibid* at para 100-101.

The Tribunal ultimately did not decide the merits of the Respondents' defence under section 13(3)(b), but denied their application to dismiss Mr. Barker's complaint on a summary basis since it was not clear that their defence would succeed.

Commentary

This case clarifies that parties cannot defend discriminatory provisions under section 13(3)(b) of the *Code,* unless the provisions are contained in a retirement, superannuation or pension plan, or group or employee insurance plan. This case suggests that provisions that are separate and distinct from any plan are not exempt from discrimination claims under section 13(3)(b), since it may be reasonable to infer that such provisions are solely intended to limit the benefits entitlements of older employees and defeat their rights under the *Code.*

8. *Denluck v. The Board of Trustees for the Boilermakers' Lodge 359 Pension Plan,* 2018 BCSC 1109

Introduction

In *Denluck v. The Board of Trustees for the Boilermakers' Lodge 359 Pension Plan*, the British Columbia Supreme Court certified a class action for a group of former Pension Plan members (the Class Members) where the Plan Trustees cancelled promised transfer payments owing to the Class Members. The fundamental issue underlying the litigation is whether under the circumstances the Trustees were obligated and/or entitled to cancel the transfer payments due inadequate solvency levels.

The Court found that the test for class action certification was met on the facts. With the pleadings disclosing a cause of action, there being a common issue to be decided on one of the two pleaded grounds, a class proceeding being the preferable procedure to resolve the claim, with Mr. Denluck as an appropriate representative plaintiff.

Facts

The representative Plaintiff, Mr. Denluck, was a member of the Boilermakers' Lodge 359 Pension Plan. The Plan is a negotiated-cost multi-employer plan. At a certain point in time, he chose to exercise his right under the provisions of the Plan to transfer the commuted value of his pension to another pension plan. Per the Plan Summary Booklet, a first instalment to the new plan was made immediately – in Mr. Denluck's case, of $299,877.46 – with a second instalment of $105,362.35 to follow. Also per the Plan Summary Booklet, the second instalment was to be paid on the earlier of five years from the date of the first instalment, and the date on which the Plan's Transfer Ratio was restored to 1.00 (the latter being tied to a solvency measure). The Plaintiff pleaded the existence of a contract between him and the Plan, based on the terms contained in the Plan Summary Booklet, standard form documents provided to him, and oral representations made. He asserted that the Plan agreed it would pay the second instalment at the five year mark even if the Transfer Ratio never reached 1.00.

Just over five years later – before the Plan had transferred Mr. Denluck's second instalment as it had been scheduled to do – the Plan put a halt to all outstanding transfer payments on the basis that its advisors counselled that making such payments would impair the Plan's solvency. The

Trustees asserted that the relevant statutory provisions forbid them from making outstanding transfer payments when the Plan's solvency levels were inadequate. Less than a year later, it permanently cancelled the scheduled payment to Mr. Denluck and the Class Members. Mr. Denluck and the other Class Members declined an offer to buy back into the Pension Plan by returning the initial payments made to them.

The issues before the Court were: 1) whether the pleadings disclosed a cause of action; 2) whether the claims raised common issues; 3) whether a class proceeding was the preferable procedure to resolve the claims; and 4) whether Mr. Denluck was an appropriate representative Plaintiff.

Decision

The Court held that the representative Plaintiff bore the burden of demonstrating that he had met each of the certification requirements. It held that he met that burden for each requirement, and approved certification.

On the question of whether the pleadings disclosed a cause of action, the Court noted that the bar the Plaintiff had to meet was the same as in a motion to strike – that is, whether it was plain and obvious, assuming all pleaded facts were true, that the Plaintiff's claim could not succeed, or whether essential elements of the cause of action or necessary material facts were not pleaded. The representative Plaintiff pleaded two causes of action – breach of contract, and breach of trust on the part of the Trustees.

The Court found, first of all, that it was not plain and obvious that Mr. Denluck's claim for breach of contract would fail. While the Trustees pleaded that any contractual arrangement it may have had with Mr. Denluck to pay the second instalment regardless of the Plan's solvency was void, as it was contrary to statutory provisions that it interpreted as preventing the Trustees from making such a payment under the circumstances. The Court examined the statutory language and found that the Trustees' interpretation of the relevant statutory provisions was not the only or even the preferable interpretation. On the Court's reading of the provisions, it was readily possible that a contract the Trustees may have had with Mr. Denluck would be valid and not contrary to statute. It also found he had pleaded the relevant material facts to support his claim.

The Court found that Mr. Denluck's breach of trust claim would not plainly and obviously fail, as the Trustees' defence again relied on a particular interpretation of statutory provisions with which the Court did not agree. The Court also declined to find that Mr. Denluck's claim constituted a collateral attack on a prior regulatory decision, as the Trustees argued.

With respect to the common issues test, the Court declined to find a common issue with respect to the alleged contract between Mr. Denluck and the Trustees. Mr. Denluck failed on this point because, while relying in part on standard form documents, he also relied on an assertion that part of the contract was grounded in the oral representations the Trustees made to him. The Court found that even if it determined that a contract between Mr. Denluck and the Trustees existed, such a finding could not be extrapolated to all members of the class.

However, the Court found that Mr. Denluck's breach of trust claim raised common issues, because it involved determining the interaction between the relevant statutory provisions and

Plan documents. Unlike the contractual claim, the issue could be resolved within the four corners of the relevant documents.

The Court found that a class action would be the preferable procedure for the fair and efficient resolution of the common issues, and that Mr. Denluck was an appropriate representative Plaintiff.

Commentary

The Court's decision is not final with respect to the merits of the matter. However, it highlights the need for trustees to carefully consider how their statutory obligations interact with representations they may have made to plan members regarding future payments owing. Courts may be reluctant to permit trustees to rely on a particular interpretation of governing statutes to permanently cancel planned instalment payments where firm representations indicating the certainty of a future payment were made to a plan member (or former member). Further, in exercising their trust obligations, it may be important for trustees to thoroughly canvass all possible avenues by which they can uphold their trust obligations while meeting statutory requirements. One suspects there will be a natural disinclination on the part of courts to find that a statute requires trustees to permanently cancel a planned payment of funds owing to a member in all but the clearest of circumstances.

With respect to class actions law, the Court's decision reiterates that the bar for whether the pleadings disclose a cause of action is low. A court will generally be loath to make a final substantive determination on an issue that involves a complex interaction of fact and law at the certification stage.

Mr. Denluck's failure to prove a common issue on his contractual claim underlines the difficultly of relying on oral evidence involving a particular individual when attempting to certify a class action.

9. *Duncan v. Retail Wholesale Union Pension Plan,* 2017 BCSC 2375

In *Duncan v. Retail Wholesale Pension Plan,* the British Columbia Supreme Court (the "Court") has arguably departed from past jurisprudence and signalled to pension plan administrators that the exemptions for discrimination in human rights legislation that apply to pension plans may not be as broad as once thought.

The case arrived at the Court as a result of a judicial review of the British Columbia Human Rights Tribunal (the “Tribunal”). John Duncan was a member of the Retail Wholesale Union Pension (the “Plan”) and commenced his pension in 2015. The Claimant complained to the Tribunal that it was discriminatory that married plan members were entitled to greater benefits - in the form of survivor entitlements which continue after the death of the plan member - under the pension plan than single plan members, whose pensions could not be assigned to another person for their life. This difference, according to the Claimant, constituted discrimination on the basis of marital status.

Decision Below

The Claimant filed a complaint to the Tribunal under the *Human Rights Code*, R.S.B.C. 1996, c. 210 (the "*Code*"), arguing that this differential treatment violated his rights under the *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982*, c. 11 [the "*Charter*"], and that the relevant exemption in the Code did not provide an exemption to the Plan.

