LEGISLATIVE DEVELOPMENTS AND THE TOP 20 CASES OF 2018 – 2019

52ND ANNUAL CANADIAN EMPLOYEE BENEFITS CONFERENCE

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LEGISLATIVE DEVELOPMENTS AND COURTS AND TRIBUNALS

LEGISLATIVE DEVELOPMENTS

The last year has seen a variety of legislative and regulatory changes across the country. In comparison to previous years, however, the changes have been relatively modest.

Both BC and Ontario welcomed new pension regulators. In BC, FICOM became the British Columbia Financial Services Authority. In Ontario, FSCO became the Financial Services Regulatory Authority.

In the Federal jurisdiction, perhaps the most significant change relates to the anticipated conversion of all health and welfare trusts (HWTs) to employee life and health trusts (ELHTs). On May 27, 2019 the Department of Finance released draft legislative proposals supporting the conversion of HWTs to ELHTs. The legislative proposals were accompanied by a Backgrounder document summarizing the proposals and outlining additional issues related to ELHTs under consideration in the next phase of Finance's consultation process. It is expected that any details of the conversion process that do not make their way into the final legislation will be enacted as CRA policy.

The Federal Government also introduced significant changes with its 2019 Budget. Many of these changes follow a consultation on "Enhancing Retirement Security for Canadians". The changes brought in by the Budget Implementation Act include the establishment of solvency reserve accounts for relevant pension plans and changes to corporate governance rules that are intended to enhance the security of pension plans administered by corporations incorporated under the *Canada Business Corporations Act (CBCA)*. The CBCA is amended to add employees, retirees and pensioners to the list of those whose interests can be considered when directors are considering "the best interests of the corporation". The Budget Implementation Act also makes changes to the *Bankruptcy and Insolvency Act (BIA)* and the *Companies' Creditors Arrangement Act (CCAA)*, specifically mandating in those acts that any “interested person” in any insolvency proceeding shall act in "good faith" during that an insolvency proceeding. If the court finds that an "interested person" has failed to act in good faith, the court can make "any order it considers appropriate in the circumstances. Section 101 of the BIA is also amended to add director and manager compensation, severance and termination pay as a reviewable transaction.

In Ontario, the April 2019 Budget confirms the current Ontario Government's intent to move forward with the 2018 Target Benefit Plan framework that had been created by the previous government. The only change references the inclusion of non-unionized workers within the framework, as well as the extension of the framework to the non-profit sector. Other highlights from Ontario include draft regulatory amendments dealing with electronic communications, annuity discharges and variable benefits.

In Alberta, three public sector plans transitioned to joint sponsorship and joint trusteeship effective March 1, 2019 pursuant to the *Joint Governance of Public Sector Pension Plans Act*. These plans were the Local Authorities Pension Plan, the Public Service Pension Plan and the Special Forces Pension Plan.

In British Columbia, in addition to the change of their regulator, a new regulation was passed which provided solvency funding relief to certain plans. At the same time, B.C. has also been consulting on overall changes to the funding structure of pension plans, and has come up with a summary of the recommendations that it received from its stakeholder committee. While no legislation has been released yet, there is apparently consensus in moving to a funding regime that focuses on going-concern funding, with a funded PfAD and solvency funding to 85%.

Nova Scotia introduced new funding rules in April of 2019, including with respect to the finding of reserve accounts and the use of letters of credit. It also amended its provisions about annuity purchases and the deemed trust that deems amounts owing to a pension plan to be held in trust. Saskatchewan also amended its deemed trust provisions, inserting a super priority for the deemed trust into its personal property security legislation.

Manitoba has announced proposed amendments to the Manitoba *Pension Benefits Act* to be introduced in Fall 2019, based on recommendations from the Manitoba Pension Commission's consultation in 2018.

In Quebec, there were no significant changes, although the province did bring in legislation that specifically overrides the Charter of Rights and Freedoms with respect to certain public sector pension plans.

COURTS AND TRIBUNALS

In addition to numerous legislative changes, the pension and benefits industry also saw significant jurisprudential developments. The Top 20 cases this this year arise in a variety of areas, with the largest number of cases coming from the human rights and constitutional law area (specifically the Canadian Charter of Rights and Freedoms), and from cases concerning challenges to the decision making of pension plan administrators. The interaction of collective bargaining with pension and benefits was also a central theme, as was the status of post-retirement benefits in the context of employers seeking to amend their benefit programs for those already retired.

With respect to cases concerning human rights and the Charter, there were at least five cases of significance. The jurisprudence concerning medical marijuana and its interaction with human rights law continued to develop in the decision in *Rivard v. Essex (County)*.[1] That case concerned an allegation of discrimination in services on the basis of disability against an employer and insurer about a lack of coverage for medical marijuana. The Ontario Human Rights Tribunal dismissed the claim against both respondents, holding that the insurer did not determine benefit coverage under terms of Plan text and that the claim against the employer had to fail as coverage was denied since the Plan only covered cost of drugs with a Drug Identification Number and thus coverage was denied due to the lack of a DIN not due to a protected ground.

The claimants in *Fraser v. Canada (AG)* similarly failed to establish that they had been discriminated against.[2] In that case, certain RCMP members who were mothers had used an RCMP job sharing policy to work reduced hours. As a result, their pension entitlements had been

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1 2018 HRTO 1535.

2 2018 FCA 223.

as if they were part-time employees. The claimants argued that their entitlements should be the same as if they were on an unpaid leave rather than simply as part time employees, given that they were only job sharing due to their familial responsibility. If they were treated as on an unpaid leave, they would be entitled to buyback the portion of their pension they lost while job-sharing. They commenced an action based on the Charter, alleging discrimination based on sex and family status. This claim was dismissed by the Federal Court and that decision was upheld by the Federal Court of Appeal. The rationale for dismissing the case was that the differential treatment was not because of sex or family status, but because leave without pay is a different status than job sharing.

The Federal Court of Appeal upheld another dismissal by the Federal Court in the decision in *Bemister v. Canada (AG).*[3] In that case, the appellate court upheld the lower court's decision that the employer amending the percentage of premiums paid by retirees for the Public Service Health Care Plan from 25% to 50% was neither a breach of contract nor Charter violation. The Court determined that there was no vested right to a specific premium split and while the Charter's right to freedom of association applied to the retirees, there had been no evidence led that supported the claim that such rights were undermined.

While the Federal Court of Appeal upheld two decisions this year, the Quebec Court of Appeal overturned one. In *Procureur general du Canada c. Union of Canadian Correctional Officers,* the Quebec Court of Appeal determined that the prohibition on bargaining about pensions contained in the *Federal Public Sector Labour Relations Act* infringed the Charter right to freedom of association but was saved under the Charter's justification provision, which allows rights to be overridden where it is reasonably justified to do so in a free and democratic society (section 1). The lower court had determined that the violation could not be saved by section 1. The Court ultimately gave the legislature a lot of deference in determining how to approach the issue of public service pensions, and noted that the prohibition was not absolute and permitting negotiations would likely fragment the plan.

The claimants were also unsuccessful in the decision of *Barker v. Molson Coors.*[4] In that case, the BC Human Rights Tribunal considered whether a reduction of benefits, made on the basis of age, is immune from the charge of discrimination on the basis that it arises from the operation of a "*bona fide* group or employee insurance plan" under the terms of the BC *Human Rights Code.* The Tribunal determined that the reduction of benefits to those over 65 years of age was permissible under the Code. Importantly, the Tribunal determined that it did not have the jurisdiction to apply the Charter directly to the legislation to determine whether the relevant exemption was a violation of the Charter. While the Tribunal did look at whether "Charter Values" should affect its interpretation, it ultimately determined that prior Supreme Court jurisprudence required that the discriminatory impact of the reduction be "immunized from scrutiny" provided that "the distinction finds its origins in a 'legitimate', good faith benefit plan". It found that collectively bargained changes were indeed "bona fide".

The *Bemister* and *Barker* cases engaged human rights issues but also dealt with the issue of the employer's obligations with respect to providing employee and retiree benefits to an aging

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[3] 2019 FCA 190.

[4] 2019 BCHRT 192.

population. The decisions in *Labatt Brewing Company Ltd v Unifor Local 250A*[5] and *Service Employees International Union, Local 1 Canada v Bluewater Health*[6] also dealt with the issue of the provision of retiree benefits, although not in the human rights context.

In *Labatt*, at issue was the quintessentially Canadian retiree benefit of free beer for life. Unfortunately for the retirees of Labatt, the arbitrator determined that the annual beer allotment was a long-term gratuitous benefit and not a vested right. As a result, the employer was entitled to decrease the annual allotment from 24 cases to 12 cases in 2018 and to discontinue the allotment entirely in 2019. Active employees continue to receive 52 cases per year.

In the *Bluewater Health* case, the issue concerned what portion of the premiums for retiree benefits that must be paid by Bluewater. The Arbitrator ultimately concluded that conclude that Bluewater was obligated to pay the same percentage of premiums for retiree benefits as it pays for active employees based on the wording of the collective agreement.

While the *Bluewater* and *Labatt* cases dealt with the interaction of collective agreements with the provision of retiree benefits, there were also several cases that considered the interaction of collective agreements with pension and benefit entitlements for active employees. In *Goyetche et al. v International Union of Operating Engineers et al*,[7] the New Brunswick Court of Appeal considered an action that was launched by a group of former employees against their unions for failing to protect their interests in the context of a plant closure. The Plaintiffs, who were all employees who were terminated before the age of 55, were concerned about the fact that they were not bridged to a full pension in the same manner as had occurred in a different facility in New Brunswick. In that other case, the employees had continued to receive credited service as they were on a layoff and had recall rights. The NBCA ultimately distinguished the two cases, finding that in *Goyetche* there were no recall rights and the mill closure was known to be permanent at the time it closed.

In *National Elevator and Escalator Association v International Union of Elevator Constructors, Local No. 82*,[8] a BC Arbitrator considered which party was required to pay the LTD benefits of a disabled member: the employer, the multi-employer benefits trust or the union. The Arbitrator determined that the LTD plan was incorporated into the Collective Agreement. Since Sun Life and the Trust had found the Grievor to be ineligible to receive LTD benefits but the arbitrator had determined that the Grievor is eligible to receive those benefits under the collective agreement, it determined that the employer, as guarantor, was primarily responsible for the payment of those benefits in those circumstances.

The decision in *B.C. School District No 63 v. Canadian Union of Public Employees, Local 441*[9] concerned the employer's obligation to pay a health tax for each employee in a situation where they had previously paid a universal health care premium that was being replaced by the health tax. The collective Agreement provided that the employer paid the health care premiums, and in

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5 2018 CanLII 138185.

6 2019 CanLII 25975.

7 2019 NBCA 16.

8 2018 CanLII 128742.

9 2019 CanLII 28163.

the event premiums were reduced parties would discuss the reduction. Employer argued obligation to discuss was not triggered because of health tax being phased in. The arbitrator held that the obligation to discuss the change was triggered, and that tax was clearly intended to replace premiums and that this should be a relevant feature of the discussions between the union and the employer.

Another major theme of this year's cases concerned challenges to the actions of pension plan Administrators. In *Austin v. Bell Canada*, the Plaintiff in a class action moved for both certification of the class proceeding and summary judgment on the common issues.[10] The case concerned a dispute over whether a rate of indexation for a certain year should be 1% or 2%. At issue was the definition of "Pension Index" in the Plan Text and whether the calculation of the relevant sum should be done by Statistics Canada or by the Plan Administrator (Bell Canada). The motions Judge ultimately determined that the interpretation urged by Bell Canada should be accepted. The decision is under appeal.

In *Dillman v. BC Pension Corporation*, a Plan member brought an application claiming the Plan's administrator had failed to act in her best interest when answering questions about transferring her interest to another plan. The member brought an application to the Courts seeking that the administrator answer certain questions about this issue. The Court held that the administrator must answer certain questions (e.g. information regarding staff training, actuarial instructions, decisions regarding communications with the member, etc.) but did not have to answer questions that were unclear, repetitive, based on positions not ceded by the administrator, were essentially arguments, or were questions of law

In *Archibald et al. v Ontario (CEO of FSRA)*,[11] the windup administrator of Nortel's pension plans had determined that a certain refund was owed to the Pension Benefits Guarantee Fund. The Applicants in this case had taken the position that the Administrator's proposed refund was contrary to the PBA as it allowed the PBGF to recover from amounts that were paid to the Plan on account of benefits that it did not insure (namely indexation adjustments). The Superintendent of Pensions (now CEO of FSRA) had issued a Notice of Intended Decision ("NOID") rejecting the Applicants' position. The NOID was challenged by the Applicants at the Financial Services Tribunal, and that Tribunal ultimately rejected the Applicants' arguments and allowed the NOID to proceed based on the Tribunal's interpretation of the applicable Regulation.

Several other NOIDs issued this year have not yet resulted in proceedings before the Financial Services Tribunal. In a Notice of Intended Decision of the Superintendent of Financial Services to Refuse to Make an Order under section 87 of the *PBA* relating to the General Motors Canadian Hourly-Rate Employees Pension Plan, Registration Number 0340968, GM had found administrative errors that caused excess pension credits to be distributed, contravening both the ITA and the plan. As Plan Administrator it sought to correct the errors, including retroactively adjusting credited service in some cases. On behalf of its members, Unifor alleged GM was acting in its own interest, contrary to its duties to plan members. The Superintended ultimately declined to intervene, finding (1) the Plan was administered in accordance with PBA, PBA regs, and Plan text, (2) the Plan complied with PBA and regs, and (3) Employer had not contravened the PBA.

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[10] 2019 ONSC 4757.

[11] 2019 ONFST 16.

