CITATION: Austin v Bell Canada., 2019 ONSC 4757
COURT FILE NOs: CV-18-603803-00CP
DATE: 20190812

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Leslie Austin, Plaintiff

– AND –

Bell Canada, Bell Media Inc., Expertech Network Installation Inc., and Bell Mobility Inc., Defendants

BEFORE: E.M. Morgan J.

COUNSEL: *Mark Zigler, Jonathan Ptak, Garth Myers, and Matthew Baer*, for the Plaintiff

Dana Peebles, Atrisha Lewis, and Amanda Iarusso, for the Defendants

HEARD: July 9-10, 2019

CERTIFICATION AND SUMMARY JUDGMENT

[1] This case finds two canons of construction squaring off against each other: the last antecedent rule vs. the series qualifier rule. It also considers the contractual significance of an Oxford comma.

[2] All of this is found in the annual indexing provision of a pension plan.

I. The double motion

[3] The Plaintiff is a pensioner who worked for one of the Defendants. Each of the Defendants is a members of the Bell Canada corporate family. Like all other retired employees of the Defendants, the Plaintiff has a pension funded by his former employer and administered by Bell Canada.

[4] The terms of the pension plan are set out in the Bell Canada Pension Plan, as restated May 1, 2013 (the "Plan"). Some version of the Plan has been in existence since 1919. Yearly indexing for inflation (i.e. a cost of living increase) has been a part of the Plan's terms since 1977.

[5] The claim issued by the Plaintiff is a proposed class action on behalf of all similarly situated Bell retirees. It alleges that in 2017, Bell Canada miscalculated the cost of living increase for all pensioners. The Plaintiff contends that this miscalculation, in turn, negatively impacts on the calculation of his and his fellow pensioners' payments under the Plan for all years thereafter.

[6] In this double motion, the Plaintiff seeks certification under s. 5(1) of the *Class Proceedings Act, 1992*, SO 1992, c 6 and summary judgment of their claim under Rule 20.01(1) of the *Rules of Civil Procedure*, RRO 1990, Reg 194. His counsel submit that Bell Canada's error is self-evident as a matter of statutory interpretation and mathematics, and that the error can be corrected and compensated in damages.

[7] The Defendants oppose both motions. Indeed, they argue that not only should both of the Plaintiff's motions be dismissed, but that summary judgment dismissing the claim should be granted in their favour. Defendants' counsel submit that Bell Canada's pension calculations reflect an appropriate interpretation of the Plan, and that the mathematics employed in calculating the pension benefits is self-evidently correct.

[8] Both sides agree that the affidavits and exhibits appended thereto comprise a sufficient record in which to grant summary judgment: *Hryniak v Mauldin*, [2014] 1 SCR 87, para 57. One way or another, the documentary evidence will suffice and there is no need to hear *viva voce* evidence or to conduct a full trial.

II. Certification

[9] The *Class Proceedings Act*, 1992, SO 1992, c 6 ("CPA"), sets out the criteria for certification of the action as a class action as follows:

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[10] This is an easy claim to certify.

[11] Except for the cause of action requirement, the Plaintiff need only demonstrate that there is "some basis in fact" for each of the certification requirements: *Pro-Sys Consultants Ltd. v Microsoft Corporation*, [2013] 3 SCR 477, para 99. "Thus the certification stage is decidedly not meant to be a test of the merits of the action… Rather the certification stage focuses on the form of the action": *Hollick v Toronto (City)*, [2001] 3 SR 158, para 16. The question in this part of the double motion is not whether the Plaintiff's claim is legally sound, but whether it can proceed as a class action.

[12] The causes of action pleaded are all feasible under the circumstances. The test to be applied here is the same as in a motion under Rule 21.01(b) of the *Rules of Civil Procedure* – that is, accepting the facts as pleaded as true, is there a cause or more than one cause of action that can be sustained in the Statement of Claim. The Plaintiff's claim alleges causes of action in breach of contract, breach of trust, and breach of fiduciary duty, all arising out of calculation and 'rounding' dispute in interpreting the Bell Canada pension plan.