The Tribunal concluded that the discriminatory aspect of the Plan was exempted from the application of the Code due to the Plan being "bona fide" under s. 13(3)(b) of the *Code*. That section provides as follows:

> **13** (1) A person must not
>
> **…**
>
> (b) discriminate against a person regarding employment or any term or condition of employment
>
> because of the…marital status… of that person.
>
> …
>
> (3) Subsection (1) does not apply
>
> (b) as it relates to marital status…to the operation of a bona fide retirement, superannuation or pension plan…

The Tribunal decided that the Plan was exempt because it satisfied the test for *bona fide* laid out by the Supreme Court of Canada in *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc*., 2008 SCC 45 [*Potash*]. In that decision, the Supreme Court of Canada had determined that when examining whether a plan is bona fide or not, "It is the plan itself that is evaluated, not the actuarial details or mechanics of the terms and conditions of the plan" and that " "unless there is evidence that the plan as a whole is not legitimate…it will be immune from the conclusion that a particular provision compelling retirement at a certain age constitutes age discrimination". This broad protection has frequently provided comfort to plan administrators who are tasked with administering pension plans which frequently make distinctions on the basis of protected grounds such as age, marital status and disability.

The Tribunal ultimately concluded that *the Plan was exempt under* s.13(3)(b), as per the test for "bona fide" in *Potash, because:*

> (1) the plan is objectively a legitimate and genuine pension plan;
>
> (2) nothing in the material before the Tribunal suggested the plan was anything but subjectively *bona fide*;
>
> (3) there was no evidence suggesting the plan was put in place to defeat the human rights of members;

(4) the payment of larger pension benefits to married people than single people is an established practice in numerous pension plans registered in British Columbia and Canada; and

(5) the pension plan is a bona fide plan within the meaning contemplated by s. 13(3)(b) of the *Code*.

In reaching its decision, the Tribunal declined to take jurisdiction over any of the constitutional issues raised by the Claimant and rejected the Claimant's argument that the Tribunal was required to consider the values reflected in the Charter when interpreting the Code.

The Court's Reasoning

The Court ultimately determined that the case should be sent back to the Tribunal, and directed it to conduct its analysis with respect to s. 13(3)(b) of the Code with consideration of the underlying Charter values. It held that failure to consider Charter values was an error by the Tribunal.

The Court held that the Tribunal erred when it concluded that it could not consider *Charter* values in deciding whether the Plan was *bona fide* because there was no ambiguity in the statute. The Court further stated that the Tribunal should have engaged in a *Charter* value analysis and considered how the *Charter* value at issue could be best protected in light of the statutory objectives in the Code, which are laid out in section 3 of that statute:

3 The purposes of this Code are as follows:

(a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;

(b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;

(c) to prevent discrimination prohibited by this Code;

(d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;

(e) to provide a means of redress for those persons who are discriminated against contrary to this Code.

Based on recent Supreme Court of Canada jurisprudence, the Court determined that the Tribunal had an obligation to weigh the purpose of the *Code* against the right of the Claimant not to be discriminated against on the basis of marital status when applying the exemptions in the Code. It noted that even in *Potash*, where there was no ambiguity in the statute, the Supreme Court of Canada still considered some of the policy considerations and legislative history behind the government's rationale for allowing a specific exemption on the basis of age under New Brunswick's human rights legislation.

The Court admonished the Tribunal for performing an analysis of the legitimacy and genuineness without consideration the underlying policy rationale for the exemption for marital status in s. 13(3)(b) or the potential influence of Charter values on the issue. It also determined that "[g]iven the Tribunal's insistence that a strict interpretation of the *Potash* framework was necessary, the Tribunal at the very least should have engaged in a similar exercise with respect to marital status based discrimination that the Supreme Court engaged in for age based discrimination."

The Court further held that the Tribunal was obliged to balance the objectives of the statutory regime the *Charter* values being infringed. It held that Charter values can be considered when assessing whether the Plan's terms were adopted in good faith. The Court also referenced the Supreme Court's decision in *Zurich Insurance Co. v. (Ontario Human Rights Commission)*, [1992] S.C.R. 321, and noted that based on that decision, "sound and accepted business practices" can be considered in evaluating the *bona fides* of the plan. As a result, the Court held that it is possible that *Charter* values could inform the Tribunal's analysis of what constitutes a "sound" business practice in balancing the objectives of the statute with the Claimant's *Charter* interests. On this basis, it determined that the Tribunal had erred in failing to consider Charter values in applying the exemptions under the Code.

A Troubling Development for Plan Administrators and Sponsors?

The *Duncan* case arguably signals a departure from the strict analysis that is normally undertaken by Plan administrators in assessing whether a plan provision is exempt from the discrimination protections in relevant human rights legislation. Provided that a plan is not a sham and no part of it has been intentionally created to defeat protected rights, most human rights statutes across Canada appear to create broad exemptions from discrimination. These exemptions are based on the policy rationale that pension plans are, by their very nature, required to draw broad distinctions between and within groups. The *Potash* line of cases created a clear line that pension plan administrators could look to in assessing whether their plan was in compliance. In requiring the consideration of Charter values – a broad and elusive concept – the Court in *Duncan* has made life more difficult for plan administrators and sponsors. It is not clear how these parties are supposed to weigh Charter values when determining if their Plan is in compliance with human rights legislation.

It is not yet known whether the *Duncan* case will be appealed.

10. *ITB Marine Group Ltd v. Northern Transportation Company Limited,* 2017 BCSC 2007

Facts

Northern Transportation Company Limited ("NTCL") operated marine shipping and transportation in Northern Canada. After identifying a shortfall in the funding of its pension plan in 2011, NTCL sought relief under the "distressed pension plan workout scheme" ("DPPWS"), contained in section 9(1.1) of the *Pension Benefits Standards Act, 1985* RSC, 1985, c. 32 ("PBSA").

The DPPWS allows companies in distress with underfunded pension plans to negotiate an alternative payment schedule with plan members, with the idea that this will help the company continue to operate. The workout plan resulted in NTCL having 10 years instead of 5 to pay the shortfall.

In 2013, NTCL purchased 19 vessels from ITB Marine Group Ltd ("ITB"). This purchase was financed by ITB with security against the 19 vessels. On April 28, 2016, NTCL was granted protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C 1985, c. C-36 ("CCAA").

A dispute arose as to whether the deemed trust priority applies to the amounts owing under the negotiated DPPWS plan, and if so, whether the deemed trust takes priority over ITB's security in the plan.

Decision

The decision turned on the meaning of "accrued" in pension legislation, which had previously been dealt with in *Indalex Ltd., Re*, 2013 SCC 3 ("*Indalex*"). Justice Bowden found that as of the date of the bankruptcy, the amounts under the Workout Scheme were fully constituted and precisely ascertainable. Even though they were not yet payable, he determined that they were "accrued" and required to be made, so the deemed trust applied.

Justice Bowden then went on to find that the deemed trust applies only to the marine vessels in which it has gained a proprietary interest, and not the remaining finance portions as title has not yet passed. Further he followed the reasoning of recent decision, *Arrangement relatif a Bloom Lake*, 2017 QCCS 4057, to incorporate the priorities in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3 into the CCAA.

Following this reasoning, he determined that s. 81.5 of the BIA only gave priority to Normal Payments in the CCAA. Therefore, the amounts owing under the DPPWS could not have priority over the secured claims of ITB.

Comment

This case illustrates the ongoing concerns of pension priorities in the CCAA, and it also seems to contradict the reasoning of the Supreme Court of Canada in *Indalex*. Unfortunately, this decision was not appealed, and the uncertainty continues to reign without further appellate review and clarification.

11. *Re Walter Energy Canada Holdings, Inc.*, 2017 BCSC 1968

Introduction

In *Walter Energy Canada Holdings, Inc. (Re)*, British Columbia Supreme Court Justice Fitzpatrick approved a settlement of claims against a mining company under section 11 of the

Companies' Creditors Arrangement Act [the "CCAA"].[21]

Background

The petitioners, New Walter Canada Group, comprised part of the Canadian arm of Walter Group, a major exporter of metallurgical coal for the steel industry with mines and operations in British Columbia, the United States, and the United Kingdom.[22] Upon restructuring, the petitioners' coal mining assets had been sold, and the focus of the proceedings had moved to a consideration of the claims advanced by alleged creditors.[23]

The most significant claim against the petitioners, exceeding $1.2 billion, was held by the United Mine Workers of America 1974 Pension Plan and Trust [the "1974 Plan"]. Had the 1974 Plan's claim been found valid, it would have consumed the majority of the funds available for distribution to creditors. Justice Fitzpatrick had held in an earlier decision, however, that the 1974 Plan's claim was governed by Canadian substantive law instead of US substantive law, which, given the nature of the 1974 Plan's claim, amounted to a rejection of the claim against the petitioners.[24] The 1974 Plan was granted leave to appeal from that decision, and the appeal was scheduled for hearing. The hearing date was eventually adjourned in light of ongoing negotiations between the parties which could resolve the issue.