In a Notice of Intended Decision of the Superintendent of Financial Services to Make an Order under section 87 of the PBA relating to the Pension Plan for Employees of Hewlett Packard Enterprise Canada Co. (for Former EDS Retirement Plan Members), Registration Number 0911271, the Superintendent determined that the term "base pay" in a pension plan included vacation pay. In this case, a plan member was paid a lump sum for unused vacation when he retired. The Plan administrator did not include this payment in calculating his "base pay" when calculating his pensionable earnings. Plan text did not define "base pay". The Superintendent found that vacation pay was a statutory entitlement under the *Employment Standards Act, 2000,* and an integral part of base wages and therefore concluded that the Plan had not been administered in accordance with its terms.

Another NOID was issued this year where the Superintendent upheld an administrator's conduct. In a Notice of Intended Decision of the Superintendent of Financial Services to Refuse to Make an Order under section 62.1 of the PBA relating to The IUOE Local 793 Pension Plan for Operating Engineers in Ontario, Registration Number 0389890, the Superintendent refused to make an order sought by an employer with respect to certain overpayments. The employer, Coco Paving, determined in 2014 that it had made higher contributions to a MEPP than required for four years, and brought a grievance to the OLRB in 2016. The OLRB deferred the hearing pending a determination from the Superintendent. The Superintendent ultimately refused the application as (i) the Employer was not the Plan administrator and therefore lacked standing to bring the application, and (ii) the application should have been made within 6 months of becoming aware of the overpayment, not four years later.

There were also three decisions from New Brunswick concerning pre-hearing motions in an ongoing pension dispute between Police and Firefighters' Associations and City of Fredericton. The first two decisions concerned disclosure and the third concerned a challenge to the Tribunal's jurisdiction and authority over certain grounds of the appeal and over the relief sought. The Tribunal agreed that it lacked the authority over some of the relief sought by the appellants, but declined to make a determination at the pre-hearing stage on the issue of its jurisdiction over certain grounds of the appeal.

Rounding out the top 20 cases were a few cases that do not fall neatly into a theme. In the *Trustees of the IWA v. Wade*,[12] the Court considered the possibility of a director of a company being held liable for pension contributions that had been missed. In that case, the sole director, officer, and shareholder of a corporation had signed an agreement to contribute to registered pension plan but did not establish a separate account for contributions that it received from employees and was required to remit to the plan. The corporation faced financial troubles and employee contributions were used to cover operating costs of corporation. The BC Court held that the corporation was in breach of trust and that the director had knowingly and directly assisted in the breach of trust, knowing the breach was fraudulent. As a result, the director was held personally liable.

Finally, in *Chao v. the Queen*, the Tax Court of Canada provided useful guidance on deductible employment expenses in industries characterized by short-term and itinerant employment, where workers may travel to a number of worksites, work for more than one employer, and/or provide their own tools and supplies. The appellant, Ms. Chao, a second camera assistant employed in

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[12] 2019 BCSC 1085

the film industry, was hired separately by five different employers for different productions in and around the Greater Toronto Area during 2010. Ms. Chao attempted to claim a variety of expense deductions on her tax return relating to her travel to production sites, as well as other expenses that she argued were related to her employment. The Tax Court allowed some, denied others, and generally provided a good roadmap for employees to follow in determining what can and cannot be claimed.

CASE SUMMARIES

ONTARIO DECISIONS

1. *Rebecca Rivard v Corporation of the County of Essex and Green Shield Canada Inc.*, 2018 HRTO 1535 (CanLII)

This decision (*Rivard*) joins a growing body of cases confirming that a benefit plan does not necessarily discriminate against plan members by failing to cover the cost of medical marijuana.

Facts

Rebecca Rivard, a dependant of an employee of the Corporation of the County of Essex, was denied coverage for medical marijuana on the basis that the Essex County benefit plan only covered drugs that had been issued drug identification numbers (DIN) by Health Canada. Ms. Rivard filed an application with the Human Rights Tribunal of Ontario alleging the benefit plan's manager, Green Shield, had discriminated against her on the basis of a disability, in contravention of the *Human Rights Code* (the *Code*).

Decision

Following a summary hearing, Ms. Rivard's application was dismissed as having no reasonable prospect of success. Notably, the issue of a reasonable prospect of success was raised by the Tribunal of its own accord, and not by one of the respondents. This indicates that, at least from the perspective of the Tribunal, it is now well-established that the fact that a benefit plan does not cover the cost of medical marijuana does not amount to discrimination of individual beneficiaries whose doctors have prescribed medical marijuana.

Earlier this year, the Nova Scotia Court of Appeal addressed this issue in *Canadian Elevator Industry Welfare Trust Fund v. Skinner*, 2018 NSCA 31 (*Skinner*). As in *Rivard*, Mr. Skinner had been prescribed medical marijuana because other medications were unsuitable for him but his benefit plan denied coverage on the basis that the plan only covered pharmaceuticals with drug identification numbers (DIN) issued by Health Canada.

The Court in *Skinner* accepted the finding that medical marijuana was the most effective medication for treating Mr. Skinner's chronic pain, and that he was therefore adversely impacted by the decision not to provide coverage for the drug. The Court held, however, that Mr. Skinner experienced this adverse impact because the medications covered by the plan were not effective for him personally, not because he fell within a protected group described in Nova Scotia's *Human Rights Act*.

The Tribunal in *Rivard* also considered the applicant's submission that she was denied coverage because of a bias against cannabis use. The Tribunal concluded that if this were true, it would not contribute to a finding of discrimination as it would point to a connection between the type of drug and the decision to deny coverage and not a connection between the disability and that decision.

The Decision in Context

Interestingly, just as it is being established that a benefit plan is permitted to exclude coverage for medical marijuana on the basis that Health Canada has not approved the drug for therapeutic use, Health Canada may be on a path toward approval. Under new medical marijuana regulations, the department is committed "to evaluate the drug review and approval process so Canadians in need have better access to a range of medicinal options."[13] The Canadian Institutes of Health Research has also invested heavily in 2018 into research on cannabis and cannabinoids, including research related to use for medical purposes. The CIHR website explains that, "this targeted investment in cannabis research will provide support for health research activities to strengthen the evidence base and expand cannabis research in areas where it is needed most."[14]

In addition to being another case which has wrestled with the issue of medical marijuana, one of the takeaways from this case is that it is always worthwhile for plan administrators and plan sponsors to be aware of who is making decisions with respect to coverage. This issue arose in *Rivard*. Ms. Rivard named Green Shield in her application, and Green Shield requested an order that it be removed and Essex County be added. Ms. Rivard did not object to Essex County being added, but did object to Green Shield being removed. She submitted that Green Shield had made the decision to deny coverage.

The Tribunal determined that Ms. Rivard's allegations related to benefit coverage only, and not to the administration of the benefit plan. Since Green Shield had not made decisions with respect to plan coverage, Ms. Rivard's allegation against Green Shield had no reasonable chance of success. Nevertheless, the Tribunal noted that it was possible for Green Shield to breach the *Code* under other circumstances because its role as plan administrator could result in a finding that a service relationship exists between Green Shield and plan beneficiaries.

2. *Archibald et. al. v. Ontario (CEO of FSRA), 2019 ONFST 16*

More than ten years after 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**"), former employees and pensioners of Nortel have fought their last battle in an attempt to recover benefits promised to them by their former employer.

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[13] Government of Canada, "Cannabis for medical purposes under the Cannabis Act: information and improvements" (17 October 2018) *Government of Canada*, online: <https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/medical-use-cannabis.html>.

[14] Canadian Institutes of Health Research, "Research in Substance Use: Cannabis" (18 October 2018) *Government of Canada*, online: < http://www.cihr-irsc.gc.ca/e/50932.html>.

On July 23, 2019, the Financial Services Tribunal ("**FST**") released its decision in *Archibald et. al. v. Ontario (CEO of FSRA)*, 2019 ONFST 16 denying an application by the court appointed representatives of the former employees and pensioners of Nortel (the "**Court Appointed Representatives**") challenging a Notice of Intended Decision ("**NOID**") by the Superintendent of Financial Services (the "**Superintendent**") with respect to amounts to be paid to the Ontario Pension Benefits Guarantee Fund ("**PBGF**").

Background

At the time Nortel filed for CCAA protection, it sponsored two pension plans (the Nortel Networks Negotiated Pension Plan and the Nortel Networks Limited Managerial and Non-Negotiated Pension Plan, together the "**Nortel Pension Plans**"), which it continued to administer during the CCAA proceedings pursuant to a settlement agreement reached among various parties until September 1, 2010.

The Superintendent appointed Morneau Shepell Ltd. (the "**Administrator**") as the administrator as of October 1, 2010, and on March 8, 2011, the Superintendent ordered that the Nortel Pension Plans be wound up.

To address hardship cause by the insolvency of a plan sponsor, the Ontario government established the PBGF to provide protection, subject to specific maximums and specific exclusions, to Ontario members and beneficiaries of privately sponsored single-employer defined benefit pension plans. In the course of a pension wind up, an administrator may apply for interim allocation of funds from the PBGF to alleviate the hardship a reduction of benefits to the funded level would cause or may reduce pensions to the level funded by the pension plan after taking into account the amount estimated to be guaranteed by the PBGF.

On April 5, 2011, the Administrator of the Nortel Pension Plans filed an application for an interim allocation from the PBGF. In support of the application, the Administrator filed an actuarial opinion which identified the benefits guaranteed by the PBGF, estimated the PBGF claims and provided certain statements regarding the opinion, including that potential recoveries from the Nortel CCAA proceedings had not been taken into account in their actuarial opinion.

In May 2011, the Superintendent issued orders declaring that the PBGF applied to the Nortel Pension Plans and subsequently approved the application for an interim allocation. In total, $383,877,000 was allocated to the Nortel Pension Plans.

In August 2011, after taking into account the interim allocation from the PBGF, the Administrator reduced pension benefits payable to most beneficiaries in the Nortel Pension Plans and rolled back indexation increases for Ontario Plan members, all in accordance with the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the "**PBA**").

Actuarial valuations were subsequently prepared by the Administrator as of October 1, 2010, and were both revised and eventually approved the by Superintendent.

In August 2015, the Administrator filed claims against Nortel for the amounts required by applicable legislation to satisfy in full the pension benefits of both Nortel Pension Plans and all related costs in respect of the wind up. In calculating the total wind up deficit for the claims of each of the Nortel Pension Plans, the Administrator considered all benefit entitlements, including

pension benefits guaranteed by the PBGF as well as benefits not covered by the PBGF, such as the indexation entitlements.

On October 12, 2016, a Global Settlement and Support Agreement (the "**Settlement Agreement**") was announced resolving litigation over the allocation of the roughly US $7.3 billion collected from the sales of Nortel's worldwide businesses. The Settlement Agreement was approved by courts in Canada and the U.S. and a Plan of Compromise and Arrangement was sanctioned by the CCAA Court in Canada. As a result of the Settlement Agreement, on or about July 6, 2017, the Nortel Pension Plan's received an interim distribution from the Canadian Debtors for both Nortel Pension Plans in the amount of $859,574,937 (the "**First CCAA Dividend**").

On August 31, 2017, the Administrator filed an addendum with the Superintendent for each of the wind up reports to account for the receipt of the First CCAA Dividend. The addenda included a refund to the PBGF for amounts received in the First CCAA Dividend.

On September 13, 2017, the Court Appointed Representatives objected to the addendum. The Court Appointed Representatives argued that amounts that had been recovered that were attributable to benefit indexation that had been eliminated should not be included in the pool of assets available to satisfy all liabilities of the Nortel Pension Plans but rather should only be applied to pay for compensate those who lost their indexation benefit.

On March 12, 2018, the Superintendent issued a NOID providing notice that he intended to make a decision approving the Administrator's original plan to provide no compensation for those who lost indexation. The Court Appointed Representatives objected and requested a hearing before the FST.

The FST Decision

The key issue before the FST was the interpretation of the PBA and Regulation 909 (General), R.R.O. 1990 (the "**Regulation**") and whether the PBGF should recover amounts paid out in the Nortel insolvency that relate to benefits that it did not guarantee.

The Court Appointed Representatives argued that the Superintendent, as administrator of the PBGF, only has a right to recover amounts it has provided from the PBGF as a subrogee under s. 86(4) of the PBA, which provides:

> (4) The Superintendent is subrogated to the rights of the administrator of a pension plan in respect of which the Superintendent authorizes payment from the Guarantee Fund in satisfaction of a pension, deferred pension, pension benefit or contribution guaranteed under section 84 (guaranteed benefits). R.S.O. 1990, c. P.8, s. 86 (4); 1997, c. 28, s. 206.

The Court Appointed Representatives argued that the Indexation Addenda would allow the Superintendent to recover a greater benefit than is permitted under s. 86(4) of the PBA since the amounts recovered for lost future indexation, which are not guaranteed by the PBA, were being included in the pool of assets for the purpose of calculating the PBGF refund.

The FST disagreed with this position, holding that the Indexation Addenda did not undermine the Nortel Pension Plan members' contractual rights to indexation. The FST instead agreed with the position of the Administrator and Superintendent, finding that the Indexation Addenda were calculated correctly pursuant to s. 34 of the Regulation, which provides a methodology to calculate the final benefit where the PBGF has been found to apply, and s. 47 of the Regulation, which provides a list of benefits that are not guaranteed.

The FST rejected the argument of the Court Appointed Representatives that s. 34 of the Regulation no longer applied as a result of the interim allocation that was made from the PBGF and subsequent reconciliation which the Court Appointed Representatives argued invoked the subrogation rights of the Superintendent and reduced the amounts that could be refunded to the PBGF.