[13] The ingredients of each have been properly pleaded; and while the merits of the claims will be discussed below in the context of the summary judgment motion, these causes of action are well known legal bases for challenging a pension plan. Indeed, they have formed the basis of claims certified in similar cases on behalf of members of pension plans: see *Mortson v Ontario Municipal Employees Retirement Board*, [2004] OJ No 4338, para 37 (SCJ); *Kranjcec v Ontario*, 2004] OJ No 1, para 51 (SCJ); *McGee v London Life Insurance Co.*, [2008] OJ No 1760, para 18 (SCJ). As Cullity J. put it in *Caponi v Canada Life Assurance Co.*, [2009] OJ No 114, para 47:

> Numerous cases involving challenges to employers' administration of pension and other employee benefits plans have been certified in the past. Typically, this has been held to be appropriate because of the existence of common questions of interpretation of plan documents, and common formulae and methodologies that determine and govern the rights of all, or some group of, participants in the plan and constitute most of the issues in dispute between the parties.

[14] The requirement in s. 5(1)(b) of the CPA that there be an identifiable class of two or more persons is satisfied here, since the Bell Canada pensioners and their dependents are all subject to the same Plan. The class is defined by counsel for the Plaintiff as:

> All persons, wherever resident, who are or were members under the Bell Canada Pension Plan, or otherwise entitled to benefits under the Plan, and who were entitled to receive indexed pension payments pursuant to section 8.7 of the Plan as of January 1, 2017, together with the spouses, estates, heirs, beneficiaries, and representatives of any of the above who has died.

[15] The s. 5(1)(c) requirement of common issues is also a straightforward one here. The issues are broken down into two common questions for each of the causes of action, plus two questions going to damages.

[16] The breach of contract questions are:

> 1. Did the Defendants owe a contractual obligation to provide pension indexation under the Plan? If so, what amount of pension indexation ought to have been applied and provided in respect of the year 2017?
>
> 2. Did the Defendants breach their contractual obligations?

[17] These questions are capable of common resolution. There is only one pension plan that applies to all class members. Whether the Plan gives rise to a contractual obligation to all members, and how that Plan is to be interpreted under the circumstances, are issues that must be determined for every class member. The determination of the amount of pension indexation for 2017 applies on an equal basis to all class members.

[18] The breach of trust questions are:

> 3. Does Bell Canada, as administrator of the Plan, owe a duty as a trustee to the class?
>
> 4. If so, did Bell Canada breach its duty as a trustee?

[19] The breach of fiduciary duty questions are:

> 5. Did Bell Canada, as administrator of the Plan, owe a fiduciary duty to the class?
>
> 6. If so, did Bell Canada breach its fiduciary duty?

[20] The duties of a trustee to the class and the duties of a fiduciary to the class are closely related questions that apply across the proposed class. They raise issues of law more than issues of fact, and are capable of resolution on a common basis, without any need for individual inquiries.

[21] The damages questions are:

> 7. If one or more of the above common issues are answered affirmatively, can the amount of damages payable by the Defendants be determined on an aggregate basis? If so, in what amount?

[22] Counsel for the Defendants do not dispute that damages here can be calculated in the aggregate for the entire class. Rather, they dispute the amount. There is also a live dispute between the parties as to whether damages can be calculated on the basis of missed past pension payments alone, or in the basis of the total present value of the loss sustained into the future. These questions apply across the proposed class, and qualify as common issues.

[23] As for the s. 5(1)(d) requirement that a class proceeding be the "preferable procedure for the resolution of the common issues", counsel for the Defendants submits that it is not preferable. Rather, they contend that the Plaintiff ought to be required to bring the identical case as a one-off 'test case' rather than on behalf of the entire class. Frankly, I do not see any merit in this submission.

[24] It is obvious that here, as in all class proceedings, judicial economy will be enhanced by answering the common issues once and for all members of the Bell pension plan: *Caponi*, para 48. In addition, if Bell were to be found to be miscalculating the payments under the Plan, it will be compelled by virtue of this being a class action to changes its method of calculation for all pensioners. This type of behaviour modification is equally a goal of the CPA: *Caponi*, para 48; *Mortson*, paras 77-79; *Hollick*, para 35.

[25] Moreover, the amount at stake for each class member here is relatively modest. Plaintiff's counsel estimates that on average each class member will earn $3,909 if the claim is successful. Furthermore, the class is a vulnerable group of retirees. As Plaintiff's counsel put it in their factum, "It is not feasible, economical or fair to require 35,000 individual proceedings to determine the same issue."