It was in this context that the parties prepared the Settlement Term Sheet Re Plan of Compromise and Arrangement [the "Settlement Term Sheet" or the "STS"] that was the subject of this application.

The Settlement Term Sheet

The STS was the result of negotiations between the petitioners, the 1974 Plan, and Warrior Met Coal, LLC ["Warrior"], another US entity that had advanced claims against some of the petitioners' assets.

The STS provided for:

- Allowance of Warrior's claims in respect of certain shared services ($9,892,193.92) as well as accrued but unpaid interest owing in respect of a promissory note (an amount equal to the amount of the Available Net Proceeds; see below);

- In consideration of the 1974 Plan abandoning its appeal, payment of $13 million of Available Net Proceeds from petitioners to the 1974 Plan, with Warrior receiving the remainder of any Available Net Proceeds;

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[21] 2017 BCSC 1968 at para 1.

[22] 2016 BCSC 107 at para 2; 2016 BCSC 1413 at para 4.

[23] 2017 BCSC 1968 at para 4.

[24] *Ibid* at para 7.

- In consideration of the 1974 Plan abandoning its appeal, an agreement by the petitioners that they would not pursue costs against the 1974 Plan, and would pay the costs of the USW, which had been involved in opposing the 1974 Plan's efforts to assert its claim;

- Upon the completion of the unresolved restructuring claim process, or an earlier date as the petitioners and Monitor would decide, the bringing of a motion seeking the Court's approval of a plan of compromise or arrangement [the "**Plan**"] that contained the principal terms set out in the STS;

- A release of claims against the Walter UK Group, so that the assets of a subsidiary of that Group could be sold to an interested party.

There was concern as to whether the $13 million payment could be made, since it was not yet clear what other claims might be brought against the petitioners.[25] The STS provided that in such a situation, the 1974 Plan could bring its appeal, and the petitioners, the Monitor, and the USW could pursue costs against the 1974 Plan in relation to proceedings arising from the assertion of its claims.[26]

The STS also provided that the director of the corporations composing the petitioners would be paid US$250,000 from the Available Net Proceedings "in consideration for his commitment to [the petitioners] throughout the *CCAA* [p]roceedings."[27]

The Decision

Justice Fitzpatrick approved the STS pursuant to section 11 of the *CCAA*, which provided that she could exercise her discretion to make any order that was "appropriate in the circumstances."[28]

She reiterated her conclusion from an earlier decision - that section 11 provides the necessary jurisdictional basis to consider and approve a settlement agreement even before the presentation of a plan of arrangement.[29]

The relevant considerations in approving a settlement in the *CCAA* context, she confirmed, were:[30]

- Is the settlement fair and reasonable?

- Does the settlement provide substantial benefit to stakeholders? and

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25 *Ibid* at para 17.

26 *Ibid* at para 20.

27 *Ibid* at para 22.

28 *Ibid* at para 31.

29 *Ibid* at para 32.

30 *Ibid* at para 33.

- Is the settlement consistent with the purpose and spirit of the CCAA?

Justice Fitzpatrick found that all three considerations were satisfied. The STS removed a major stumbling block in providing a distribution to creditors, and provided a much faster resolution to the issues than if the appeal went forward. It avoided the risk of the 1974 Plan being successful and effectively depriving all other claimants of any recovery. It made it so all of the "Allowed Claims," many of which were asserted by former employees, would be paid in full. The STS also facilitated the sale of the Walter UK Group assets.[31]

The judge noted that the *CCAA* is a remedial statute that gives the court a "broad and flexible authority." She commented:

> There can be no doubt but that this settlement achieves what few *CCAA* proceedings achieve, namely a somewhat timely but full recovery for the vast majority of claimants. That the parties were able to resolve their differences to avoid the complex and costly legal battles to come is a testament to the ingenuity of the stakeholders and the flexibility that the *CCAA* affords in these difficult circumstances.[32]

In the result, she approved the STS, finding it fair and reasonable, substantially beneficial to the creditors of the petitioners, and consistent with the purpose and spirit of the *CCAA*.[33]

12. *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 170 v. British Columbia (Information and Privacy Commissioner),* 2018 BCSC 1080

A recent British Columbia Supreme Court case found that a freedom of information request should be denied because it would cause harm to the unions whose information was at issue. The case involved a judicial review of a decision of the Information and Privacy Commissioner of British Columbia.

Background

The Financial Institutions Commission ("FICOM") is a regulatory agency of the government of British Columbia and is subject to requests for information under the *Freedom of Information and Protection of Privacy Act,* RSBC 1996, c 165. Section 38 of the *Pension Benefits Standards Act* SBC 2012, c 30 ("PBSA") necessitates that administrators of pension plans must disclose certain information to the Superintendent of Pensions (who is located within FICOM).

The Independent Contractors and Business Association ("ICBA") submitted requests in 2010 and 2011 for pension plan filling documentation from certain union-sponsored pension plans. FICOM released some of the requested information and withheld some of it. The ICBA sought

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31 *Ibid* at para 34.

32 *Ibid* at para 35.

33 *Ibid* at para 42.

review of this decision and FICOM then agreed to release the withheld records. Thirteen of the sixteen pension plans that received notice of the planned release of information objected to the decision. They relied on section 53 of the FIPPA to request that the Office of the Information and Privacy Commissioner of British Columbia ("OIPC") review the decision. OIPC agreed with FICOM that the records should be released, which caused the unions to file a petition in the British Columbia Supreme Court to review the issue. The court concluded that an implicit decision by OIPC not to give notice to some unions that a request for review had been received was unreasonable. The matter was referred back to OIPC.

In 2015, the ICBA made a further access to information request to FICOM for the same information as requested before. This time, however, FICOM withheld the information based on the rationale that the disclosure would be harmful to the business interests of a third party (the unions and pension plans), according to section 21 of the FIPPA.

The 2010-2011 request and the 2015 request were combined to be heard as one inquiry by OIPC. OIPC's decision required FICOM to release the requested information.

The group of unions and pension plans argued that this decision was unreasonable because the manner in which the adjudicator applied the test for proof of harm and causation of harm set the bar too high. The Superintendent of Pensions agreed with and adopted the arguments of the unions and the pension plans. The ICBA argued that the decision was reasonable.

The Decision

The court concluded that the adjudicator did set too high a bar in deciding whether the disclosure of the relevant information could reasonably be expected to result in harm. Because of this, her decision was found by the court to be unreasonable and was set aside.

The court referenced an earlier Supreme Court of Canada case (*Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3) in which the Supreme Court decreed that the standard for a public body to refuse disclosure because it would do damage to a third party is "a reasonable expectation of probable harm." This means that:

> …while the third party need not show on a balance of probabilities that the harm will in fact come to pass if the records are disclosed, the third party must nonetheless do more than show that such harm is simply possible" (para 196).

According to the court, the adjudicator failed to apply this standard. The information being sought included the average annual hours worked, average annual pension paid and average monthly accrued pension for the current year for present employees. The "probable harm" at issue was the likelihood that the release of this information would give competitors of the unions the ability to critique them on the basis of the benefits they grant their members, and thereby potentially lure away those members.

While the adjudicator accepted that the above harms were reasonably foreseeable, she found that the standard had not been met because she was provided with no evidence that such harm had

previously come to pass. According to the court, the adjudicator was therefore "seeking to satisfy a balance of probability standard, rather than a more than simply possible standard" (para 97).