In closing, the FST rejected the argument of the Court Appointed Representatives that the Indexation Addenda breached the fiduciary duty the Superintendent and Administrator owed to the Nortel Pension Plan members, finding that the actions taken by the Superintendent and Administrator were consistent with the PBA and Regulation.

The decision is not being appealed and this case appears to be the end of the Nortel saga, which has been ongoing for over ten years. While it is a disappointing result for the pensioners who have lost their right to indexation, it will also allow the Plan windups to be completed, annuities to be purchased and benefit amounts to crystallize.

3. FSCO Notice of Intended Decision re General Motors Canadian Hourly-Rate Employees' Pension Plan, September 25, 2018

This Notice of Intended Decision ("NOID") concerned an application requesting that the Superintendent issue an order to prevent a Plan administrator from attempting to correct certain administrative errors by reducing the credited service of certain Plan members, until the affected members were each afforded an opportunity to contest the adjustment and a final determination was made in their case. The NOID stated that the Superintendent intended to refuse to issue an order, as the preconditions for him to issue such an order under the *Pension Benefits Act*, RSO 1990, c P8 (*PBA*) had not been met.

General Motors of Canada Company ("GM") is the Plan administrator for the General Motors Canadian Hourly-Rate Employees' Pension Plan (the "Plan"). The Plan has a combination of defined benefit and defined contribution provisions and is registered under the PBA. Unifor filed the application on behalf of the affected Plan members' in its capacity as their collective bargaining agent.

GM uncovered the relevant administrative errors in late 2016, as a result of first discovering that bridge benefits were being paid to certain individuals (22 in total) who were not entitled to bridge benefits under the Plan text. This included three categories of individuals: Plan members over age 65, surviving spouses outside Quebec, and surviving spouses in Quebec whose deceased spouse would already have reached age 65. GM notified the affected individuals and discontinued payment but did not pursue recovery of the overpayments.

GM subsequently initiated a general record keeping review, through which it identified three types of administrative error relating to the recognition of credited service under the Plan.

The first type of error concerned credited service granted for periods of reduced pay or temporary absence. The *PBA* neither imposes nor prohibits credited service limits. However, section 8507(2) of the *Income Tax Regulations*, CRC, c 945 imposes a five-year limit on the accrual of credited service during periods of reduced pay and temporary absence. Exceeding this limit puts a Plan in revocable status under the *Income Tax Act*, RSC, 1985, c 1 (5th Supp), pursuant to section 147.1(8) of that Act. This five-year limit was explicitly incorporated in the Plan text at section 3(b) of Article II.

GM identified approximately 130 cases in which more than five years of credited service was granted for periods of reduced pay or temporary absence.

The second type of error concerned credited service granted to members prior to their "seniority date". Under the Plan text, credited service is only granted to members who have acquired seniority rights in accordance with an applicable collective agreement. The collective agreement between GM and Unifor provided that members generally acquired seniority rights by working 90 days in a 6 month period. The collective agreement did not permit employees hired on vacation replacements for 4 months or less to acquire seniority rights or attain credit toward acquiring seniority rights.

GM identified approximately 643 cases in which members were credited service prior to their seniority date, including students acting as vacation replacements.

The third type of error concerned the amount of credited service granted for one full year of work. Under the Plan text, members are granted one full year of credited service if they work 1700 hours or more in a calendar year.

GM identified 7 members who were credited with more than one full year of credited service based on working more than 1700 hours and 132 members who were credited with one full year of credited service based on working less than 1700 hours. GM also identified 131 members who were credited less service than they had earned.

The NOID states that GM made the following representations to the Financial Services Commission of Ontario ("FSCO"), regarding the error correction process:

- GM did not pursue members or former members for overpayments related to credited service;
- Members were informed of the errors as quickly as possible to prevent any further retirements based on incorrect information;
- Retired members and former members were informed of their overstated credited service by letters in June and September 2017;
- GM determined it was necessary to correct credited service calculations that were not consistent with the terms of the Plan, the PBA, or the ITA;
- GM decided to correct the identified errors on a go-forward basis in order to minimize the impact on members;

- GM began paying excess benefits out of corporate revenues for 78 retired members who would no longer have been eligible for enhanced early retirement as a result of the corrections;

- GM conducted further reviews if questions or issues were raised by Unifor or members.

In response, Unifor alleged that GM was acting in its own self-interest as a plan sponsor and contrary to its duties as plan administrator under the PBA, the common law, and the terms of the Plan. Unifor argued that GM should not be permitted to adjust credited service retroactively and negatively without the informed, express and written consent of the effected plan beneficiaries and Unifor requested that the Superintendent support the parties in establishing an appropriate process for the resolution of any disputes.

FSCO staff responded to written submissions made by the parties in a letter dated May 9, 2018. In the letter, FSCO staff stated that GM was acting in accordance with its statutory obligations as Plan administrator in identifying and taking steps to correct various errors and that they had not identified any steps taken by GM that would cause FSCO to intervene.

Unifor subsequently wrote to the Superintendent, in a letter dated July 11, 2018. Unifor alleged that GM's actions were "a brazen repudiation and disavowal of past administrative decisions". Unifor further alleged that GM's actions amounted to a "unilateral reduction of benefits" and thereby to an adverse amendment to the terms of the Plan.

Unifor requested that the Superintendent make an order pursuant to section 87(1) of the PBA that GM refrain from making any reductions to credited service until an opportunity was afforded for each affected individual to contest the reduction and a final determination was made on the merits of their case.

Section 87(1) of the *PBA* provides:

> **Chief Executive Officer's orders**
>
> **Order re administration in contravention of Act**
>
> **87.** (1) Subject to section 89, the Chief Executive Officer may make an order requiring an administrator or any other person to take or refrain from taking any action in respect of a pension plan or a pension fund if the Chief Executive Officer is of the opinion, upon reasonable and probable grounds,
>
> (a) that the pension plan or pension fund is not being administered in accordance with this Act, the regulations, the Authority rules or the pension plan;
>
> (b) that the pension plan does not comply with this Act, the regulations and the Authority rules; or

> (c) that the administrator of the pension plan, the employer or the other person is contravening a requirement of this Act, the regulations or the Authority rules.

In the NOID, the Superintendent stated that he intended to refuse Unifor's request because the facts presented did not support a finding that either of subsections (a), (b) or (c) had been met.

4. Notice of Intended Decision re Pension Plan for Employees of Hewlett Packard Enterprise Canada, December 28, 2018

In this Notice of Intended Decision ("NOID"), the Superintendent took the position that absent language to the contrary in the Plan text, "vacation pay" is included in the term "base pay" as the *Employment Standards Act, 2000*, SO 2000, c 41 (*ESA*) provides that entitlement to vacation pay accrues during employment.

The Pension Plan for Employees of Hewlett Packard Enterprise Canada (the "Plan") is a single employer combined defined benefit and defined contribution plan, administered by Hewlett Packard Enterprise Canada ("Hewlett"). The Applicant, F.B., was a retired member of the Plan who took an enhanced early retirement package as of November 30, 2012.

F.B.'s application arose in the context of an amendment to the definition of "Final Average Earnings" (FAE) under the Plan. The Plan text defined FAE as meaning the average of a member's highest five discreet periods of twelve consecutive months of earnings during the member's final one hundred twenty consecutive calendar months of continuous service. Effective January 1, 2011, the Plan text was amended to state that FAE for a fulltime employee was determined based on the remuneration paid to a member of the Plan including base pay and eligible commissions but "excluding bonuses, overtime pay, and any other forms of compensation". The Plan did not provide a definition for the term "base pay".

In his application, F.B. sought an Order that his vacation pay be factored into his pensionable earnings as a component of his base pay. Hewlett took the position that F.B. was not entitled to have his vacation pay factored into his pensionable earnings because he received the vacation pay as a lump sum representing unused vacation at the time of his retirement. Hewlett argued that including his vacation pay would be "double counting".

The Superintendent wrote that under the *ESA*, "vacation pay is a statutory entitlement and accrues while the employee is employed" and that vacation pay therefore "represents the base pay amounts payable in respect of earned vacation days." In light of this, the Superintendent concluded that the term "base pay" should be interpreted to include vacation pay unless the Plan text explicitly excludes vacation pay from its definition.

Further, the Superintendent noted that the lump sum F.B. received on termination of employment was therefore a payment of an amount past owing—such that including the amount in his pensionable earnings would not amount to double-counting.

In result, the Superintendent stated that he intended to issue the requested Order pursuant to section 87(1)(a) of the *Pension Benefits Act*, RSO 1990, c P8, on the basis that by failing to

factor vacation pay into F.B.'s pensionable earnings, Hewlett was not administering the Plan in accordance with its terms.

5. Notice of Intended Decision of the Superintendent of Financial Services to Refuse to Make an Order under section 62.1 of the PBA relating to The IUOE Local 793 Pension Plan for Operating Engineers in Ontario

This case concerned a multi-employer pension plan with approximately 11,300 active members. It had been operating for almost fifty years. The Plan was administered by a Board of Trustees and the beneficiaries of the Plan were members of the International Union of Operating Engineers, Local 793 (the "Union"). Coco Paving Inc. was one of the participating employers under the Plan, and had discovered that it had been making overpayments to the Plan between 2010 and 2014.

Coco Paving brought the alleged overpayments to the attention of the Union in November 2014. The Union requested information to support the claim and ultimately objected to the requested refund in or about June 2016. Coco Paving then filed a grievance with the Ontario Labour Relations Board (the "OLRB") in June of 2016.

At the OLRB, the Union, the Trustees and Coco Paving all appeared. The Union, with the support of the Trustees, brought a motion to have the grievance dismissed on the ground that the Superintendent had the expertise to deal with the case and not the OLRB. On February 17, 2017, the OLRB issued a decision that it was appropriate to defer the hearing of the grievance to a determination by the Superintendent.

In the NOID, the Superintendent refused to order the repayment to Coco Paving. It noted that the Plan Text was silent on the refunding of overpayments, aside from Article VII.08, which allows a return of contributions to avoid revocation of the Plan's registration by the Canada Revenue Agency. The Superintendent also noted that the relevant Trust Agreement stated that that nothing in the agreement shall prevent an employer contribution "made by a mistake of fact" from being returned by the Trustees to the employer. Finally, it pointed out that Section 62.1 of the PBA governs the refund of overpayments related to pension plans, and states that if an employer makes an overpayment into the pension fund, an application may be made for the Superintendent's consent to the payment from the fund to the employer related to the overpayment if the application is made by the later of: a) 24 months after the date on which the employer made the payments; b) 6 months after the date on which the administrator, acting reasonably, became aware of the overpayment.

The Superintendent ultimately determined that there were two jurisdictional grounds upon which the application of Coco Paving was to be refused. The Superintendent reasoned as follows:

a) The Plan is a multi-employer pension plan. Therefore, an application under section 62.1 of the PBA must be made by the plan administrator. The Applicant is a participating employer, not the administrator of the Plan. The Applicant therefore has no status to bring the application, and the Superintendent consequently has no jurisdiction to consent to it.

b) Even if it is held that the Applicant has status to make the application, the application was not brought to the Superintendent within the time limits set out in section 62.1 of the PBA. The last alleged overpayment was made in September 2014. Therefore, the application to the Superintendent should have been made either by September 2016 (24 months after the date of the last payment) or by December 2016 (within six months of the date the Trustees became aware of the claim, which may have been as late as June 2016 when the OLRB grievance was filed).

The Superintendent also declined to exercise its discretion to extend the time limits, noting that an extension of the deadline for making an application has the potential of causing prejudice to both the members on whose behalf the alleged overpayments were made (as they relied on those payments as being accurate) and to the other members of the Plan (as a refund could negatively impact the solvency of the Plan). Although section 105 of the PBA allows the Superintendent to extend a procedural time limit upon an application by an affected person, the Superintendent must be satisfied that there are reasonable grounds for doing so and was not satisfied that such reasons existed in this case.

6. *Service Employees International Union, Local 1 Canada v Bluewater Health,* 2019 CanLII 25975 (ON LA)

Facts

The case involved a dispute between the Service Employees International Union, Local 1 (the "Union") and the Bluewater Health hospital (the "Employer") over the interpretation of a provision in the collective agreement requiring that the Employer pay the same "portion" of premiums for active employees as early retirees.

The impugned Article 22.01(f) read:

> f) Benefits on Early Retirement: Effective March 4, 2006
>
> The Hospital will provide equivalent coverage to all employees who retire early and have not yet reached age 65 and who are in receipt of the Hospital's Pension Plan benefits on the same basis as is provided to active employees for semi-private, extended health care and dental benefits. The Hospital will contribute the same portion towards the billed premiums of these benefits plans as is currently contributed by the Hospital to the billed premiums of active employees.

Around 2009, the Employer changed insurance carriers and also changed the way it paid premiums for active employees and early retirees. Prior to the change, the Employer paid the full cost of premiums for both active employees and early retirees. After the change, the Employer paid the same dollar amount for early retirees as it did for active employees. Under the extended health plan with the new carrier, retiree premiums were higher than for active employees. This meant that early retirees were required to pay the difference between the dollar figure paid for

active employees' premiums and what the new plan required retirees to pay for premiums. Arbitrator Nyman explained the issue by way of example:

> For the purpose of illustrating the change only, if extended health premiums for active employees were $100 and for retirees the premiums were $120, then prior to the change Bluewater paid the full amount of both regardless of the difference in cost. After Bluewater changed its approach in 2009, it paid 100% of the cost of the active employees' premiums (in this example $100) and the equivalent dollar figure amount towards the retirees' premiums, with the retirees making up the difference. For the purpose of the example only, this resulted in an extra $20 being charged to the retirees.[15]

When the original change of insurance carriers occurred and the Employer changed their payment method, the Union brought the issue to the attention of the Employer. The ensuing discussions resulted in a retroactive settlement but with no clear understanding with respect to the impact of Article 22.01(f) moving forward. Following the settlement, the parties negotiated a new collective agreement in 2013 – still without coming to ground on Article 22.01(f). In 2017, early retirees' premiums significantly increased. At that point, the Union grieved.