[26] While counsel for the Defendant says that a test case would accomplish the same thing, and that the Defendants would apply the result of the test case to other analogous cases, there is no guarantee of that. As indicated by Sharpe J. in *Bywater v Toronto Transit Commission*, [1998] OJ No 4913, para 14 (Gen Div), "Without a certification order from this court no public statement by the defendant, and no admission in its defence to the nominal plaintiff, binds the defendant in respect of the members of the proposed class." In any case, that does not undermine the fact that the requirements of s. 5(1) of the CPA have been met here. The same commonality that makes this an appropriate test case in the Defendants' mind makes it an appropriate class action: *Heyde v Theberge Developments Limited*, 2017 ONSC 1574, para 88.

[27] Counsel for the Defendants also suggests that it would be preferable for this matter to be brought before the Office of the Superintendent of Financial Institutions Canada, the federal regulator of pension plans, for determination. There is, however, no evidentiary basis to support the contention that a regulatory proceeding would be a preferable procedure. In any case, the Supreme Court of Canada has indicated that if "the defendant relies on a specific non-litigation alternative, he or she has an evidentiary burden to raise it": *AIC Limited v Fischer*, [2013] 3 SCR 949, para 49. In the absence of any evidence to the length of time, difficulty or ease of enforcement, procedures that need to be completed, etc. with respect to the proposed regulatory proceeding, I cannot accept a contention that the federal regulator represents a procedure that is preferable to a class action.

[28] In the context of this case, where the merits will be determined in a summary judgment motion argued at the same time as certification, there is little to be accomplished in choosing an alternative procedure. The goals of judicial economy and access to justice will be forwarded here in the most efficient way possible. Neither a one-off test case nor a regulatory proceeding will accomplish those goals in as effective a manner.

[29] Finally, the requirements of s. 5(1)(e) of the CPA are readily satisfied here. The Plaintiff is a pensioner himself, is fully engaged in the litigation and able to instruct counsel, has no conflict of interest with other class members or with the class as a whole, and has a workable litigation plan.

[30] The requirements of s. 5(1) of the CPA are satisfied here. There is no reason not to certify this action as a class proceeding.

III. Summary judgment

[31] The summary judgment portion of this proceeding is the more contentious part. Each side is of the view that the case is entirely and unambiguously in their favour, and that there is no issue in need of a trial. Since the action will be simultaneously certified as a class proceeding, the upshot of this is that one way or another the summary judgment motion will determine the matter for the entire class.

[32] As outlined above, the common issues reflect the three substantive causes of action pleaded by the Plaintiff: breach of contract, breach of trust, and breach of fiduciary duties. Each, of course, has its own legal criteria set out in a history of case law and statutory provisions. Counsel for the Plaintiff explain that all of the class members are retirees and former employees of one or another of the Defendants, and each has a contractual entitlement from his or her employer for the pension benefits as set out in the Plan. Plaintiffs' counsel also submit that the relationship is such as to impose fiduciary duties on the Defendants, and that the pension funds are in effect held in trust for the Plaintiff and class members

[33] Counsel for the Defendants concede that the Plan amounts to a contract and imposes fiduciary duties on Bell Canada as its administrator. They further submit that whatever obligations are owed to retirees are owed by Bell Canada as administrator of the Plan, and that the other members of the Bell family have fulfilled their duty as former employer of the class members by establishing and including those class members in the Plan. The rest, they say, is up to Bell Canada as administrator, and does not involve the other Defendants. Defendants' counsel is also of the view that the allegation of breach of trust is inapplicable to the relationships in issue. They submit that, "[i]f there is no express or implied declaration of trust, then the pension plan will be governed by the terms of the plan": *Burke v Hudson's Bay Co.*, [2010] 2 SCR 273, para 48.

[34] In any case, each of the causes of action is premised here on a single interpretive dispute under the Plan. This controversy is centred on the calculation of the amount of pension indexation that ought to have been applied for 2017 and subsequent years. It is that dispute over interpretation of the indexation clause that forms the lynchpin for each of the cause of action and all of the common issues.

a) Index calculation under the Plan

[35] In 2017, Bell Canada calculated and reported a 1% indexing increase in pension payments for retirees under the Plan. The Plaintiff has worked out a calculation that would have seen a 2% increase in Plan payments for 2017.