The court also reviewed the application of s. 22 of the FIPPA, which deals with whether the disclosure would entail an unreasonable invasion of a third party's personal privacy. The adjudicator found that the kind of information sought did not constitute an unreasonable invasion into the privacy of the relevant individuals. The court as a result chose not to disturb the findings of the adjudicator.

Conclusion

The takeaway from this case is that the standard for disclosure of information through FIPPA legislation is higher than perhaps previously thought. While disclosure does require more than the demonstration that harm is "simply possible", it is not necessary to furnish actual proof that such harm has occurred in the past. The standard gathers around the notion that harm must be reasonably likely to result. Unions and unionized pension and benefit plans should be aware of this decision if they are ever faced with similar applications for information.

QUEBEC

13. *Arrangement relatif a Bloom Lake,* 2017 QCCS 4057

Justice Hamilton's decision on the motion for directions in the *Companies Creditors' Arrangement Act,* R.S.C 1985, c. C-36 ("CCAA") proceedings for Bloom Lake is some of the most recent treatment of the deemed trust created by pension legislation when a plan is wound up in a deficit. This decision, as well as a related reference question answered by the Newfoundland Court of Appeal, has created even greater uncertainty for participants in CCAA proceedings that involve a large pension deficit.

Facts

Wabush Mines operated an open-pit iron ore mine in Wabush, Newfoundland. In 2013, the parent company of Wabush Mines, Cliffs Natural Resources ("CNR"), based in Cleveland, Ohio, decided it would disengage and shut down CNR's mining operations in Eastern Canada. To avoid the $650MM - $750MM that CNR estimated for the closure costs, CNR chose to use the CCAA as its disengagement tool.

Since the head office of Wabush Mines is located in Montreal, pursuant to section 9 of the CCAA, Wabush Mines applied for CCAA protection from the Quebec Superior Court. On May 20, 2015, Wabush Iron Co. Limited, Wabush Resources Inc., Wabush Mines, Arnaud Railway Company, and Wabush Lake Railway Company Limited (collectively, "**Wabush Mines**") obtained protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C 1985, c. C-36 ("**CCAA**").

While under CCAA protection, Wabush Mines shut down all mining operations, terminated its employees (other than four who are monitoring the idled open-pit Wabush Mine), and liquidated all of its assets in a sales process through the CCAA proceedings in order to eventually pay toward creditors' claims.

Shortly after obtaining CCAA protection, Wabush Mines requested that the Newfoundland Superintendent of Pensions appoint a replacement administrator over the Wabush pension plans because it said it no longer had the resources to administer the pension plans. On December 16, 2015, the Superintendent declared that the Salaried Plan be terminated effective on that date. In addition, at the outset of the CCAA proceedings, retirees also lost their other post-employment benefits, including life, health, and dental coverage.

On September 20, 2016, the Monitor in the CCAA proceedings filed a "Motion for Directions" from the CCAA Judge, regarding the treatment of the pension deemed trust priority in the CCAA proceedings.

Decision

Justice Hamilton found that the deemed trusts under the Newfoundland *Pension Benefits Act*, 1997, SNL 1996 Chapter P-4.01 ("NLPBA"), the Quebec *Supplemental Pension Plans Act*, chapter R-15.1 ("SPPA"), and the federal *Pension Benefits Standards Act, 1985* RSC, 1985, c. 32 ("PBSA"), does not operate in CCAA proceedings. To get there, he made several determinations at law.

First, he determined, based on the precedent set in the Supreme Court of Canada case, *Royal Bank v Sparrow Electric*, [1997] 1 SCR 411, that the statutory deemed trust language must identify the property covered in order to be effective. He further found that this property must be identifiable at the "triggering event", or the event when the trust arises, in order to form a valid trust.

Judge Hamilton also found that deemed trust provisions do not have application in CCAA proceedings. He came to this conclusion first by applying the federalism doctrine of paramountcy. Because the CCAA deals with the priority of pension entitlements in s.6(6) and 37(6), and because he chose to incorporate the priorities of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3 ("BIA"), into the CCAA, any priority that alters those priorities contravenes the federal purpose of the CCAA. Further, he found that even the deemed trust provision in the federal PBSA also does not apply in the CCAA because the CCAA was amended after the PBSA, and therefore Parliament must have intended the CCAA priorities to prevail.

Justice Hamilton also determined that the deemed protections in the Newfoundland PBA could not apply to plan members in Quebec or plan members who were part of a federal undertaking. Those members were separately governed by their jurisdictions legislation, and could not benefit from the benefits-conferring Newfoundland legislation without an express interjurisdictional agreement, even though he found that the deemed trust provisions under the SPPA failed outright.

Comment

Justice Hamilton's decision contradicts much of the reasoning in the Supreme Court of Canada's decision in *Indalex Ltd., Re*, 2013 SCC 3. That decision not only held that the deemed trust continues to apply in the CCAA, but also held that BIA priorities should not be incorporated into the CCAA. Leave to appeal was granted by the Quebec Court of Appeal – however, the parties settled prior to that appeal being heard.

The uncertainty caused by this, as well as the contradictory decision out of the Newfoundland Court of Appeal, means that this is very likely not the last decision that will be heard on the pension deemed trust provisions and how they apply in the CCAA.

14. *Threlfall v. Carleton University,* 2017 QCCA 1632

Lynne Threlfall appealed a judgment the Superior Court, District of Gatineau rendered on February 2, 2016 which granted Carleton University's motion to institute proceedings and condemned her to pay the amount of $497,332.60, retroactively to December 2007, with legal interest as of the same date and with costs.

The Facts

Pension benefits were paid out to a retiree who, it turned out, was dead at the time of payment, and Ms. Threlfall had the funds in hand as his heir. In 2007, George Rosme was a retired political science professor with Carleton University. He suffered from early-stage Alzheimer's disease. He went for a walk in September of that year and never returned. Ms. Threlfall was his former de facto spouse, and lived on the same property as him in a separate house at the time of his death.

The University was initially unaware of his disappearance and continued to pay his pension benefits. He had elected to receive a "life only" pension (of $6000 per month) when he retired in 1996, meaning that he received increased monthly pension installments for his lifetime, but that also meant he waived rights to any benefits that might otherwise be payable to his beneficiaries, estate or heirs.

In 2009, a local paper published a story about his disappearance, which alerted a pension manager at Carleton University to the situation. The pension manager wrote Ms. Threlfall and requested the repayment of the moneys as they were submitted from January 2008, amounting to $70,189.77

Ms. Threlfall contacted the University stating that on February 4 2008 the Superior Court granted Ms. Threlfall's uncontested motion to institute a tutorship to the property of Mr. Rosme, as an absentee within the meaning of article 84 C.C.Q. Ms. Threlfall was appointed tutor to the absentee. Ms. Threlfall informed the University that, as an absentee, Mr. Rosme was presumed alive and that therefore the University could not cease pension payments. The University eventually agreed to resume the payments but without admission of any kind, not least because Ms. Threlfall had indicated she had no information whatsoever proving or disproving his death.

Five years and ten months after his disappearance, Mr. Rosme's remains were discovered. Ms. Threlfall informed the University and payments were stopped. Eight and a half months after the discovery of the body, the Registrar of Civil status recorded the death as having occurred the day after his disappearance in 2007.

The Appeal

There were several grounds for appeal:

1. Did the judge err in deciding that Mr. Rosme had no entitlement to pension benefits after his death?

The Court of Appeal considered whether the Superior Court judge had erred in interpreting the contractual terms of the retirement plan. Ms. Threlfall argued that the University was required to continue paying benefits until *proof of* death. The Court of Appeal disagreed; the language of the provision in the plan dealing with "life only" pensions dictated that the payments were to cease on the month of death; that is, on the true date of death.

Ms. Threlfall also argued that in addition to the date of proof of death being the appropriate date to cease payments, there should be no retroactive application of this discovery. The Court of Appeal also disagreed with this. The Court decreed that the Registrar of Civil Status has the discretion to establish the date of death and since Ms. Threlfall did not contest it, it stood. Furthermore, the protection to Mr. Rosme's benefits afforded by the 7 year presumption of life could not entitle him to benefits he did not otherwise have. Therefore, it could not confer a right to receive those benefits when he was not alive and the determination of the date of death had retroactive effect. Article 85 did not specify that the presumption is rebutted with retroactive effect but this can be inferred from a consideration of the whole of the treatment of absentees in the Code.