According to the Employer, the new method of premium payment instituted around 2009 complied with Article 22.01(f) of the collective agreement. The Employer's view was that the second sentence of Article 22.01(f) only required the Employer to pay the same dollar figure towards the premium costs of early retirees as it did for active employees. If the dollar figure was not sufficient under the terms of the new plan, the Employer took the position that the early retirees were liable for any shortfall. The Employer also took the position that even if the Union's interpretation of Article 22.01(f) was correct, the Union was estopped from claiming a remedy due to its silence on the state of affairs following the initial settlement.

The Union argued that Article 22.01(f) required the Employer to pay the same percentage of retiree premiums as it had to pay for active employee premiums. By way of example, if the Employer was required to pay 100% of active employees' premiums, the Union's position was that Article 22.01(f) of the collective agreement mandated that the Employer also pay 100% of premiums for early retirees. As to estoppel, the Union argued that an authorized Union official was not aware of the change in payment method so silence or inaction could not ground an estoppel claim.

Decision

Arbitrator Nyman agreed that, in its essence, the dispute revolved around the proper interpretation of the second sentence of Article 22.01(f). He acknowledged that the term "portion" in Article 22.01(f) was ambiguous. In particular, the plain meaning of the word "portion" did not necessarily mean that the amount was expressed as a dollar amount or as a percentage. Arbitrator Nyman determined that Article 22.01(f) was designed to grant early

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[15] *Service Employees International Union, Local 1 Canada v Bluewater Health*, 2019 CanLII 25975 (ON LA) at para. 13.

retirees and active employees the same semi-private, extended health and dental benefits. In his view, a provision in the collective agreement that sought to ensure uniformity in benefits while simultaneously allowing discrepancies in cost would not make sense given the context. In light of the purpose of the provision, the proper interpretation of Article 22.01(f) was that the Employer must pay premiums as if the early retirees were active employees.

Despite finding in the Union's favour on the interpretation of Article 22.01(f), Arbitrator Nyman ruled that the Union was in fact estopped from claiming a remedy until the commencement of the new collective agreement coming into force on January 1, 2018.

7. *Austin v Bell Canada., 2019 ONSC 4757*

In *Austin v Bell Canada*, Justice Morgan of the Ontario Superior Court of Justice resolved an ambiguity in the pension plan text in favour of Bell Canada, the employer and plan administrator in the dispute.

The Plaintiff, Leslie Austin, is a pensioner of Bell Canada. Mr. Austin commenced a class action alleging that in 2017, Bell Canada miscalculated the cost of living increase for all pensioners.

Section 1.29 of the Bell Canada Pension Plan defines "Pension Index" to mean "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." Both Bell Canada and the Plaintiff agreed that the percentage increase in 2017 was 1.49371 per cent.

Bell Canada argued that a separate section of the Plan required Bell Canada to round to two decimal places, resulting in a percentage increase of 1.49 per cent. However, under the approach taken by Statistics Canada, the annual percentage increase was rounded to one decimal place, or 1.5 per cent. Here is why the 0.01 per cent difference matters: section 8.7 of the Plan stipulates that the annual percentage increase of the Consumer Price Index ("CPI") should be rounded to a whole number. The Plaintiff, using Statistics Canada's number, rounded up to 2 per cent, while Bell Canada calculated and reported a 1 per cent indexing increase in 2017 in pension payments for retirees under the Plan. The Plaintiff argued that s. 1.29 of the Plan mandated Bell Canada to apply Statistics Canada's rounding methodology to the calculation of the annual percentage increase in the CPI. The Plaintiff further argued that this interpretation is bolstered by the *contra proferentem* rule, which provides that any ambiguity in a contract is to be interpreted against its drafter, or Bell Canada in this case.

Since the nature of the dispute centered on the interpretation of the Plan text, the Plaintiff moved for summary judgment. While Justice Morgan granted certification of the class action, he also granted summary judgment dismissing the action in favour of Bell Canada.

Justice Morgan agreed with Bell Canada's calculation of the rate of indexation. In reaching that conclusion, Justice Morgan placed particular weight on the evidence given by Robert Marchessault, Bell Canada's Director of Pension and Actuarial Services in respect of the indexation calculations. In particular, based on the observations given by Mr. Marchessault, Justice Morgan concluded that an approach using Statistics Canada's one-decimal rounding of the CPI rate would eliminate the need for any further rounding as required in another provision in the Plan Text. In other words, in Justice Morgan's view, a deferral to Statistics Canada's

method of rounding would render a provision in the Plan meaningless. On this basis, Justice Morgan held in favour of Bell Canada and dismissed the certified class action.

Notwithstanding the above analysis, Justice Morgan did not seek to reason "why s. 1.29 is phrased in the awkward way that it is" and did not give any significance to the comma that was inserted in s. 1.29 before the modifying phrase “as determined by Statistics Canada”.

The Plaintiff has filed for an appeal of the decision by Justice Morgan.

BRITISH COLUMBIA

8. *Trustees of the IWA v. Wade, 2019 BCSC 1085*

Trustees of the IWA v Wade, the Supreme Court of British Columbia found the sole director, officer and shareholder of a company personally liable for knowing assistance in breach of trust and ordered him to pay $16, 529.95 in outstanding contributions to the trustees of a pension plan.

Background

Roger Wade was the sole director, officer and shareholder of Log Transport. In 2012, Mr. Wade, on behalf of Log Transport, signed a collective agreement with the United Steelworkers, Local 1-1937 and an agreement to participate in the IWA—Forestry Industry Pension Plan (the "Pension Plan") and the IWA—Forestry Industry LTD Plan (the "LTD Plan"; collectively the "Plans"). This agreement required Log Transport to hold both employer and employee contributions in trust for its unionized employees, and to send these contributions to the Plans.

Instead, Log Transport kept the contribution funds in its general account. The company then began to experience financial difficulties, and the contributions it was required to send to the Plans remained outstanding.

The IWA trustees eventually sought judgment against Mr. Wade personally for "knowing assistance" with respect to Log Transport's breach of trust.

While "knowing assistance" has a long history in English and Canadian law, it has been infrequently applied in the pension context. Generally speaking, to establish that a defendant is liable for "knowing assistance", the Plaintiff must prove that there was a breach of trust or fiduciary duty by someone other than the defendant, that the defendant helped that person in the breach, and that the defendant had a dishonest or fraudulent intention in providing that assistance.

As a result, the main issues in this case were: (1) whether there was a breach of trust; (2) whether this breach had been in pursuit of a "dishonest and fraudulent" design; and (3) whether Mr. Wade "knowingly and directly" assisted in the breach.

Decision

The Supreme Court of British Columbia answered all three of these questions in the affirmative. First, it found that Log Transport was in breach of the statutory trust imposed on the Pension Plan and the contractual trust imposed on the LTD Plan. To do this, the plaintiffs had to first

establish that Log Transport was subject to a trust. The Court imputed knowledge of the trust over the Pension Plan contributions. For the LTD Plan contributions, the Court found that there was no evidence that Mr. Wade did not have complete copies of the participation agreements, and therefore knew that a contractual trust had been imposed.

The Court then found that Log Transport breached these trusts by: (1) failing to keep the contribution funds separate from the general account; (2) not remitting the contributions to the Plans as required by the participation agreements; and (3) using the contribution funds for other purposes without authorization, which prejudiced the beneficiaries of the trust.

Second, the Court found that this breach was in pursuit of a "dishonest and fraudulent" design. By failing to place the contribution funds in a separate bank account, Log Transport risked that these funds would be commingled with the company funds, and not remitted to the Plans. This resulted in prejudice to the Plans, because of the failure to remit the contributions, and also to the unionized employees, because of the risk to their benefits.

Third, the Court found that Mr. Wade "knowingly and directly" assisted in the fraudulent and dishonest breach of trust. Mr. Wade signed the participation agreements for the Plans on behalf of Log Transport. Mr. Wade arranged for employee contributions to be withheld from their paycheques, and was aware that these funds were not put into a separate account—funds which he acknowledge were held in trust for employees. Finally, it was clear to the Court that Mr. Wade had received a benefit from Log Transport's breach of trust, as the breach prolonged the operation of the business and he was its sole shareholder.

Comment

This case provides an alternative avenue for administrators, unions and employees to use to hold directors and officers accountable when contributions are improperly withheld from a pension or benefit plan. While directors and officers can be held liable under various statutory provisions (including corporate law statutes and employment standards legislation), those provisions are often subject to statutory defences and exemptions which make it difficult to attach liability to such individuals for missing contributions. The possibility of establishing liability under "knowing assistance" provides a more flexible route to recovery and avoids the possibility that a director or officer could escape liability through a statutory defence.

9. *National Elevator and Escalator Association v. International Union of Elevator Constructors, Local No. 82,* 2018 CanLII 128742 (BC LA)

In this case, a British Columbia arbitrator found that an employer was liable to pay for the Grievor's long term disability ("LTD") benefits. The LTD benefits were provided out of a mult-employer trust, into which contributions were pooled. The plan itself was incorporated into the provincial collective agreement, but neither the trustees nor the third party administrator were not party to the agreement. In result, the Arbitrator held that the employer was solely liable for the LTD benefits owed—not the multi-employer trust.

Facts

The Grievor in this case was an elevator mechanic who began working for KONE Inc. (the "Employer") in 2006. The Grievor was a member of the International Union of Elevator

Constructors, Local 82 (the "Union"), and the Employer was a member of an employer bargaining association, the National Elevator and Escalator Association ("NEEA").

In 2011, the Grievor provided medical evidence that he was suffering from a condition that rendered him completely unable to work and applied for LTD benefits. His benefits were denied, and the Union grieved.

The Collective Agreement and the LTD Plan

The Union and the Employer were parties to a province-wide collective agreement (the "Collective Agreement.") In a provision that dated back to 1952, the Collective Agreement provided that both the Employer and employees would contribute to the Canadian Elevator Industry Welfare Plan (the "Welfare Plan") in accordance with its Declaration of Trust.

Under the Declaration of Trust, negotiated in 1953, contributions from all of the employers represented by the NEEA and their employees were pooled in a trust (the "Trust") which was administered by a Board of Trustees ("the Trustees"). The Declaration of Trust gave the Trustees broad discretion to administer and amend the Welfare Plan. In 1998, the Trustees added an LTD plan and contracted with Sun Life Assurance Company ("Sun Life") to provide administrative services including processing and adjudicating claims.

Grievance and Procedural History

The Union originally filed a grievance challenging Sun Life's decision to deny the Grievor's claim, naming the Employer, the NEEA, Sun Life, and the Trustees as parties. In response, the Employer objected that the grievance was inarbitrable. Arguing that the Arbitrator had no jurisdiction over the the dispute, the Employer asserted that the Grievor's only recourse was to bring a civil claim against Sun Life and the Trustees.

In a preliminary award, the Arbitrator Burke held that the LTD plan was incorporated into the Collective Agreement, and that she therefore had jurisdiction to order an award against the Employer. She further held that she had no jurisdiction to order an award against the Trustees or Sun Life, as neither were party to the Collective Agreement.

A reconsideration panel of the British Columbia Labour Relations Board (the "Board") overturned the decision and remitted the jurisdictional matter to Arbitrator Flemming. Arbitrator Flemming made similar findings, and the Board again overturned the decision and remitted the issues back to him. The parties then directed Arbitrator Flemming to decide the merits of the Grievor's claim before considering the issues of jurisdiction and liability.

Arbitrator Flemming found that the Grievor was entitled to LTD benefits. The Employer notified the Trustees and requested that they grant the Grievor his benefits, but the Trustees refused. Finally, the Employer and the Union directed Arbitrator Flemming to again determine who was liable for the LTD benefits and whether the Arbitrator had jurisdiction to order the payment of those benefits.

Decision

Arbitrator Flemming began by confirming that the LTD plan was incorporated into the Collective Agreement. When an LTD plan is not incorporated into a collective agreement, the

Arbitrator observed, the employee must generally commence action against the insurance provider in court. Conversely, where a plan is incorporated, the employer is the ultimate insurer or provider of benefits pursuant to the terms of the incorporated plan or policy. As a result, the Arbitrator found, the issue in this case was whether there were any special circumstances that would release the Employer from its obligation and transfer liability to the Trustees.

The Arbitrator addressed this issue first by holding that the Trustees were not party to the Collective Agreement. He noted that Arbitrators generally lack jurisdiction over entities not party to the Collective Agreement, and only gain that jurisdiction through an entity's express consent. The Arbitrator went on to find that in this case, based on both the specific language in the Declaration of Trust and the relevant case law, the Trustees had not provided the express consent necessary to bind them to arbitral awards. The Arbitrator further rejected the Employer's argument that the Trustees would be bound by such an award because they owed fiduciary duties to the plan members.

Arbitrator Flemming also rejected the Employer's assertion that even if the Trustees are not bound by the arbitration proceeding, he should nonetheless make a declaration that the Trust ought to have paid the Grievor LTD benefits. The Employer asserted that would be desirable as a declaration could help encourage the Trustees to seek clarity and direction from the court and to remove any unnecessary hurdles for any possible proceeding initiated by the Grievor in court. Dismissing this suggestion, the Arbitrator held that it would be inappropriate to opine about an issue not before him in relation to a non-party for the purpose of another potential legal proceeding.