[36] That arithmetical difference, in turn, revolves around the interpretation of two clauses in the Plan. First, the Pension Index, representing the rate of inflation in Canada the prior year is calculated in accordance with the direction contained in s. 1.29 of the Plan. Then, as a second step, that figure is compared with the previous year's figure in order to determine the annual percentage increase for the year.

[37] The parties are in agreement as to how that calculation is to be performed. In fact, they agree that for 2017 the percentage increase over the previous year was 1.49371%. What they disagree on is how to round off that number. Statistics Canada, in publishing its Consumer Price

Index ("CPI") inflation rate for the year, rounded it off to one decimal place, resulting in a percentage increase of 1.5%. Counsel for the Plaintiff submit that this is the correct figure and is precisely how s. 1.29 mandates the calculation as based on the CPI rate.

[38] Bell Canada, on the other hand, rounded it off to two decimal places, resulting in a percentage increase of 1.49%. In doing so, it invoked the language of s. 8.7(iv) of the Plan, which provides that, "All percentage increases shall be rounded to the nearest 2 decimal points..." Counsel for the Defendants submit that this is the correct methodology taking the language of the Plan as a whole into account.

[39] Each then rounded to a whole number as mandated by s. 8.7 of the Plan, and in doing so each employed the usual understanding that figures of .5 and above get rounded up to the nearest whole number, while figures below .5 get rounded down to the nearest whole number. Accordingly, the Plaintiff, using the CPI figure referenced in s. 1.29 of the Plan, would have required an increase of 2% for the 2017 pension payments, while Bell, using its own figure in accordance with the direction in s. 8.7(iv) of the Plan, implemented an increase of 1% for the 2017 pension payments.

[40] In the result, the parties are a percentage point off of each other's calculation. That 1% difference is, of course, crucial to the 2017 payment calculation for retirees. But it will also reverberate through time, since each year's calculation is premised on an increase from the previous year.

b) The interpretation debate

[41] The calculation difference between the parties turns on whether Bell as manager of the Plan is to independently determine the annual percentage increase for the pensioners taking account of the directions otherwise set out in the Plan, or whether Bell is to apply the annual percentage increase as determined by Statistics Canada in the given year. The Plaintiff states that this is answered by the specific wording of s. 1.29 of the Plan:

> s. 1.29 'Pension Index' means the annual percentage increase of the Consumer Price Index, as determined by Statistics Canada, during the period of November 1 to October 31 immediately preceding the date of the pension increase.

[42] As both sets of counsel point out, the proper interpretation of this provision depends on the importance one ascribes to the comma after the words "Consumer Price Index".

[43] This, of course, may seem an odd, or perhaps an excessively minute detail to be determinative of a case that impacts on some 35,000 pensioners of the Bell Canada corporate family. As the British Columbia Court of Appeal commented in *Adam v Insurance Corporation of BC*, 2018 BCCA 482, para 40, "Canadian courts are 'rightly cautious of attaching too much significance to a single punctuation mark'". Indeed, the BC court went on to suggest that in today's "less rigid" written language, searching for the meaning of the diminutive grammatical indicator may be a pointless exercise: *Ibid.*, para 41. As one legal blogger has observed with respect to another high profile debate over the use of commas between words in a series, "Even for lawyers the dispute was a painfully technical one": Even Lee, "Opinion analysis: Battle of statutory interpretation canons ends in defeat for convicted sex offender", SCOTUSblog (March 1, 2016)

<https://www.scotusblog.com/2016/03/opinion-analysis-battle-of-statutory-interpretation-canons-ends-in-defeat-for-convicted-sex-offender/>

[44] The Nova Scotia Supreme Court, on the other hand, has quoted approvingly from Pierre André Coté, *Interpretation of Legislation in Canada* (2nd edn), p. 63, to the effect that, "Punctuation, particularly the comma, is essential to written communication, and judges cannot totally ignore it": *Bell v Canada (Attorney General)*, [2001] NSJ No 303, para 33. Grammar and language interpretation texts tend to suggest, correctly, that where usages are standardized, punctuation marks, including the humble comma, can signal a significant modification of how one reads a series of nouns in a list: Ruth Sullivan, *Driedger On the Construction of Statute* (3rd edn), p. 277.