2. Did the judge err in ordering restitution by misinterpreting the rules of a "receipt of payment not due" in articles 1491 and 1492 C.C.Q. and, if so, could restitution be ordered on another basis?

The University argued that the sums paid were not due, and therefore should be reimbursed. The Code sets forth sources of obligations, including one dealing with unjust enrichment. The Code, at 1491 and 1492 C.C.Q., expressly provides that the person having received such a payment has an obligation to make restitution. The Court of Appeal holds that the three conditions for unjust enrichment requiring restitution were met.

3. Was the quantum calculated incorrect?

The quantum was incorrect insofar as the date the interest was to be calculated was from the date of death, as opposed to from February 17, 2014.

Commentary

This unusual case makes clear that, where the member of a plan elects a "life only" pension, this will be adhered to. It further provides that, where the member in question disappears (at least in Quebec) and turns out to have been deceased, there will be a clawback of amounts paid out. The case affirms the strict lines courts will draw around who is eligible to receive benefits.

15. *Union of Canadian Correctional Officers - Syndicat des agents correctionnels du v. Canada (Attorney General),* 2018 QCCS 2539

In *Union of Canadian Correctional Officers* - *Syndicat des agents correctionnels du v. Canada (Attorney General),* 2018 QCCS 2539 ("*UCCO v. Canada*"), the Quebec Superior Court explored the question of when statutes excluding certain workplace benefits and hiring matters

from the collective bargaining process may violate employees' constitutional right to collective bargaining pursuant to section 2(d) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

The Union of Canadian Correctional Officers ("UCCO"), a bargaining agent representing 6,500 federal correctional officers across Canada, asked the Court for a declaration that section 113 of the Federal *Public Sector Labour Relations Act* ("FPSLRA") is invalid by virtue of being in conflict with the guarantee of freedom of association provided by section 2(d) of the *Charter*.

Section 113 of the FPSLRA prohibits a collective agreement from doing anything that would require modification of federal regulations or legislation, or from establishing terms or conditions employment where the term or condition is one that has been or may be established under three federal statutes: the *Public Service Superannuation Act* ("PSSA"), the *Public Service Employment Act* ("PSEA"), and the *Government Employees' Compensation Act* ("GECA"). The Government of Canada has relied on this statutory provision to exclude from the scope of collective bargaining negotiations three broad matters: 1) the pension regime; 2) the staffing regime; and 3) the workers' compensation regime.

The Court declared that the portions of section 113(b) prohibiting collective bargaining on the pension regime governed by the PSSA, well as on staffing matters governed by the PSEA, are constitutionally invalid as they violate section 2(d) of the *Charter*, and cannot be saved by section 1. It declined to find that excluding workers compensation matters covered by GECA from collective bargaining amounted to a *Charter* breach.

The Submissions of the Parties

The Government raised policy arguments to justify the exclusion of the pension regime from the scope of collective bargaining, highlighting the need for predictability, consistency, equity, and transferability. It also argued that existing consultative mechanisms – outside the scope of the collective bargaining process – satisfy the *Charte*r 2(d) requirement. In particular, these include discussions between the parties leading to a 2006 Memorandum of Understanding on certain pension issues (the "MOU"), as well as a statutory Consultative Committee that provides six union seats for the 20 bargaining agents whose members are part of the pension plan.

The UCCO, by contrast, stressed the compatibility of collectively negotiating pensions with the Government's policy goals. One expert called by the UCCO favourably cited the Quebec model, in which there is some scope for the parties to negotiate pensions through collective bargaining within the limits set out by statute. In addition, the Quebec government has in some cases undertaken to certain bargaining agents that it would table legislation in the National Assembly to implement agreed upon pension changes.

With respect to the staffing regime, the Government argued that the purpose of the PSEA is to preserve the merit principle in hiring. If the parties were to negotiate the hiring and transfer process in collective bargaining, the merit principle may be compromised, in the Government's estimation. In addition, as with pensions, it emphasized the presence of consultative processes outside the collective bargaining process that would satisfy the *Charter* 2(d) requirement. In particular, the Government pointed to a 2006 Global Agreement between the UCCO and the Correctional Service of Canada (CSC) on staffing, that was negotiated without the Government body responsible for collective bargaining – the Treasury Board ("TB") – at the table.

On workers' compensation, the *Government Employees' Compensation Act* (GECA) provides that federal public servants will be governed by the provincial workers' compensation regime of the province in which they reside. The Government argued that because the terms and conditions of workers' compensation benefits are governed by provincial plans, which are themselves statutory in nature, it is appropriate to continue to exclude such plans from the scope of collective bargaining. The UCCO asserted the statutory bar on negotiating issues covered by GECO should be struck down as being a violation of *Charter* 2(d).

The Court's Analysis

The Court cited *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, as setting out the primary test for a violation of the right to collective bargaining under *Charter s*ection 2(d): looking first at the importance of the affected matter and its relation to the ability of union members to pursue collective goals in concert, then turning to the degree to which the measure in question negatively impacts the collective right to good faith negotiation and consultation.

On application to the facts, the Court concluded that pensions and the staffing regime were unequivocally items of central importance to the Union and its members. It cited as evidence the behaviour of the parties – particularly the fact that they found these matters important enough to negotiate the MOU on pensions and the Global Agreement on the staffing regime. That being the case, it turned to assessing the adequacy of existing consultation mechanisms.

The Court found the Consultative Committee on pensions to be inadequate to meet the standard required under *Charter* 2(d). In the Court's view, the Committee structure denies the ability of members to choose a bargaining agent, in that it does not provide guaranteed representation for the UCCO. As for the representations and discussions that took place between the parties outside the collective bargaining framework between 2002 and 2006, when the MOU on pensions was signed, the Court found that these did not ultimately amount to the Government providing a right to collective bargaining, as is required under *Charter* 2(d). Rather, these talks were merely *ad hoc* consultations undertaken at the discretion of the Employer.

The Court found similarly regarding the Global Agreement on staffing, which was an *ad hoc* process created by the CSC and the UCCO precisely because of TB's refusal to deal with staffing matters in collective bargaining. Further, in outcome, the Global Agreement was fundamentally hamstrung by the lack of a grievance process.

The Court declined to strike down section 113(a) of the FPSLRA, finding it to merely be a restatement of the doctrine of parliamentary supremacy.

It also declined to strike down the portion of FPSLRA section 113(b) prohibiting negotiation of workers' compensation issues covered by GECA. The Court found that the UCCO had failed to demonstrate the workers' compensation regime was of central importance to its members. It also noted that GECA did not represent a complete regime for workers' compensation in the same manner as the PSEA for staffing and the PSSA for pensions, such that the parties could in principle negotiate additional provisions regarding compensation for workplace injuries.

The Court found the violations of freedom of association were not justified under section 1 of the *Charter*. While recognizing pressing and substantial objectives on the part of the Government,

the statute was not minimally impairing of the right in question, because the Government had not demonstrated that it was necessary to completely prohibit collective bargaining on staffing and pension matters in order to uphold its objectives.

The Court did not engage with arguments around the right to strike in this case.

Comment

Across the country, there are a variety of statutory bars to collective bargaining around public sector pensions. While these provisions used to be commonplace, they have been eliminated in some jurisdictions. In provinces where such provisions still exist, this case signals that such provisions may be unconstitutional as a result of developments around the law of freedom of association. A similar challenge is currently being prosecuted in New Brunswick, with respect to the bar on collective bargaining around the public sector's shared risk plan, and challenges in other provinces may also arise.