Finally, Arbitrator Flemming rejected the Employer's alternative argument that its liability was limited and that the Union was jointly liable. The Arbitrator found that while the Collective Agreement expressly limited the Employer's liability in relation to other matters, no such limitation was found in the provisions concerning the Welfare Plan.

Ultimately, the Arbitrator concluded that the Employer alone was liable for the LTD benefits that the Grievor was entitled to.

This decision illustrates how civil law, trust, and labour arbitration sometimes fail to intersect in a consistent way with respect to benefit plans and can produce unintended, inconvenient results. An issue of first instance, the problem here arose from three key facts: (a) the LTD plan was incorporated into the Collective Agreement, (b) the Trust funding the plan was not incorporated into the Collective Agreement, and (c) the plan was funded by the pooled contributions of a number of employers. As a result, a single employer was liable for three years of benefits that, according to the terms of the plan itself, ought to have been funded by the pooled contributions of many employers.

As Arbitrator Flemming noted, the Welfare Plan had operated successfully for over 65 years on a multi-employer basis, and the LTD plan had been in place for more than 15 years before this grievance arose. The Arbitrator's finding that the Employer alone was liable for the Grievor's LTD benefits has implications for the successful operation of the LTD plan which may need to be addressed in at the bargaining table.

10. *B.C. School District No. 63 v. Canadian Union of Public Employees, Local 441, 2019* CanLII 28163 (BC LA)

Facts

This case involved a dispute between British Columbia's School District No. 63 (the "Employer") and the Canadian Employee of Public Employees, Local 441 (the "Union) over the interpretation of a provision in the collective agreement pertaining legislative change. Specifically, the provision addressed how benefit plan premiums would be dispensed between the parties in the event government reduced the premiums required from individuals under the provincial health care scheme. On April 30, 2018, the Union filed a policy grievance alleging that the Employer had violated the provision by unilaterally dispensing benefit plan premiums.

The legislative change provision at issue was Article 28.07 of the collective agreement:

> **28.07 Legislation**
>
> If during the life of the agreement, the premium paid by the employer for employee benefits under the benefit plans is reduced as a result of any legislation, the dispensation of such reduction shall be discussed by the parties, and, failing settlement within thirty (30) days or such longer time as may be agreed upon by the parties, shall be resolved pursuant to the arbitration procedure.

In British Columbia ("BC"), public health insurance is partly funded by individual resident premiums paid to the BC Medical Services Plan ("MSP"). The collective agreement stipulated that the Employer was responsible for paying 100% of the MSP premiums on behalf of all eligible members of the Union. Effective January 1, 2018, MSP premiums were cut by 50% as a result of a government amendment to the BC *Medical and Health Services Regulation*. As of January 1, 2020, MSP premiums will be eliminated entirely. On January 1, 2019 employers in BC are required to begin paying an Employer Health Tax (the "EHT") to offset the lost revenue from the eliminated MSP premiums. The Union's policy grievance was born out of these legislative and regulatory changes.

According to the Union, the January 1, 2018 reduction in MSP premiums triggered Article 28.07 – meaning the Union and Employer were obligated to meet to discuss how the windfall to the employer should be dispensed. The Union made the argument that the predecessor legislative change provision to Article 28.07 was negotiated in the context of BC's shift to a public health insurance model in 1968 and that the intent of the provision had always been to singularly focus on the MSP irrespective of the premiums paid under the collective agreement's other benefit plans or taxes like the EHT. Since the Employer was now only responsible for 50% of the MSP premiums after the regulatory change, the Employer was required to pay a significantly lower premium bill that was precisely the type of windfall Article 27.08 was negotiated to cover.

According to the Employer, Article 28.07 was not to be viewed in a vacuum. The Employer argued that the "benefit plans" referenced in Article 28.07 included all four of the benefit plans that were provided for in the collective agreement. This interpretation meant that a consultation with the Union was only triggered when there was a net reduction in the global premiums paid by the Employer – for all of its benefit plans under the collective agreement. In the Employer's

view, since the other benefit plan premiums had been steadily increasing, the MSP reduction did not actually result in a net reduction of benefit plan premiums paid by the Employer. On the contrary, according to the Employer, it was now required to pay *more* considering the introduction of the EHT.

Decision

Arbitrator Fleming condensed the policy grievance to two issues that he was required to determine: (1) Was there a reduction of premiums as contemplated under Article 28.07 of the collective agreement; and (2) if there was a reduction, how should the windfall be dispensed between the parties? Fleming's decision dealt only with the first issue.

Arbitrator Fleming acknowledged that Article 28.07 was not a model of clarity. As such, his task was attempting to discern the intention of the parties when they negotiated Article 28.07. In his view, when considering the collective agreement as a whole, the reasonable interpretation of Article 28.07 was that it intended to deal with MSP premium deductions alone, irrespective of the other collective agreement benefit plan premiums. As such, Article 28.07 was triggered by the BC government phasing out MSP premiums.

His determination was based on the fact that for each applicable benefit plan, the collective agreement included a dedicated provision pertaining to the calculation of premiums. In addition, he held that it was reasonable to conclude that the parties had intended Article 28.07 to singularly deal with MSP premiums because the MSP was the only plan that had been the subject of repeated legislative reform over the past 50 years.

Having found that Article 28.07 was triggered by the BC government phasing out MSP premiums, Arbitrator Fleming turned to the issue of the EHT. He held that the EHT was relevant to the question of whether the employer experienced a windfall once the MSP premiums were cancelled. In particular, he noted that the EHT was clearly intended to be a replacement of MSP premiums. He also observed that whether the MSP premiums more closely represented a premium or a tax could not have been a concern to the parties at the time they negotiated Article 28.07. As such, Article Fleming allowed the Union's grievance, finding that Article 28.07 was triggered but held that the parties were obliged to discuss the premium reduction with regard to the imposition of the EHT. Arbitrator Fleming remained seized of the file if the parties were unable to reach an agreement.

11. *Barker v. Molson Coors Breweries and another (No. 3)*

The Complainant in this case, Mr. Barker, elected to continue working once he reached age 65 and he experienced a reduction to his health and welfare benefits at that time. Mr. Barker filed a human rights complaint against his employer and his union, alleging age discrimination. The British Columbia Human Rights Tribunal (the "Tribunal") held that section 13(3)(b) British Columbia *Human Rights Code*[16] provided a full defense against the age discrimination in this case because it arose out of the operation of a "the operation of a *bona fide* group or employee insurance plan."

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[16] RSBC 1996, c 210 (the *Code*).

The Tribunal appears to have reached this determination reluctantly, expressing the view throughout the decision that section 13(3)(b) may well be unconstitutional but that the Tribunal lacked the jurisdiction to make such a determination.[17]

Facts

The *Brewery, Winery and Distillery Workers' Union, Local 300* (the "Union") represented certain employees of Molson Coors Breweries (the "Employer"). In 1988, the Employer and the Union had reason to think that the government might pass legislation to prohibit mandatory retirement. In anticipation of such a change, they entered into a Letter of Understanding that provided, among other things, that an employee who elected to work past age 65 would only be entitled to the health and welfare benefits provided to retirees. This amounted to a significant reduction in benefits to employees working past age 65.

In 2012, the LOU was amended to permit members to accrue pensionable service until they reached age 71, up from 65. No change was made to entitlement to health and welfare benefits but, due to an administrative oversight, the Employer failed to apply the health and welfare terms of the LOU to its workers over age 65. This included Mr. Barker, who reached age 65 in 2012. The Employer discovered this error in 2015, and notified the Union that it intended to apply the LOU again once their current round of bargaining closed. As a result, Mr. Barker's benefits were reduced when he was 68 years old.

History of the Claim

Mr. Barker filed an age-based discrimination complaint against the Employer and the Union (the "Respondents") in October of 2015, pursuant to section 13 of the *Code*. The Respondents filed an application to dismiss Mr. Barker's complaint summarily on the basis that it did not involve a code violation and had "no reasonable prospect of success." Their application was based on section 13(3)(b) of the *Code*, which provides that the prohibition on aged-based discrimination does not apply "to the operation of […] a bona fide group or employee insurance plan."

The Tribunal declined to summarily dismiss the complaint, finding that Mr. Barker had established a *prima facie* claim of discrimination and that the Respondents had not established that Mr. Barker had no reasonable process of success.[18] On the later point, the Tribunal was not convinced that the Respondents would be able to establish that the provision in the LOU was incorporated into the benefit plan. If the Respondents could not establish a sufficient link between the LOU and the plan, then the impugned provision in the LOU would not be protected by section 13(3)(b).

Decision

In the hearing on the merits, the parties agreed that the reduction in benefits to workers over 65 constituted adverse treatment on the basis of age. The Tribunal noted that because section 13(3)(b) is a defence to discrimination, the onus was on the Respondent to establish that the conditions of the section were met.

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[17] *Barker v Molson Coors Breweries and another (No. 3)*, 2019 BCHRT 192, paras 30, 37, 57 (*Barker*).
[18] *Barker v. Molson Coors Breweries*, 2017 BCHRT 208.

The Tribunal began its reasoning with a detailed analysis of section 13(3)(b), noting that tension between insurance schemes and human rights legislation has long been recognized. The purpose of section 13(3)(b) in particular, the Tribunal stated, is to "accommodate the actuarial requirements of various employee benefit plans" and to "respect the financial viability of benefit plans."[19] Each of the exemptions permitted under section 13(3)(b), the Tribunal observed, may correspond to risk and usage of a particular insured benefit.

Next, the Tribunal considered the *Charter* implications of Mr. Barker's complaint. The Tribunal noted that the Ontario Human Rights Tribunal (OHRT) had recently found that a similar statutory scheme violated section 15 of the *Charter*, and was not saved by section 1.[20] In *Talos*, the OHRT considered a case of benefits terminating when the member reached age 65. Mr. Talos' wife was gravely ill and had no access to benefits but through her husband's plan. Mr. Talos brought an aged-base discrimination complaint and, upon learning that his claim would fail based on an exemption in the Ontario *Human Rights Code*[21], he applied for a declaration that the relevant provisions were unconstitutional.

The OHRT agreed with Mr. Talos, and declined to apply exemption. On the section 1 analysis, the OHRT determined that the impugned provisions of the Code did not "minimally impair" the rights of impacted workers. In particular, the OHRT noted that under the provisions, an employer had no obligation to *demonstrate* that the loss of employment benefits was reasonable or justified on an actuarial basis or because maintaining benefits would cause undue hardship.

Unlike the OHRT, however, the Tribunal lacked the jurisdiction to apply the *Charter* pursuant to the British Columbia *Charter: Administrative Tribunals Act*, section 45 and the *Code*, section 32(i). This meant that the Tribunal was bound to apply the existing terms of the *Code*. By extension, the Tribunal found that it was bound to follow the majority of the Supreme Court of Canada's (SCC) decision *New Brunswick (Human Rights Commission) v Potash Corporation of Saskatchewan*.[22]

In *Potash*, the SCC considered an exemption to age discrimination in New Brunswick's human rights legislation that applied to "a bona fide retirement or pension plan".[23] The majority of the SCC held that in order for a plan to be "bona fide" for the purpose of the exemption, it had to be a 'legitimate plan' (i.e. a registered plan), adopted in good faith and not for the purpose of defeating protected rights. The majority further held that the exemption would apply unless there was evidence that the whole plan was not legitimate, not merely because a particular provision was discriminatory. In contrast, the minority argued that the exemption should apply only where it could be established that the discrimination at issue was a bona fide requirement for the operation of the plan.

Carefully applying the reasoning of the majority in *Potash*, the Tribunal found that the LOU was incorporated into a legitimate benefit plan, which had been adopted by the Respondents in good faith and not for the purpose of defeating protected rights. The Tribunal therefore determined it

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[19] *Barker* at paras 25-26.
[20] *Talos v Grand Erie District School Board*, 2018 HRTO 680.
[21] RSO 1990, c. H.19.
[22] 2008 SCC 45 [*Potash*].
[23] *Human Rights Code*, RSNB 1973, c H-11, s. 3(6)(a).

was bound by *Potash* to dismiss Mr. Barker's complaint. The Tribunal was very clear, however, about its misgivings with respect to this outcome:

> Having reached [the conclusion that Mr. Barker's section 15 *Charter* rights are engaged], however, I find that the *Potash* framework for assessing the bona fides of an employee benefit plan leaves little scope for interpretation or discretion in the context of a complaint based on age. So long as the distinction finds its origins in a 'legitimate', good faith benefit plan, its otherwise discriminatory impact is immunized from scrutiny. Thus, while I have serious reservations about the constitutionality of s. 13(3)(b) and its impact on Mr. Barker's Charter rights in this case, I find I have no choice but to conclude that the exemption applies, as interpreted by the majority in Potash. Charter values do not permit me to interpret s. 13(3) other than consistently with the majority of the Supreme Court of Canada.[24]

The Tribunal closed its decision by stating that, "the constitutionality of this exemption remains an open question, which must eventually be answered by the courts."[25]

QUEBEC

12. *Attorney General of Canada v. Union of Canadian Correctional Officers – Syndicat des Agents Correctionnels du Canada – CSN (UCCO-SACC-CSN)* (5 June 2019), Montreal 500-09-027667-187 (QCCA)

In *Attorney General of Canada v. Union of Canadian Correctional Officers – Syndicat des Agents Correctionnels du Canada,* the Quebec Court of Appeal held that a complete bar on collective bargaining with respect to pensions was justified under the Canadian Charter of Rights and Freedoms.