[45] Despite its frequent use in clarifying the point of a sentence, "the comma has earned its notoriety as a troublemaker": *Hamilton v Nerbas*, 2008 ABQB 674, para 1. Efforts to base decisions strictly on its presence or absence in a sentence in a contract or legislative provision have proved fruitless, as that type of grammarian analysis ignores both policy and textual context. In one renowned case, the Canadian Radio and Television Commission reversed itself in a sequence of rulings, first determining that the presence of a comma in the English version of a contract clarified the effective date of the contract and then deciding that the absence of a comma in the French version clarified an altogether different effective date: *Telecom Decision CRTC* 2006-45 (July 28, 2006); *Hamilton*, paras 13-14. The comma, it would seem, can mean everything or nothing in a sentence, statutory provision, or contractual clause.

[46] When it comes to its use in demarcating items in a list, the comma is as important, and enigmatic, as can be. The renowned Strunck & White style guide instructs: "In a series of three or more terms with a single conjunction, use a comma after each term except the last": W. Strunk, Jr. & E.B. White, *The Elements of Style* (4th edn, 2000), p. 2. By contrast, both the Associated Press Stylebook (2015) and the Canadian Press' *The Canadian Style: A Guide to Writing and Editing* (1997) advise against it as a general rule. Perhaps the most that can be said as a matter of grammar and punctuation is that "Commas are used to separate items in a list or sequence… Usage varies as to the inclusion of a comma before *and* in the last item": Tom McArthus, "Comma", in: *Concise Oxford Companion to the English Language* (1998).

[47] Despite their physically small stature, commas have created controversy in important places. Nowhere has this been more obvious than in legislation containing a sequence of items separated by commas and followed by a modifier phrase. In those instances, the question of interpretation is whether the phrase at the end of the list modifies only the last item in the sequence or the entire series of items. This, of course, will depend on how the list is read and, potentially, where the commas are placed – with special attention being paid to the final comma and whether or not it immediately precedes the final modifying clause.

[48] In *Lockhart v United States*, 136 S. Ct. 958 (2016), the absence of a comma before the modifier coming after a list of offences in a U.S. criminal statute led to the imposition of a minimum 10-year sentence by the U.S. Supreme Court, overturning the alternate reading of the statute and more lenient sentencing that had been imposed by the Second Circuit Court of Appeal in New York. The provision imposed a mandatory minimum on anyone convicted of possessing child pornography who had "a prior conviction…relating to aggravated sexual abuse, sexual abuse,

or abusive sexual conduct involving a minor or ward." The defendant had a prior conviction for sexual abuse of his adult girlfriend, and argued successfully in the Second Circuit that the phrase "minor or ward" applies to each of the three offences that precede it and so the provision as a whole did not apply to him. Justice Sotomayor reversed, reasoning that the defendant had committed "sexual abuse", not "abusive sexual conduct" which was the last offence in the sequence and was the only one qualified by "of a minor or ward", there being no comma separating the two phrases. Thus, the defendant fell squarely within the mandatory minimum sentence. As she put it, "A timeworn textual canon" – the last antecedent rule – "is confirmed by the structure and internal logic of the statutory scheme": *Ibid.*, 959.

[49] I describe a U.S. case not because it is applicable here, but simply to illustrate how a textual argument works, and how the nuances of text and grammar can create diametrically opposed meanings. Albeit in a vastly different context, a similar textual argument is made by Plaintiff's counsel in the case at bar.

[50] Section 1.29 of the Plan raises a classic comma question. The so-called Pension Index, or measurement of the cost-of-living increase built into the pension, must be calculated every year. As administrator, Bell Canada must apply "the annual percentage increase of the Consumer Price Index, as determined by Statistics Canada, during the [previous year]."

[51] The section contains a list of two items – the annual percentage and the CPI – followed by a modifier "as determined by Statistics Canada". There is no comma between the items in the list since there are only two of them, but there is a comma immediately preceding the clause that constitutes the modifier. What can one make of this grammatical structure? To put it another way, what is it that Statistics Canada must determine – is it the Consumer Price Index alone, or is it the CPI together with the annual percentage increase in the CPI?

[52] Counsel for the Plaintiff argues that, "A comma before the qualifying words ordinarily indicates that they are meant to apply to all antecedents while the absence of a comma indicates that they are meant to apply to the last antecedent alone": Sullivan, *supra*, p. 277. This is the mirror image of the same "timeworn textual canon" that Jusice Sotomayer invoked in *Lockhart*. The 'last antecedent rule' holds that the modifier "as determined by Statistics Canada" would apply only to the last item in the preceding sequence if there were no comma preceding it.