ALBERTA

16. *International Brotherhood of Electrical Workers, Local No. 1007 v. Epcor Utilities Inc.,* 2017 ABCA 314

In *International Brotherhood of Electrical Workers, Local No. 1007 v. Epcor Utilities Inc.*, 2017 ABCA 314, the Alberta Court of Appeal the two leading Supreme Court of Canada decisions on the interaction of human rights legislation with pension and benefits entitlements. The Court of Appeal determined that an LTD plan that precludes benefits to a member that is eligible for a full pension can be exempt from the operation of Alberta's human rights legislation. It further indicated to parties in collective bargaining that, human rights should be part of the consideration in the negotiating process, lest the courts consider the parties to have accepted discriminatory provisions as *bona fide*.

The grievor, McGowan, was unable to work and placed on long-term disability ("LTD") in 2011. The LTD policy that his union negotiated provided coverage until the earlier of age 65, or when the disabled worker "retires on pension with the employer or is eligible to retire with a full pension or a full pension equivalent". Under the pension plan, McGowan became eligible to retire on full pension because he was 55 with over 35 years' of service.

The problem was that his monthly compensation decreased as a result of receiving pension payments as opposed to LTD payments. McGowan, therefore, filed a grievance stating that the policy terminating his LTD payments prior to turning 65, just because he was eligible to retire, even though he did not choose to retire, was discriminatory on the basis of "age" in contravention of the *Alberta Human Rights Act*, RSA 2000, c. A-25.5 ("the *Act*").

The arbitration board found that while a *prima facie* case of discrimination had been made out because age is a connective factor to pension entitlement, the plan was nevertheless a *bona fide* employee insurance plan and unaffected by the *Act*. An application for judicial review at the Alberta Queen's Bench was dismissed, and that decision was appealed to the Alberta Court of Appeal.

The analysis at the Alberta Court of Appeal relied heavily on two decisions of the Supreme Court of Canada. The first was *Zurich Insurance Co. v Ontario (Human Rights Commission)*, [1992] 2 SCR 321 ("*Zurich Insurance*"). *Zurich Insurance* asked the Supreme Court to decide whether automobile insurance premiums based on age, sex, and marital status were discriminatory in contravention of the Ontario human rights legislation. The applicable human rights legislation contained an exception for certain types of insurance agreements that discriminate on the basis of "age, sex, marital status, family status or handicap" on "reasonable and *bona fide* grounds".

Bona fides was conceded in *Zurich Insurance* because the discriminatory policies were developed for legitimate economic and business reasons, and the Supreme Court decision was based on whether the policies were "reasonable". The reasonableness test was met because the premiums were based on actuarial evidence, meaning the discriminatory rates had a "'substantial connection' to the operation of the business".

In *Zurich Insurance*, reliance on actuarial evidence on its own was not enough to demonstrate that the rates met the reasonableness test, but instead the fact that there was not an alternative basis for setting insurance rates. This showed that the basis for discrimination was no more discriminatory than necessary.

The second Supreme Court decision was *New Brunswick (Human Rights Commission) v Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45 ("*Potash Corporation*"), which dealt with a mandatory retirement age in a New Brunswick pension plan. In the applicable human rights legislation, age was explicitly exempted as a term or condition "of any bona fide retirement or pension plan". This wording meant that all that was required in these circumstances was that the plan be *bona fide*.

The Supreme Court in *Potash Corporation* determined the test for a *bona fide* term or condition of a pension plan. *Bona fides* requires that the pension plan be "adopted in good faith and not for the purpose of defeating protected rights", subjectively requiring good motives and intentions, while objectively requiring it be legitimate and genuine as a plan as a whole.

The Alberta Court of Appeal identified the test for *bona fides* as being the important aspect of these two cases for interpreting the *Act* because it only contained a requirement that the discriminatory insurance policy be *bona fide*. It further stated that the *bona fides* tests differed only because of the factual contexts in which *bona fides* was being interpreted, and not because there are two separate tests for *bona fides* arising in the insurance context versus the pension context (or the employment context versus the commercial insurance context).

The Alberta Court of Appeal recognized that the circumstances at bar differed from those in *Zurich Insurance* in that that case involved premiums and this involved benefits. This distinction was found to be moot. The existence of better benefits not being offered (i.e. a later termination date of the LTD payments) did not automatically remove the *bona fides* of the current benefits. The Court found that better benefits usually came with higher premiums, and for this reason, a condition of *bona fides* could not be that the potentially discriminatory benefit was the best benefit available on the market.

Further, actuarial evidence was explicitly found not be to be a requirement of *bona fides*. Instead, the natural employment life cycle was found to be of importance, where an employee

progresses through a career and eventually transitions into retirement. The LTD plan's recognition of this cycle and termination of benefits at the retirement phase were considered *bona fide*.

This case is of particular importance to the collective bargaining context because it explicitly stands for the proposition that a union cannot do through human rights grievances what it was unable to do at the bargaining table. The Court recognized that there was "no impediment to the appellant bargaining for a different type of long term disability benefit if it thought the one selected by the employer was not bona fide". The Court noted that the Joint Benefits Advisory Committee was aware of the policy, and that the "source of the long term insurance benefits in the collective bargaining process is…a good indication that it is a bona fide plan, and not adopted 'for the purpose of defeating rights'".

NEWFOUNDLAND AND LABRADOR

17. *Reference re Section 32 of the Pension Benefits Act,* 2018 NLCA 1

In *Reference re Section 32 of the Pension Benefits Act,* the Court of Appeal of Newfoundland and Labrador has issued the most recent judicial pronouncement on the scope and effect of the legislative deemed trust provisions contained in pension benefits statutes across Canada. While the decision focuses on the specific legislative provisions in Newfoundland and Labrador's *Pension Benefits Act, 1997 ("the NLPBA")*, there are jurisprudential and practical implications of the decision that may impact proceedings across the country.

The Reference was instituted as a result of Newfoundland and Labrador referring certain questions regarding the interpretation of provisions of the NLBPA to the Court of Appeal, pursuant to the *Judicature Act*. Although the Court's opinion on the reference is advisory in nature and not based on a particular case, the context in which the decision is being made is explicitly stated by the Court: the termination of underfunded pension plans in the Wabush CCAA proceeding.

Numerous parties with an interest in the Wabush CCAA proceedings intervened, including Representative Counsel to the Members of the Wabush Salaried Pension Plans, the Monitor - FTI Consulting, the Pension Plan Administrator, the Superintendent of Pensions of Newfoundland and Labrador, certain members of the Wabush corporate group, the Syndicat des Métallos, locales 6254 and 6285, and the municipality of Sept-Iles. These intervenors were joined by the Attorneys General of Canada, Quebec and Newfoundland and Labrador.

Despite the Court's acknowledgment that the Reference might have some relationship to the Wabush CCAA proceeding, the Court was very clear that any effect it might have is merely incidental:

> *"[t]he response by the Court to the Questions comprises an advisory opinion, with reasons, designed to assist government and persons having an interest with an interpretation of the legislation at issue. As a result of the Reference, the rights of parties to litigation may be affected, but this is an incidental effect that may flow from application of the Court's response to the Questions."* (para. 7)

The Court also noted that the decision would not consider whether the relevant provisions of the NLPBA, a provincial act, might be rendered inoperative based on the doctrine of federal paramountcy. The fact that such provincial pension deemed trusts survive CCAA filings, subject to paramountcy, had previously been determined by the Supreme Court of Canada's decision in *Sun Indalex v. United Steelworkers.*

The First Question: the scope of the deemed trust

The first question dealt with by the Court considered the "the scope of the deemed trusts in section 32 of the [NLPBA] in respect of: (a) unpaid current service costs; (b) unpaid special payments; and (c) unpaid wind-up deficits". This issue, with respect to Ontario's pension benefits standards legislation, had been considered in *Indalex*, with the Supreme Court determining that the legislative deemed trust covered all amounts owing to a pension plan on wind up.

Despite the Supreme Court's analysis on the subject, certain cases from other jurisdictions - including the *Timminco* decision from Quebec and the *Aveos* decision from the federal jurisdiction - had held that the deemed trust only covered certain missed payments that were owing to a pension plan and not the entire amount needed to fulfill the pension promise.