Background

The appellant (Attorney General of Canada) had appealed a judgement of the Superior Court that declared paragraph 113(b) of the *Federal Public Sector Labour Relations Act* unconstitutional. The Superior Court also suspended the declaration of constitutional invalidity and the effects of the judgment for a period of 12 months. Section 113(b) of the *Act* states:

> **113.** A collective agreement that applies to a bargaining unit – other than a bargaining unit determined under s. 238.14 – must not directly or indirectly, alter or eliminate any existing term or condition of employment or establish any new term or condition of employment if
>
> b) the term or condition is one that may be established under the *Public Service Employment Act*, the *Public Service*

[24] *Barker* at para 37.
[25] *Barker* at para 57.

> *Superannuation Act* or the *Government Employees Compensation Act*.

Ultimately, the issue before the Court of Appeal was whether this section was an infringement of freedom to associate and if yes, whether such an infringement is justified under section 1 of the *Canadian Charter of Rights and Freedoms*?

Since the Supreme Court of Canada's decision in *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, freedom of association under the *Charter* has included a right to collective bargaining. The Supreme Court of Canada has qualified this and stated that "the protected activity might be described as employees banding together to achieve particular work-related objectives. Section 2(d) does not guarantee the particular objectives sought through this associational activity. However, it guarantees the process through which those goals are pursued".

Decision

The Court of Appeal drew from the Supreme Court of Canada's decision in their analysis and went on to emphasize that the right to collective bargaining is a limited right; it does not guarantee a particular economic or substantive outcome at the outset, nor does it guarantee the right to a specific bargaining method or a particular model of labour relations. They concluded that in completely excluding important labour relations matters such as staffing and pension plans from collective bargaining, section 113(b) of the *Act* interfered with the collective bargaining process. Given the importance of the prohibited matters and the prohibition on the collective right to good faith negotiations and consultation, the Court determined that the interference was substantial.

The Court of Appeal then went through a section 1 analysis under the Charter, which is the section of the Charter that allows breaches to be justified provided that they are "reasonably justified in a free and democratic society". In the first stage of analysis, they identified a pressing and substantial objective, namely, that the objective of excluding the pension plan from collective bargaining was "to promote the mobility of employees from one sector of the public service to another", ensure pension predictability and maintain control over the government's financial obligations – especially since the government has to draw from the public purse in order to fund the plan. In addition to identifying a pressing and substantial objective, the Court found that the government's position here was at least logical and reasonable, and therefore satisfied the rational connection branch of the test.

At the minimal impairment stage of analysis the court emphasized two things: 1) the government is not required to pursue the least drastic means of achieving its objective so long as it is within a range of reasonable options and; 2) in social, economic and public interest matters, courts generally grant some leeway to the legislator and show deference to the legislator's choice. Here, the Court sided with the appellant and agreed that the trial judge did not consider the evidence indicating that negotiation of the pension plan (within the scope of arriving at a collective agreement) would be less than optimal and would jeopardize the plan's sustainability, especially due to the risk of fragmenting the plan. They also noted that there were several alternatives that the government could opt for in this instance. In this case, the prohibition on negotiating the pension plan forms part of the reasonable solutions available to the legislature because of: public interest considerations, the involvement of public finances, and the fact that the solution serves to

achieve the government's objective in a real and substantial manner. Therefore, the appellant had satisfied the minimal impairment test because the facts had shown that the prohibition on negotiating the pension plan and staffing was not absolute, but rather, was reasonably tailored to contribute to the government's objectives.

At the proportionality stage of analysis, the appellant argued that the deleterious effects on the respondents' freedom of association were minimal, especially when considering the other ways in which they could address their interests with regards to pension and staffing matters. The Court accepted this argument and determined that the salutary effects of the prohibition on negotiating staffing and the pension plan outweighed the deleterious effects on the appellant's freedom of association rights.

In their conclusion, the Court of appeal stated that the trial judge did not err in concluding that section 113(b) of the *Act* interferes substantially with section 2(d) rights. Rather, the trial judge erred in concluding that paragraph 113(b) of the *Act* cannot be justified under section 1 of the *Canadian Charter of Rights and Freedoms*. The Court reiterated the importance of deference to the legislature in matters concerning social, economic, and political spheres as well as cases that deal with public interest or public finance matters. In these cases, the courts have consistently said that legislators are in the best position to make such choices. Keeping that notion in mind, the Court determined that the appellant chose a reasonable and acceptable measure to achieve its objectives in a real and substantial manner; they also showed that there was proportionality between the measures adopted and the objectives they had sought to address.

ALBERTA

13. *Labatt Brewing Company Ltd. v. Unifor Local 250A, 2018 CanLII, 13185 (AB GAA)*

In *Labatt Brewing Company Ltd v Unifor Local 250A* (2018 CanLII 138185 (AB GAA), the union filed a policy grievance challenging the employer's decision to unilaterally end its decades-long practice of providing an annual beer allotment to retirees. The union argued that retirees had a "vested right" to the allotment. The arbitrator dismissed the grievance. The decision is an interesting application of the *Dayco (Canada) Ltd v CAW* (1993 CanLII 144 (SCC) case law. The arbitrator held that a vested right was not made out on the facts and that, as a matter of law, a vested right cannot be created through estoppel alone.

The annual beer allotment started in the 1970s. Although the practice was not recorded in any collective agreement, letter of understanding, or other contractual document, the parties understood that the employer would provide all retirees of its Edmonton Brewery an annual allotment of 24 cases of beer. If a retiree predeceased their spouse, the employer's practice was to provide the allotment to the surviving spouse.

In October 2016, the employer provided written notice to retirees that the beer allotment would be reduced by half in January 2018 and discontinued entirely in January 2019. The letter claimed that the decision was based on the rising cost of benefits packages for retirees.

In April 2017, the union filed a policy grievance alleging that the employer could not unilaterally end the practice because retirees had a vested right to the allotment. The union's position was that

a vested right was established through the employer's long-standing practice and that the employer was estopped from unilaterally eliminating the allotment.

The outcome of the case turns on the Supreme Court's decision in *Dayco, supra*, the leading case on the vesting of post-retirement benefits. Justice La Forest held:

> To summarize, I am of the view that retirement rights can, if contemplated by the terms of a collective agreement, survive the expiration of that agreement. Moreover, although it is not strictly necessary to decide the point in this appeal, I would also find that these surviving rights vest at the time of retirement, and would survive subsequent collective bargaining that purported to divest such rights.

In *Labatt*, the union had no written contractual terms that it could rely on to meet the test of rights that were contemplated to vest at retirement. This distinguished the case from other post-retirement benefit decisions on which the union relied.

Absent contractual language, the union argued that a vested right could arise directly out of a long-standing practice through the equitable principle of estoppel, at least as it is flexibly applied in the labour relations context. The union argued that the annual beer allotment amounted to a long-standing, mutually accepted practice that persisted over the course of numerous collective agreements.

The Arbitrator observed that if the union's argument were successful, it would become impossible for an employer to end a long-term gratuitous benefit—the mere fact that the benefit was provided long-term would give rise to an indefinite obligation with contractual force.

14. *Dillman v. BC Pension Corporation, 2019 ABQB 395*

In this case, a pension plan member (the "Plaintiff") who brought an action claiming that the pension plan administrator (the "Plan Administrator") had failed to act in her best interest when advising her about the implications of moving provinces and transferring her interest in the Plan.

The Plaintiff was self-represented, and in the course of discovery, the Plan Administrator refused a number of her questions. The Plaintiff applied to the case management judge for an order compelling the Plan Administrator to answer 119 questions.

The court denied the application in relation to 92 of the questions on the basis that they did not meet the requirements of relevant and material, as set out in *Rule 5.2(1)* of the *Alberta Rules of Court*, Alta Reg 124/2010.

The Court noted that a number of the questions were unclear, assumed facts not admitted, sought interpretation of documents not authored by the party being questioned, or were questions of law. Others were questions of opinion, hypothetical questions, or questions that were in substance argument. Finally, a number of questions pertaining to certain documents had obvious answers based on the face of the document.

On the other hand, the court granted the Plaintiff's application in relation to 27 questions. These may provide pension plan administrators with useful indications about the type of information that courts will consider relevant to an action for negligent misrepresentation and breach of fiduciary duty.

The court ordered that the Plan Administrator answer questions on the following topics:

The Plan Administrator's calculations:

- How the Plan Administrator calculated the transferable value of the Plan Administrator's pension, including whether it was based on the commuted value calculation or the actuarial value calculation;
- What the Plan Administrator understood "reciprocal transfer value" to mean in the context of a particular document, and why the Plan Administrator did not use the value of the deferred pension in the calculation of a transfer value;
- Why the Plan Administrator used the calculation it used rather than the commuted value calculation;
- Why the Plan Administrator took four months to complete the transfer value calculation;
- What interest rates were used in any of its calculations relating to the Plaintiff and why they were used;
- Whether the Plan Administrator based the calculation of the transfer value on certain assumptions; and
- Whether the Plan Administrator told the Plaintiff to instruct her actuary to use commuted value methodology, and if so, why, and whether that information was accurate and complete;

The Plan Administrator's staff:

- Any training or courses that the Plan Administrator's staff receive;
- Whether the Plan Administrator's employees were required to follow a public service code of conduct or standards of conduct; and
- Whether the Plan Administrator keeps excess funds not needed by the importing plan;

The Plan Administrator's communications with the Plaintiff:

- Any information the Plan Administrator had relating to the reasonableness of the Plaintiff's reliance on representations by the Plan Administrator;
- Whether the Plaintiff ever requested a calculation, whether the Plan administrator provided one, and if not, why not;

- Whether the Plan Administrator received communications from the Plaintiff on certain dates, whether it responded, and why it responded in the time and manner it did;
- Whether any information provided by the Plan Administrator in certain communications was inaccurate or incomplete;
- Why the Plan Administrator sent the Plaintiff specific information at specific points in time;
- Why the Plan Administrator did not provide specific information at specific times;
- Whether the Plan Administrator made decisions to not provide the Plaintiff with certain documents; and
- Whether the Plan Administrator lost certain communications, and if so, how.

NOVA SCOTIA

15. *Nova Scotia (Finance and Treasury Board) (Re)*

Facts

In January 2016, the Department of Finance and Treasury Board (the "**Department**") received two very similar access to information requests (the "**Requests**") seeking information contained in annual information returns for the year preceding the Requests including:

1. A list of all registered pension plans and for each plan:
    a. the name of the plan; and
    b. whether it was a defined benefit plan or a defined contribution plan;

One of the Requests went on further to request:

    c. the name and contact information for the plan administrator;
    d. the number of active members; and,
    e. the market value of the plan at year's end.

The Requests were refused by the Department, which cited section 15(3) of the *Pension Benefits Act*, SNS 2011, c. 41 (the ***"PBA"***) and section 4.A(2)(n) of the *Freedom of information and Protection of Privacy Act*, SNS 1993, c. 5 ("***FOIPOP***") as the basis for the denial.

The Decision

The Privacy Commissioner for Nova Scotia (the "**Commissioner**") considered whether s. 4A(2)(n) of *FOIPOP* applied to the requested records. Section 4A of FOIPOP provides:

> A(1) Where there is a conflict between a provision of this Act and a provision of any other enactment and the provision of the other enactment restricts or prohibits access by any person to a record, the provision of this Act prevails over the provision of the other

enactment unless subsection (2) or the other enactment states that the provision of the other enactment prevails over the provision of this Act.

4A(2) The following enactments that restrict or prohibit access by any person to a record prevail over this Act:

…

(n) subsection (3) of Section 15 of the Pension Benefits Act.

Section 15 of the *PBA* provides:

Surveys, research and information
15 (1) The Superintendent may conduct surveys and research programs and compile statistical information related to pensions and pension plans.

(2) The Superintendent may request an employer, an administrator or a member of a pension plan to provide information necessary to compile the statistical information and such person shall comply with the request within a reasonable period of time.

(3) The Superintendent shall use the information only for the purpose of compiling the statistical information and shall not otherwise reveal the information without the consent of the person who supplies the information.

The Commissioner started her review by considering the Department's assertion that *FOIPOP* does not prevail over the *PBA*, which the Commissioner holds is wrong in law. Section 4A(1) of *FOIPOP* provides that *FOIPOP* prevails over all other legislation unless listed in 4A(2). Since the *PBA* does not have a general provision stating that it prevails specifically over *FOIPOP*, and only section 15(3) of the *PBA* is listed as prevailing over *FOIPOP*, the Commissioner holds that using a purposive approach that *FOIPOP* applies to the information requested.

Examining the *PBA*, the Commissioner notes that the preamble to the *PBA* provides includes that "greater transparency of information" and holds that using a purposive approach, subjecting annual information returns to the access rules under *FOIPOP* is consistent with the purposes of both the *PBA* and *FOIPOP*.

The Commissioner then considered the *PBA* and concludes that the Requests were being made for information that was provided to the Superintendent of Pensions (the "**Superintendent**") pursuant to section 31 of the *PBA*, which creates a mandatory requirement on pension plan administrators to file an annual information return in the form approved by the Superintendent. Nothing prevented the Superintendent from using the information from the annual information returns pursuant to section 15 of the *PBA*, however, the plan administrator's must already supply the information pursuant to section 31 of the *PBA*.

The Commissioner further observed that pursuant to section 43(2) a number of interested parties (including plan members, former members, retired members, their spouses or agents, etc.) are entitled to inspect and obtain copies of annual information returns. Based on this, as there is nothing preventing an unhappy interested party from posting the annual information return online, the Commissioner found that the interpretation advanced by the Department in refusing the Requests "violates the norms of reasonableness and plausibility."

The Commissioner recommended that the Department proceed with processing the Requests pursuant to *FOIPOP*.