[53] Since there is a comma preceding the modifier, the opposite of the last antecedent rule – often dubbed the 'series qualifying rule' – is applied. In such instances, "When there is a straightforward, parallel construction that involves all nouns or verbs in a series," a modifier that comes at the end of the list with a comma separating it from the list, "normally applies to the entire series": A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* (2012), p. 147. Thus, the Plaintiff contends, the modifier "as determined by Statistics Canada" qualifies both items in the preceding series of items – i.e. the CPI *and* the annual percentage increase – and not just the last antecedent – i.e. the CPI alone.

[54] Counsel for the Plaintiff argues that this interpretation is bolstered by the *contra proferentem* rule, since the Plan was drafted by Bell Canada and not by any of the class members. They state that, "It is a basic principle of contractual interpretation that a provision that is ambiguous or capable of more than one reasonable interpretation shall be interpreted against its

drafter": *O'Neill v General Motors of Canada*, 2013 ONSC 4654, para 69. They also invoke the inherent vulnerability of the class members engaged in employment litigation against their employer, and submit that, "in the absence of 'clear language mandating some other result,' employment contracts are interpreted so as to protect employees": *Ibid.*, para 72, citing *Wallace v United Grain Growers Ltd.*, [1997] 3 SCR 701, para 91.

[55] For their part, counsel for the Defendants point out that in statutory interpretation, "The 'last antecedent doctrine' does not apply where it is rebutted by the context of the statute or by a reading of the statute as a whole": *Adams*, *supra*, para 37. The same, they say, applies to its opposite, the series qualifier rule. They submit that in modern interpretation cases, "[r]esort is made to the entire document so as to ensure that the interpretation of a particular term is contextual": *Dinney v Great-West Life Assurance Co.*, 2009 MBCA 29, para 58. With respect to the interpretation of s. 1.29 of the Plan, they state that, "The meaning of a particular clause should be considered in conjunction with other relevant clauses": *Ibid.*, para 61.

[56] The context that the Defendants have in mind is s. 8.7 of the Plan. That section sets out the way in which the annual indexation is to be calculated once the Pension Index is arrived at under s. 1.29. For pensioners aged 65 and older – the vast majority of class members, with the exception of only those in their first fraction of a year as pensioners – s. 8.7(ii)(a) provides that the rate of indexation is the greater of

> a) the Pension Index calculated under s. 1.29, rounded to the nearest whole number as required by s. 87(iv), up to a maximum of 2% as stipulated in s. 8.7(i), and
>
> b) 60% of the Pension Index rounded to two decimal places under s. 8.7(ii) to a maximum of 4% under s. 8.7 (ii)(a).

[57] As already indicated, Bell calculated that the adjusted Pension Index for 2017 was 1%. This was then compared with a figure equal to 60% of the pension Index of 1.49 (=0.89622%) and rounded to two decimal places (=0.90%). Accordingly, the greater figure of 1% was used for pensioners such as the Plaintiff who are 65 and over.

[58] For those few pensioners under 65, the rate of indexation is stipulated in s. 8.7(iv) as 100% of the Pension Index for the year rounded to the nearest whole number, to a maximum of 2% under s. 8.7(i). Since the 2017 Pension Index came to 1%, the rate employed by Bell for the under 65 pensioners was also 1%.

[59] The Defendants adduced an affidavit by Robert Marchessault, the Director of Pension and Actuarial Services for Bell Canada Enterprises, who went through the calculations for the benefit of the court record. One interesting observation made by Mr. Marchessault is that the calculation required under s. 8.7(ii)(a) for arriving at the annual indexation for pensioners aged 65 and older – i.e. 60% of the Pension Index for the year – will never yield more than a two decimal place figure if you use only a one decimal place annual increase as Statistics Canada (and the Plaintiff) does. Mr. Marchessault states that it is "mathematically impossible" to go to three or more decimal places when calculating 60% of a one decimal place percentage.

[60] There is no evidence that contradicts this statement of mathematical fact.

[61] Thus, an approach using the Statistics Canada one-decimal rounding of the CPI rate, would eliminate the need for any further rounding as set out in s. 8.7(ii). It would also render meaningless the provision in s. 8.7(iv) that all rounding be to two decimal places.