In the *Reference*, the Court held that section 32 of the NLPBA, applied to the entirety of the pension deficit. Although the NLPBA had slightly different language than Ontario's, the Court held that "the explanation set out by Deschamps J. [for the majority in *Indalex*] would apply equally to both." The Court also noted that its decision on the scope of the deemed trust was consistent with the purpose of the NLPBA provisions ("the protection of pension plans for workers") and with Supreme Court jurisprudence on pension benefits being a form of "delayed remuneration" that represent "earned income" for those entitled to them (see Waterman v. IBM, 2003 SCC 70).

The Second Question: The Inter-jurisdictional Application of the NLBPA Deemed Trust

The second question considered by the Court concerned whether whether the NLPBA would apply to: (1) employees who work on a federal undertaking such as a railway; and (2) employees who report for work in another province.

The Court held that it was not possible to answer this question in the Reference due to the highly-fact specific nature of the issue and the fact that the court had "insufficient information":

> *"The jurisdictional questions, that is, whether the Newfoundland pension legislation would apply to employees who work on a federal undertaking such as a railway or to employees who report for work in another province, may be determined only by applying the relevant law to all the facts of a particular situation."* (para. 40)

The Third Question: The Secured Nature of the Administrator's Lien and Charge

The third question dealt with by the Court concerned whether "the lien and charge provided for in section 32(4) of the *Act* [is] a valid secured claim in favour of the plan administrator? [and] If yes, what amounts does this secured claim encompass?"

This issue had previously been considered by the Ontario Court of Appeal in *Harbert Distressed Investment Fund, L.P. v. General Chemical Canada.* In that case, which was decided before the principles espoused in *Indalex* began to shape the jurisprudence, the Court of Appeal held that "[t]he Administrator [of the Pension Plan] does not hold a charge or lien as security for a debt due or accruing due to the Administrator from the debtor GCCL." (2007 ONCA 600, at para. 27).

The Court of Appeal of Newfoundland and Labrador came to a radically different conclusion. After again referencing the legislative purpose of the provisions and the nature of pension benefits as "entitlements earned by the employee", the Court held that the Administrator of a pension plan under the NLPBA has a valid and enforceable secured claim on the assets of the employer. The Court explains their conclusion as follows:

> *"The lien and charge under section 32(4) of the Act create a valid secured claim in favour of the plan administrator. The lien and charge would be engaged upon the creation of a deemed trust under section 32 and would attach to the assets held by the employer regardless of their location...In particular with respect to a pension plan that is terminated, the amount to which the lien and charge would apply is the total of the accrued normal actuarial costs and special payments and all other amounts due to the pension fund from the employer that have not been remitted at the date of termination, together with any other payments necessary to fund the benefits provided under the plan."* (para. 51)

Conclusion

Reference re Section 32 of the Pension Benefits Act represents the latest case in the evolving line of jurisprudence flowing from the Supreme Court of Canada's decision in *Indalex.* While it does not answer all questions that remain with respect to the scope and applicability of the pension deemed trust, the case represents a positive development for employees, pensioners and unions in Canada - not to mention the retirees of Wabush. The Reference reinforces the broad scope of the pension deemed trust as well as the need to read provincial deemed trust protections in the context of the purpose of such provisions and with respect to the "earned income" nature of pension benefits. Perhaps most importantly, the case represents the high-water mark with respect to the secured nature of the administrator's lien and charge and provides much-needed support to the legal toolbox available to employees and pensioners in insolvency proceedings.

NOVA SCOTIA

18. *Canadian Elevator Industry Welfare Trust Fund v. Skinner,* 2018 NCSA 31

In a recent Nova Scotia Court of Appeal case, it was found that the Human Rights Board of Inquiry erred in its application of the *prima facie* test for discrimination, as articulated by the Supreme Court in *Moore v. British Columbia (Education),* 2012 SCC 61. The plaintiff, Mr. Skinner, was not held to have been discriminated against simply because the relevant health and welfare plan (the "Plan") did not cover his use of medical marijuana. The drug was not approved by Health Canada and the Plan excluded it on this basis. He was not denied access to it on account of his disability, and therefore, no discrimination was found.

Facts

Gordon (Wayne) Skinner was an elevator mechanic and member of the International Union of Elevator Constructors, which entitled him to participation in the Plan established in 1952. The Plan provided health and related benefits to employees and former employees working in the unionized sector of the Canadian elevator industry. He was in an automobile accident in 2010 which caused a chronic pain condition, along with anxiety and depression. His original treatment involved narcotics and anti-depressants. These had serious side effects and were not effective in treating him. In the summer of 2012, he began using medical marijuana on the advice of his psychologist. It was initially paid for by his no-fault medical benefits under his motor vehicle insurance policy, but these benefits expired after 2 years. In May of 2014, he requested coverage from the Trustees under the Plan. The Board of Trustees found as a fact that marijuana was the most effective medication for Mr. Skinner. However, the Board did not approve reimbursement, because a criterion for coverage by the Plan was that the drug be approved by Health Canada and have an assigned "Drug Identification Number" or "DIN", which medical marijuana does not. As a result, Mr. Skinner was denied coverage.

Decision

Mr. Skinner challenged his denial of coverage under the Plan through application to the Human Rights Board of Inquiry under the *Human Rights Act*, RSNS 1989 c 214. The Board found a prima facie case for discrimination. The decision was appealed.

According to the Court of Appeal, the issue was not "whether it is legal to prescribe medical marijuana or … whether Mr. Skinner may have it or … whether he needs it". This case is only about whether the Plan administered by the Trustees must reimburse Mr. Skinner for his medical marijuana costs because not doing so would offend the *Human Rights Act*, RSNS 1989 c 214."

The court reviewed the Human Rights Board of Inquiry's interpretation of the *Human Rights Act* on a reasonableness standard. Discrimination is defined by s. 4 of the *Human Rights Act* as the making of a distinction based on a characteristic that has the effect of imposing disadvantage on an individual with that characteristic, which is not imposed on those without it. The case of *Moore v. British Columbia (Education)* outlines the test for discrimination. According to this case, the demonstration of *prima facie* discrimination requires that a) there is a protected characteristic, b) there is an adverse impact and c) the adverse impact is based on the protected characteristic.

The first two criteria are held by the Court to be met: Mr. Skinner's disability counted as a protected characteristic, and the situation produced an adverse impact on his life. According to the Court, however, non-coverage of Mr. Skinner's medical marijuana was not "based on" his disability. S. 4 of the *Act*, mentioned above, necessitates that the distinction or discrimination in question be based on the enumerated ground. Many cases take "based on" to mean "factor" in. The Human Rights Board of Inquiry, conversely, had found that Mr. Skinner's disability *was* a factor in the decision-making process that ultimately led to denying him coverage for his use of medical marijuana.

The Court of Appeal comes to the conclusion that there is no connection between Mr. Skinner's disability and the decision to deny him coverage. The Court finds that the adverse effect on Mr.

Skinner of non-coverage is not a result of his membership in a protected class of disabled persons who are suffering from chronic pain:

> "Refusing Mr. Skinner a drug not approved by Health Canada does not differentiate him from others disabled by chronic pain. No beneficiary received medical marijuana. No beneficiary received drugs not approved by Health Canada. The Plan's exclusion of such drugs was not "based on" Mr. Skinner's disability. The Board's test for discrimination is therefore legally unreasonable because it fails to require a connection between the adverse effect and membership in an enumerated group."

The Court of Appeal notes that the Board of Trustees chose to limit available reimbursement for prescription drug benefits to those drugs with Health Canada approval, which necessarily would adversely affect some individuals subject to the plan. "Mr. Skinner's argument means that the Trustees' exercise of their fiduciary duty of choice becomes in itself an act of discrimination." The Court finds that the logical result of Mr. Skinner's argument is that every under-inclusive plan would be grounds for discrimination, causing human rights decision-makers to become arbiters of private benefit plans – a state of affairs that the Court rejects. The Court finds that coverage decisions, and their effects, do not necessarily make disability a factor in non-coverage decisions.

It is found, as a result, that there was no discrimination against Mr. Skinner, and so he is not entitled to coverage by the Plan for medical marijuana.