Following the decision, in March 2019, the Nova Scotia legislature introduced Bill 109, which amended the *PBA*. Clause 2 of the Bill "requires the Superintendent of Pensions to keep all information related to pensions and pension plans confidential except for disclosure to the persons specifically listed in the Act." As such, the Nova Scotia legislature has addressed the shortcomings of the *PBA* which led the Commissioner to make the finding she did in ordering the Department to produce the information requested in the Requests.

Section 15(3) of the *PBA* has been amended to now read:

> (3) Information that is filed, collected by or submitted to the Superintendent in relation to a pension or a pension plan must be kept confidential by the Superintendent and must not be disclosed to any other person, except to a person referred to in any of clauses 42(1)(a) to (k) and in accordance with Sections 42 and 43.

NEW BRUNSWICK

16. *Goyetche et al. v. International Union of Operating Engineers et al., 2019 NBCA 16*

In 2005, a pulp mill closed, leaving its workers unemployed. Some of those workers did not meet the age requirements for a full pension. In 2012, those workers brought an action against their parent unions, arguing that they negligently failed to grieve their pension eligibility. The New Brunswick Court of Appeal upheld the decision dismissing the claim on summary judgment. The Court found that even if the unions had grieved, such a grievance would not have succeeded.

Facts

In 2005, Smurfit-Stone Container Canada Inc. (the "Employer") informed its employees and their unions that its pulp mill in Bathurst, New Brunswick was closing permanently. Under the applicable collective agreements and pension plans, only those employees who were at least 55 years old were eligible to receive full pension benefits. After the announcement, the employees under 55, their local unions, and the Employer all proceeded under the understanding that said employees were only eligible for partial pension benefits.

In 2009, however, some of these employees learned about a parallel situation where workers at other closed pulp mills had grieved their employer's denial of their pensions. Those workers had successfully argued that the mill closure constituted a layoff with recall rights lasting for up to three years. Under their collective agreements and pension plans, layoff time counted as pensionable service, and "bridged" some of the employees from the time of the closure until the time they reached the age of eligibility for a full regular pension (see *C.E.P., Local 117 v. Bowater Maritimes Inc.*, [2008] N.B.L.A.A. No. 28 (NB LA), aff'd 2010 NBBR 134; aff'd 2011 NBCA 22, "*Bowater*").

Procedural History

In 2012, a group of the employees who were under age 55 at the time of the closure (the "Appellants") issued a claim in negligence against their local unions, parent unions, the

Employer, the Province of Quebec and the Province of New Brunswick. The appellants subsequently discontinued their actions against all defendants except the parent unions (the "Respondents"). In 2014, the Appellants filed an amended statement of claim asserting that the Respondents had negligently failed to consider the layoff terms of their collective agreements and failed file grievances to enforce those terms.

The Respondents applied for summary judgment. The Court of Queen's Bench granted the motion on the basis that the Appellant's action was time-barred. The motions judge held that the material facts were known the Appellants in August 2005, and as a result, the applicable statutory six-year limitation period had expired by the time the Appellants initiated their claim in 2012.

Decision

Limitations

The Court first examined whether the action was time-barred. The Respondents asserted that according to the doctrine of discoverability, the limitation period started to run when the Appellants learned of the material facts in August of 2005. The Appellants argued that the Respondents were estopped from relying on the doctrine of discoverability – the Appellants were unaware of their potential pension entitlement before 2009 precisely because they relied on the Respondents to inform them, and the Respondents had failed to do so.

The Court noted a number of problems with the submissions of both the Respondents and the Appellants. First, the Appellants had failed to plead what the material facts were, a requirement for relying on the doctrine of discoverability, while the respondents in turn failed to point this out in their submissions. Finally, the Appellants had failed to make their estoppel argument until their appearance at the Court of Appeal. As a result of these issues, the Court found it was preferable to dispose of the appeal on the merits.

Duty of Fair Representation: Owed by Parent Unions?

On the merits of the claim, the Court noted that while the Appellants action was in negligence, their argument was essentially that the Respondent's failure to grieve constituted a breach of the duty of fair representation and should have been brought to the labour board rather than the Courts. If the Respondents had filed a grievance, the Appellants argued, it would have succeeded, as per *Bowater*. As such, according to the Appellants, the motion for summary judgment should have been dismissed.

The Court first addressed the Appellants' assertion that parent unions owed the Appellants a duty of fair representation. The Court noted that a parent union's involvement in bargaining and representation can give rise to a duty of fair representation, but that no such involvement was pleaded here. Instead, the Appellants argued that specific provisions of the parent unions' constitutions gave rise to a duty of fair representation.

The Court held that in other circumstances, the existence of such a representational duty would be a genuine issue requiring trial, and the motion for summary judgment would therefore be dismissed. In this case, however, the Court found that even if the Respondents had grieved the

Appellants' pension entitlement on the basis that the layoff period could be used as a bridge to entitlement, such a grievance would have failed.

The Grievance Would Not Have Succeeded

The Court began its analysis by noting that under the New Brunswick *Employment Standards Act*, S.N.B. 1982 c. E-7.2, "layoff" is defined as a "temporary interruption" of the employment relationship. The Court confirmed this definition was often used in the collective bargaining context, relying heavily on *Nelson Forest Products Inv. v. IWA-Canada, Local 306*, [2000] N.B.J. No. 104 (C.A.). In that case, the New Brunswick Court of Appeal held that "terminated employees cannot be said to be laid off."

Looking to the specific collective agreements, the Court confirmed that an employee could not be in layoff where there was no real hope of returning to work, as in the case of a permanent site closure.

The Court further distinguished the case before it from the situation in *Bowater* that initially sparked the Appellants' action. The Court noted the arbitrator's finding that under the collective agreement in that case the employees could remain on layoff after the mill's closure. The Court also pointed to the holding that at the time of the closure, the re-opening of the mill remained a possibility. Finally, the Court noted that on appeal, the *Bowater* court did not find that the arbitrator was correct. Instead, that court let the decision stand "simply because the case for reasonableness had not been made."

On the facts of the present case, the Court found, the grievance would not succeed. On that basis, the Court upheld the motion for summary judgment.

Comment

This case may have important implications for when employees can use a layoff period as a bridge to pension eligibility. Specifically, it signals that when an employee's permanent worksite is closed down with no expectation of re-opening, the employee will not be considered in layoff.

The case also serves as an important reminder about the force of decisions made on judicial review. *Bowman* reflects the court's continued commitment to respecting the expertise and jurisdiction of labour adjudicators. However, the treatment of *Bowman* in this decision serves as an important reminder that cases decided on the "reasonableness" standard may have limited precedential significance.

17. *Fredericton Police Association v. New Brunswick (Superintendent of Pensions)*

These three procedural decisions of the New Brunswick Financial and Consumer Services Tribunal (the "Tribunal") arise in the context of an ongoing pension dispute between the Fredericton Police and Firefighters' Associations (the "Appellants") and the City of Fredericton (the "City"). The first decision concerns the Appellants' motion for the production of documents.[26] The second concerns the Respondent's motion seeking orders in relation to the

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[26] *Fredericton Police Association v New Brunswick (Superintendent of Pensions)*, 2019 NBFCST 4 (*Decision No. 1*).

Appellant's expert witness.[27] The third concerns the Respondent's motion challenging the Tribunal's jurisdiction.[28]

Background

In 2013, the City made a decision to split the Superannuation Plan for the Employees of the City of Fredericton into two plans: a new defined benefit plan for Police and Firefighters and a shared risk plan for the remainder of the City's employees. The City obtained an actuarial report from Mercer valuing the assets and liabilities of the original plan and proposing a split of those assets and liabilities between the two new plans.

On March 9, 2017, the Tribunal allowed the Appellants' appeal of the Superintendent's decision to consent to this proposed split. The Tribunal directed that the transfer of assets should be granted on the basis of the solvency apportionment method. As a result, the City obtained new valuations from Mercer in June or July of 2017. Also in 2017, the City dissolved the Superannuation Board and made itself the new administrator for the Police and Firefighters' plan.

On July 31, 2017, the Appellants complained to the Superintendent that the new valuations unilaterally reduced pension contributions for Police and Firefighters, retroactive to 2013. On October 26, 2017, the Appellants further alleged before the Superintendent that the City had dissolved the Superannuation Board because of its opposition to the City's decisions.

On July 12, 2018, the Superintendent issued a decision broadly accepting the new valuation reports and the associated proposed transfer of assets. The Superintendent also determined that neither the City nor its staff had breached conflict of interest rules or any other statutory obligations.

Production of Documents (*Decision No. 1*)

The Appellants filed a pre-hearing motion seeking production of the following eight categories of documents by the City:

i. Copies of all internal City documents concerning the implementation of the Tribunal's decision of March 9, 2017, including any emails, letters, memos, or notes between certain named staff;
ii. Copies of all documents sent to or received from Mercer by any City employee from March 9, 2017 to [x], including emails, letters, notes or other communications;
iii. Copies of all minutes of the Superannuation Board from March 2016 until the date the Superannuation Board was dissolved;
iv. Copies of all internal City documents concerning the decision to dissolve the Superannuation Board,
v. Copies of any correspondence between the City and the Superintendent of Pensions not already on record before the Tribunal,

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[27] *Fredericton Police Association v New Brunswick (Superintendent of Pensions)*, 2019 NBFCST 5 (*Decision No. 2*).
[28] *Fredericton Police Association v New Brunswick (Superintendent of Pensions)*, 2019 NBFCST 6 (*Decision No. 3*).

vi. A copy of any contract or retainer between the City and Mercer, including any updates or amendments;
vii. A copy of correspondence or documents authorizing City staff to sign any Application for Registration of Amendment to the pension plan in 2016, 2017 and/or 2018;
viii. Any correspondence or documents, including any notes taken by any City employee, and any communications between the City and Mercer, concerning the decision of the City to implement the reduction of contributions to the Police and Firefighers' plan.

Both the Superintendent and the City took the position that the Tribunal lacked the power to order a party to produce documents in advance of a hearing, because no such general power was conferred on the Tribunal in legislation or the Tribunal's *Rules of Procedure*. Additionally, the City argued that the Appellants had not established the relevancy of the requested documents.

The Tribunal began its analysis on jurisdiction by acknowledging that it is an administrative tribunal whose powers are strictly limited to those provided to it by statute. Nevertheless, the Tribunal concluded it had an express grant of jurisdiction to order production *by necessary implication* given its quasi-judicial status as a Tribunal whose sole function is to conduct hearings. As the New Brunswick Court of Appeal had recently held, the Tribunal had the inherent right to control its processes, subject to legislative constraints and the principles of procedural fairness. The Tribunal also held that it had a *direct* express grant of jurisdiction under Rule 1.3(2) of it *Rules of Procedure*, which provides that, "where procedures are not provided for in these Rules, the Tribunal may identify any procedure it deems necessary to ensure the fair and equitable determination of the matter before it."

As to relevancy, the Tribunal found that the Appellants had identified specific categories of documents in well-defined date ranges and that the documents were necessary for the Appellants ability to fairly present their case, and ordered their production.

Expert Witness (Decision No. 2)

The Appellants retained an actuary to provide an expert report and expert testimony (the "expert witness") and the City brought a pre-hearing motion seeking production of the expert witness' file, including all correspondence between him and the Appellants, all documents he reviewed in preparing his reports, and his draft reports. Additionally, the City sought to conduct an examination for discovery of the expert witness. The City argued that the crux of the Appellants' case would be established through his evidence.

The Tribunal noted that the Appellants were required to comply with section 50(2) of New Brunswick's *Evidence Act*[29], which provides that in order for an expert report to be admissible, the party offering the report must have:

> […] afforded the adverse party a reasonable opportunity to inspect and copy any records or other documents in the offering party's possession or control, on which the report or finding was based, and also the names of all persons furnishing facts upon which the report or finding was based.

[29] RSNB 1973, c E-11.

On this basis, the Tribunal ordered the Appellants to produce the requested file, excepting the expert witness' draft reports. The Tribunal held that examination for discovery was not necessary, however, as the City would have the file as ordered and would be able to conduct a cross-examination at the hearing.

The Appellants had argued in response to this motion, that the Tribunal lacked jurisdiction to order the Appellants to produce the file or to compel the expert witness—a third party—to present for examination for discovery. The Tribunal rejected this argument, pursuant to its reasoning in *Decision No. 1*.

Jurisdiction (Decision No. 3)

Grounds of Appeal

The City brought a further pre-hearing motion challenging the Tribunal's jurisdiction to hear certain grounds of the Appellants' appeal, on the basis that they did not relate to breaches of the *Pension Benefits Act*. This included the Appellants' allegations that:

- the Superintendent did not adequately investigate the basis for the increased discount rate, or Mercer's "unfounded conclusion that the CRA would not have approved the higher level of contributions by members of the Police Union and Fire Fighters Association",

- the Superintendent incorrectly and unreasonably failed to:

    - ensure that the City engaged an independent actuarial firm to advise the New Plan to ensure that the rights of members of the New Plan were adequately protected.

    - investigate the alleged complaints of conflict of interest and breach of statutory duties by the City and its members on the Superannuation Board.

- the Superintendent incorrectly and unreasonably applied the law concerning:

    - the fiduciary and statutory duties of the City and its representatives of the Superannuation Board, as set out in the *Pension Benefits Act*,

    - the City's unilateral decision to abolish the Superannuation Board,.

Section 73 of the *Pension Benefits Act* sets out the Tribunal's power to hear appeals of the Superintendents decisions as follows:

> 73(1) If the Superintendent has made an order or decision under this Act or the regulations, the person against whom the order or decision is made or who is affected by the order or decision may appeal the order or decision to the Tribunal within 30 days after the date of the order or decision.