[62] On the other hand, if you take the CPI rate as calculated by Statistics Canada and round it to two decimal places to arrive at the annual Pension Index, and then plug this figure into the 60% calculation in s. 8.7(ii)(a), the scheme makes more sense. As Mr. Marchessault explains, you will then most often arrive at an outcome of three decimal places, and will have to round it down to two decimal places under s. 8.7(iv). This approach is the only one that gives s. 8.7(iv) any real meaning.

[63] Counsel for the Defendants submits that, "The court should strive to give meaning to the agreement and 'reject an interpretation that would render one of its terms ineffective'": *Scanlon v Castlepoint Development Corp.* (1992), 11 OR (3d) 744, para 88, quoting *National Trust Co. v Mead*, [1990] 2 SCR 410, 425. It is hard to argue against this logic.

[64] Regardless of the existence of general policies favouring employees/pensioners and doctrines of contract interpretation favouring the non-drafting party, there is no rule of interpretation that would implement a version of the Plan that renders it partly meaningless. A contract like the Plan cannot be interpreted so as "to effectively gut a key aspect of the [calculation] process": *Tercon Contractors Ltd. v British Columbia (Transportation and Highways)*, [2010] 1 SCR 69, para 72.

[65] Section 8.7 of the Plan is a precisely drafted, mathematically crafted section that is dependent on rounding being part and parcel of the calculations it prescribes. It is not possible to surmise that the drafters of the Plan went to all of that trouble and detail only to have the entire exercise rendered meaningless by a deferral to Statistics Canada's method of rounding when doing the initial Pension Index calculation under s. 1.29 of the Pan.

[66] I do not read the words of s. 1.29 as reflecting a modifying rule for the series of two items that come before it. It was not intended to apply the Statistics Canada rounding methodology to the calculation of the annual percentage increase in the Consumer Price Index.

[67] Statistics Canada may take a one-decimal place approach to rounding in comparing one year's CPI to the previous year's, but it does so for its own purposes and for a different audience. That exercise is unrelated to the calculation by Bell of the Pension Index under the Plan.

[68] The Plan calls for Bell to take the CPI calculated by Statistics Canada and then for Bell to figure out the annual percentage increase over the previous year by a method compatible with the Plan overall. That means that it must be done by rounding the annual percentage increase to two decimal places, not one. That is the only way to make sense of the combination of s.1.29 and s. 8.7 of the Plan.

[69] I do not know why s. 1.29 is phrased in the awkward way that it is. I certainly do not know why a comma had to be inserted before the modifying phrase "as determined by Statistics Canada". It was not necessary, since that modifier applies only to the CPI which is the last antecedent before the modifying clause. It was likely punctuated that way unconsciously; I do not believe it was a legally induced comma.

IV. The common issues

[70] The Defendants did owe contractual and fiduciary duties to the Plaintiff and all class members. They did not, however, breach those duties. It is not necessary to determine whether Bell or any of the Defendants owed a duty as trustee to the Plaintiff and all class members, as in any case the Plaintiff and the class received precisely what the Plan called for them to receive.

[71] The calculation of the 2017 annual percentage increase as required by s. 1.29 of the Plan was done correctly by Bell. The Plaintiff and class have received the correct pension payments.

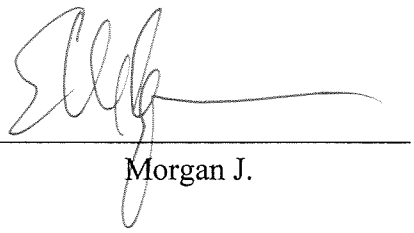
[72] Since there is no breach of any duty owed by the Defendants to the Plaintiff and the class, the damages question is moot.

V. Disposition

[73] The action is certified as a class proceeding under s. 5(1) of the CPA. The class is as described in paragraph 14 above.

[74] Summary judgment is granted to the Defendants. The action, now certified, is dismissed.

[75] The parties may make written submissions as to costs. I would ask that Defendants' counsel provide me with written submissions of no more than 3 pages and a Bill of Costs within 2 weeks of today's date. I would likewise ask that Plaintiff's counsel provide me with written submissions of no more than 3 pages and a Bill of Costs within 2 weeks thereafter.



Morgan J.

Date: August 12, 2019