Comment

The main takeaway from the case is that courts are hesitant to utilize human rights legislation to dictate what benefit plans will cover and what they will not. The conclusion that the Court arrives at is that, were courts and tribunals to adopt this role, private benefit plans would be prevented from excluding any drug from the ambit of their coverage. This decision is helpful for the many multi-employer health and welfare plans that must deliver benefits within the context of expanding health costs and limited employer contributions.

FEDERAL JURISDICTION

19. *Bemister v. Canada (Attorney General),* 2017 FC 749

The recent Federal Court decision in *Bemister v. Canada* highlights some of the difficulties that litigants face in attempting to use the Canadian Charter of Rights and Freedoms to remedy pension and benefit issues.

Background

The Applicants in *Bemister* were federal retirees who participated in the Public Service Health Care Plan ("PSHCP") and the National Association of Federal Retirees ("NAFR"), a non-profit organization that advocates on behalf of federal retirees.

The PSHCP is a health care plan for active and retired federal public servants, established pursuant to the *Financial Administration Act*. The Applicants sought declarations that their contractual and constitutional rights were infringed by certain changes made to the cost-sharing ratio in the PSHCP.

Active federal employees do not pay premiums for PSHCP coverage, but for several years, retirees had been required to pay 25% of their own premiums. In 2014, the federal government changed the retiree contribution rate to 50%. The Court found that the retirees had some input into these changes as announced because a representative of the NAFR sat on the PSHCP oversight Committee.

The Court rejected the breach of contract claim of the retirees, on the basis that there was "no evidence that the 75-25 % split on premiums, or any set formula for that matter, was guaranteed as a term of employment or was a term of any applicable collective agreement."

Section 2(d): Freedom of Association

The Court also rejected each of the constitutional arguments raised by the Applicants. The first of these was brought pursuant to the Freedom of Association guaranteed by section 2(d) of the Charter. The Court held that the protection that section 2(d) provides to the collective bargaining process was not engaged, noting that retired public servants are excluded from the terms of the *Federal Public Service Labour Relations Act*…by the definition of an employee under subsection 2(1). The NAFR does not represent employees with collective bargaining rights. Unlike trade unions, the NAFR has no formal statutory mandate to represent all federal government retirees. It is not a bargaining unit like the unions that make up the NJC.

The Court further noted that even if the NAFR could "bring itself within the collective bargaining sphere", the protections provided by section 2(d) of the Charter only guarantee a "process rather than an outcome". The Court found that "[t]he evidence shows that the NAFR had the opportunity to make representations and had input to the process", referred to multiple meetings that were held with NAFR representatives present, and determined that the federal government, acting through the Treasury Board, had not "substantially interfered with the process by which the retirees pursue their associational activity".

Section 15: Equality

The Applicants had also alleged that their right to "equal protection and equal benefit…without discrimination" under section 15 of the Charter of Rights had been infringed. They argued that a burden was imposed on the retirees which was not also imposed upon active federal employees, and this created a distinction based on age and on retirement status.

The Court rejected this line of argument for several reasons, including that:

1. The distinction does not undermine the "presumption upon which the guarantee of equality is based".

2. The distinction was appropriate "in order to maintain a plan that is fair, competitive and sustainable which all the while respects Canadian taxpayers' dollars."

3. The change did not impose a burden on retirees in a manner which reflects stereotyping or has the effect of reinforcing, perpetuating or exacerbating the disadvantage that retirees face.

4. Federal service retirees are, in general, not marginalized or economically disadvantaged due to their likelihood of high pension incomes and medical coverage that many Canadian retirees do not enjoy.

The Court ultimately determined that the cost sharing ratio change was "not of sufficient magnitude to support a **section 15 Charter** argument."

Section 7: The Right to Life, Liberty and Security of the Person

Finally, the Court rejected the Applicants' arguments that the change to the PSHCP was a breach of the protection of "life, liberty and security of the person" in section 7 of the Charter. The Applicants had argued that the change had interfered with their ability to afford healthcare and this was a violation of their section 7 rights.

While section 7 has been utilized in some health-specific contexts such as safe-injection sites and the right to access life-saving treatment from private sources, the Court in this case characterized the right in question as fundamentally economic in nature and not about the denial of access to healthcare. The Court pointed out that "economic interests are not protected by section 7" of the Charter and dismissed this aspect of the claim. This has been a familiar theme in pension and benefit disputes where the individual claimants sought to rely on the section 7 guarantee.

Comments

This case highlights some of the common difficulties that arise with respect to attempting to use the Charter to defend against government changing pension and benefit schemes. Where the government is both legislator and employer, employees and retirees are at a major disadvantage if changes are to be made to their pension and benefit entitlements. More than 100 years ago, the Ontario Court of Appeal noted that "the Legislature within its jurisdiction can do everything that is not naturally impossible, and is restrained by no rule human or divine … The prohibition "Thou shalt not steal," has no legal force upon the sovereign body."[34] The only limitation on much governmental action comes from the Constitution and its Charter of Rights and Freedoms, but the utility of those documents is often questionable in the pension and benefits context.

20. *Scott v. The Queen,* 2017 TCC 224

On November 11, 2017, the Tax Court of Canada released *Scott v. The Queen*, 2017 TCC 224 (CanLII), a precedent setting decision regarding the taxation of payments made in relation to the termination of employment benefits in the context of the Nortel insolvency. The Tax Court "overruled", in part, an Advanced Tax Ruling issued by the Canada Revenue Agency ("CRA") relating to lump-sum payments made to former employees in respect of the termination of life insurance benefits. The Court confirmed the CRA's Ruling with respect to the taxation of

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[34] [1] Florence Mining Co. v. Cobalt Lake Mining Co., (1909), 18 O.L.R. 275, [1909] O.J. No. 196 (C.A.), at p. 279 O.L.R., per Riddell J

payments made for the termination of survivor income benefits. The time in which to appeal these decisions has now passed, with no parties appealing the decision.

The four cases before the Court served as test cases for four different groups of former Nortel employees and beneficiaries who received distributions from the underfunded health and welfare trust (the “HWT”) established by Nortel to provide various employment benefits. The payments at issue in the appeals related to the termination of life insurance coverage and monthly survivor income benefits. Koskie Minsky, serving as Representative Counsel to the pensioners, former employees and long-term disability beneficiaries of Nortel brought the test cases on behalf of approximately 10,000 former Nortel employees and beneficiaries.

The payments were made pursuant to a settlement agreement – approved by the Ontario Court in the insolvency proceeding – in order to compensate for the loss of life insurance coverage and monthly survivor income benefits. The CRA ruled that all of these payments were taxable. Koskie Minsky sought to challenge the CRA Ruling, primarily based on the principle affirmed by the SCC in *Tsiaprailis*, that a payment in settlement of a right to receive future benefits is in the nature of a capital payment and not taxable as income under the ITA. As capital payments, tax should only be payable if the beneficiaries earned a capital gain.

Notwithstanding *Tsiaprailis* and other SCC decisions on which *Tsiaprailis* relied, the Tax Court held that it was not aware of any authority that would suggest that capital payments are not taxable.

However, the Tax Court held that the lump-sum payments to the former employees whose lives were insured under a group term life insurance policy were not taxable because they did not fall within the scope of subsection 6(4), which imposes tax on life insurance premiums for any time in the tax year when “a taxpayer’s life is insured under a group life insurance policy”. The Tax Court also rejected the Crown’s alternative argument that the payments should be taxed under section 6(1)(a), the catchall provision imposing tax on employment income and benefits. However, the Court confirmed the CRA Ruling with respect to the survivor income benefits, which were taxable as death benefits prior to their termination. The section of the ITA which taxes death benefits is worded much more broadly, and includes in taxation “any amount received . . . on account or in lieu of payment of, or in satisfaction of, . . . a death benefit.” The Court concluded that the language was broad enough to capture any payment in replacement of future survivor income benefits, even if the payment is properly characterized as a capital payment.

As none of the parties are appealing, the way is now clear for thousands of former Nortel employees to recover amounts that were improperly deducted from their claim amounts.