The Tribunal noted that this provision does not limit the right of appeal to breaches of the PBA, and that in this case, the impugned grounds essentially constituted allegations as to *why* the Superintendent's decision was wrong. The Tribunal also observed that if the right of appeal was limited to breaches of the PBA, then the Superintendent could make *ultra vires* decisions that parties could not appeal.

The Tribunal ultimately declined to make a final determination on this question on a preliminary basis, stating that it was not satisfied that it *clearly* had no authority to hear the impugned grounds of appeal and that further evidence would be required at the merits hearing.

Relief

The City also challenged the Tribunal's jurisdiction to grant certain relief sought by the Appellants. The City argued (i) that the Tribunal could only make a decision the Superintendent had the authority to make, (ii) that the Tribunal's remedial authority was limited to that of the Superintendent under section 72 of the *PBA*, and (iii) that there must be a breach of the *PBA* in order for relief to be granted under section 72.

The Tribunal agreed that it could only make an order that the Superintendent had the jurisdiction to make, but held that its power to make any order "the Superintendent should have made" to section 76(1)(b) of the *PBA* constituted a grant of remedial authority beyond that set out in section 72.

Regarding section 72, the Tribunal interpreted the provision as granting the Superintendent the authority to provide relief under section 72(1), if she was of the opinion on reasonable and probable grounds that one of the circumstances listed in section 72(2) occurred—such as the administrator violating a provision in the *PBA* (72(2)(c)), or the assumptions or methods used in the preparation of a report being inappropriate for the plan (72(2)(d)).

The Tribunal agreed with the Superintendent a breach of the *PBA* was not necessarily required to provide relief under section 72(1), as not all events listed under 72(2) constituted breaches of the *PBA*. Additionally, the Tribunal noted that the contested grounds of appeal may fall within the circumstances set out in section 72(2) but declined to make a determination on this question prior to the hearing on the merits.

FEDERAL JURISDICTION

18. *Fraser v. Canada (Attorney General), 2018 FCA 223*

In the recent decision of Fraser v. Canada (Attorney General), 2018 FCA 223, the Federal Court of Appeal (the "FCA") was asked to determine whether it was lawful that individual employees who were on job sharing programs received reduced pensions as a result of working fewer hours. After the Federal Court determined that the reductions were lawful, the appellants sought to have the Court of Appeal overturn this decision, and advanced arguments based on the Canadian Charter of Rights and Freedoms (the "Charter") as well as on non-Charter-based grounds.

Background

The appellants were all former members of the RCMP who had participated in the job sharing program to raise their families. The program allows them to share their duties to worker fewer hours. Neither the Royal Canadian Mounted Police Superannuation Act, R.S.C. 1985, c. R-11 nor the applicable regulation have any provision aimed explicitly at the job-sharing program and the pension entitlements that arise therein. Therefore, the job sharing participants were treated as part-time employees for the period in which they participated for the purpose of calculating their pension entitlements. This meant that their credited service was reduced to the number of hours that they actually worked.

The appellants argued that participation in the job sharing program should qualify as full time employment for that period for the purpose of calculating their pension. In the alternative, they argued that participation in this program should be considered the same as unpaid care and nurturing leave, which would have allowed them to buy back their pension entitlements for the accredited service lost. Both the Federal Court and the Federal Court of Appeal took a formalistic approach, finding that the job sharing participants had worked less than the hours required to be considered full time, but as they also had regularly scheduled shifts could not be considered to be on an unpaid leave.

The appellants then argued that the policies were discriminatory, contrary to Section 15 of the Charter. To prove this, the Court held that the appellants were required to meet the standard two-step test for establishing discrimination under the Charter:

1. Does the impugned law, either on its face or in its impact, create a distinction based on a ground enumerated in Section 15, or based on an analogous ground?

2. Does the distinction impose a burden or deny a benefit "in a manner that has the effect of reinforcing or perpetuating prejudice or disadvantage."

Decision

In this case, the Court found that the Charter challenge failed at the first step of the analysis. Determining first that the discrimination was based "on hours regularly worked and whether an employee is on leave without pay", which were not enumerated or analogous grounds, the Court found that the policy could only be contrary to the Charter on the basis of adverse impact or adverse effect discrimination (i.e. a facially neutral policy that had a disproportionate impact on members of an identifiable group). It followed Supreme Court of Canada precedent to find that to meet the adverse impact discrimination threshold at step one, "the claimant must establish that the law has a disproportionate effect on the claimant or the group to which the claimant belongs based on his or her membership in an enumerated or analogous group." The Court determined the discrimination as between the job sharing participants and those who took leave and held that "pension entitlements cannot be viewed in isolation from the rest of the remuneration package afforded to the two groups of employees". The Court further noted that "Job-sharing and care and nurturing leave without pay are both leave options that are open to RCMP members to address demands associated with caring for young children."

The Court appears to have been influenced by the fact that no evidence was produced to illustrate any discriminatory economic impact. The Court wrote about this aspect as follows:

> "[t]here is no other evidence as to the financial impact of the pension treatment afforded to RCMP members who job-share or as to the comparative value of an equivalent period of leave without pay…All the job-sharers were woman, but for many the reasons for job-sharing were reported to be unrelated to the need to care for young children. No

> evidence was provided as to the total percentage of female RCMP members or as to the proportion of them that might have children."

The Court in its decision then found that "[t]here was no evidence before the Federal Court to establish the requisite nexus between the grounds recognized under section 15 of the Charter and any adverse result."

Comment

The Court may have come to a different result if the appellants brought forth evidence in their initial evidentiary record that illustrated the actual financial impact of their pension loss. However, the Court in this context seems to be comparing apples to apples. By comparing the pension losses faced by job sharing participants to the present day financial loss of individuals choosing to take care and nurturing leave, the Court was looking at two groups potentially being adversely impacted on the same enumerated and analogous grounds. Both groups are quite possibly being forced to choose between one financial burden or the other, based on their sex and family status. As the Court stated towards the end of its decision, "there was no evidence before the Federal Court to suggest that the option of a leave without pay was unavailable (either actually or practically) to female members who had young children. Nor was there any evidence to suggest that more men than women or more childless individuals than those with children had opted to take leaves without pay."

This decision should likely be revisited if an evidentiary record can show that both of these programs are utilized more by women with family-care needs, and they are forced to decide between the lesser of two evils: taking a financial blow now or later when it is time to collect pension benefits. For now, the Court has allowed the Federal government to create a pension system where individuals who took advantage of a part-time program that was designed to allow parents to continue to work while raising a family receive lesser pensions.

19. *Chao v. The Queen, 2018 TCC 72*

In *Chao v. The Queen*, 2018 TCC 72, a recent decision concerning the film and television industry, the Tax Court of Canada provided useful guidance on deductible employment expenses in industries characterized by short-term and itinerant employment, where workers may travel to a number of worksites, work for more than one employer, and/or provide their own tools and supplies.

The appellant, Ms. Chao, a second camera assistant employed in the film industry, was hired separately by five different employers for different productions in and around the Greater Toronto Area during 2010. Ms. Chao attempted to claim a variety of expense deductions on her tax return relating to her travel to production sites, as well as other expenses that she argued were related to her employment.

By way of background, the *Income Tax Act* (the "ITA") allows for a broad range of expense deductions for self-employed individuals carrying on their own business, essentially allowing deductions for all expenses incurred for the purpose of producing income, subject to certain exceptions. However, deductions for *employees* are significantly more restricted and must fall into specific categories under section 8 of the ITA.

In many industries, this is not a significant concern. Office employees, for example, are rarely required to incur expenses in the course of their employment that are not reimbursed. However, in certain industries, including the film and television industry and the construction sector,

workers may be expected to travel to a variety of different worksites in their own vehicles and/or purchase their own tools, supplies and equipment. Many employees mistakenly assume that these expenses are easily deductible.

Unfortunately, this is not the case. Certain categories of travel expenses, supplies and tools are deductible for employees. However, they are subject to stringent restrictions under the ITA and CRA policy. Employees are also generally required to obtain and keep in their records a signed T2200 form to support these deductions. This may be difficult if an employer is only in existence or present in a jurisdiction for the duration of a particular job.

Overall, *Chao v The Queen* illustrates that while the Tax Court, in some circumstances, may be prepared to provide some latitude for deductions to employees who have complicated employment relationships with multiple employers, employees are only likely to be successful if they keep careful records and documentation. Employees who do not have appropriate documentation and cannot support the deductions may risk penalties, interest, and other consequences under the ITA.

Facts and Decision

Ms. Chao was paid through a payroll service provider (EP Canada) for all five productions. However, the Court found that the deal memos (individual contracts) she signed made clear the individual production company, not the payroll company, was the employer in each instance.

Travel Expenses Claimed

Ms. Chao claimed $1608 of gasoline expenses and $242 in car repair expenses. These expenses are governed by section 8(1)(h.1) of the ITA which allows an employee to deduct motor vehicle travel expenses if she is "ordinarily required to carry on the duties of… employment away from the employer's place of business or in different places" and is required to incur the costs of the travel.

As a general rule, the law is clear that the cost of getting to a place of work and back (i.e. commuting) is a personal expenditure and not deductible. However, travel in the course of work throughout the day, or on an overnight trip, is generally deductible.

The Tax Court noted that order to determine if the travel was non-deductible commuting to a single location, or potentially deductible travel in the course of work, each of the five employers must be looked at in isolation. The Court found that two of Chao's five employers only required Chao to work at locations within Toronto. Another required Chao to work exclusively in Hamilton. The Court held that travel expenses working for these three employers were not deductible because none required Ms. Chao to work at a location away from the usual place of employment – even if Ms. Chao was required to report to different locations each day.

The remaining two employers required Chao to work at a mix of locations inside and outside the Greater Toronto Area. The Court suggested these circumstances might fall into the "non-standard" or "unusual" situations in which certain travel to and from a single place work could be deductible. However, the Court found that as Ms. Chao had not provided a logbook or any other evidence of the distances travelled, how many days she worked at each location, or how many

days were worked in total, it was impossible to determine if the expenses were reasonable, or incurred in the course of work, and therefore denied the deductions.

Ms. Chao also claimed $108 for meal expenses. Subsection 8(4) of the *ITA* provides that an employee can claim meals if the employee was required to be away from the municipality or metropolitan area in which the employee normally worked for a period of twelve hours or more. The Court denied Chao's food deductions because there was no evidence the expenses were incurred under those circumstances.

Other Expenses

Ms. Chao also claimed deductions for telecommunications services such as cell phone expenses, internet, and home phone for a total of $793. She also claimed $247 of "media and entertainment purchases" including smart phone cases, external battery chargers for an iPhone, and a DVD. These expenses, if eligible, would fall under section 8(1)(i)(iii) of the ITA, which allows an employee to deduct the cost of supplies required to be consumed in the course of work.

With respect to the "media and entertainment purchases," Ms. Chao's rationale included that the filming locations were dusty and that her phone case got dirty and needed replacing. As well, she was sometimes on location for a long period of time, and needed to extend the battery life of her phone. The Court was not convinced by these explanations, and denied the deductions as personal expenses.

With respect to the telecommunications expenses, the Court noted that while a portion of Ms. Chao's cell phone, home phone, and Internet use was for work, Ms. Chao had claimed deductions for the *total* amounts charged for each service. In addition, at least two of Ms. Chao's employers provided a cell phone allowance of $5 per day. The Court concluded that while Chao may have incurred expenses for work-related use beyond the amount reimbursed, it was impossible to determine what amount was deductible based on the evidence provided, and therefore denied the deductions.

Ms. Chao also appeared to have claimed $577 in expenses for the preparation of an income tax return. The Court noted there appeared to be no basis under the Act to deduct this expense.

Other Comments by the Court

The Court also discussed generally two key requirements that applied to the employment expense deductions at issue.

First, the Court emphasized that employees must demonstrate that the employment contract **required** the employee to pay for the expenses claimed.

In this case, the Court found that the Appellant testified generally as to the nature of many expenses and why she incurred them but that she did not demonstrate that any of her five contracts of employment **required** her to incur the expenses. All five employers provided her with kit allowances and two employers provided cell phone allowances. The collective agreement provided that employers paid for certain travel expenses. However, the documents filed did not show any provision requiring the employee to pay for any particular expense.

The Court concluded that Ms. Chao had not demonstrated that there were any implicit or explicit terms in the contracts requiring her to pay the expenses at issue, and for this reason alone, she had not met the requirements for the deductions claimed.

The second requirement that the Court discussed was the requirement under subsection 8(10) of the *ITA* that an employee must obtain a T2200 form, signed by the taxpayer's employer in order to claim the relevant categories of expenses. The Court found that in the absence of a T2200, an employee can still satisfy subsection 8(10) based on the legal maxim that the "the law does not require the impossible." However, in order for this maxim to apply, an employee would have to make careful diligent efforts to obtain the form, demonstrating that they were aware of their legal obligations.

In this case, Ms. Chao had attempted to obtain a T2200 form from the payroll service provided only for whom she worked. The Court held that this did not rise to the required level of diligence as she did not request the form from the five production companies who were her employers.

20. *Bemister v. Canada (Attorney General)*

In this case, the Federal Court of Appeal dismissed an appeal concerning the federal government's benefits program for its retirees.

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 Federal 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." It also rejected the applicants' arguments that their Charter rights under section 2(d) (freedom of association), section 15 (equality) and section 7 (life, liberty and security of the person) had been violated.

At the Federal Court of Appeal, the applicants sought the review of two issues:

(a) Did the Federal Court err in concluding that the Plan amendments did not breach vested contractual rights?

(b) Did the Federal Court err in finding that the Treasury Board did not violate the appellants' freedom of association under paragraph 2(*d*) of the Charter?

With respect to the first issue, the Federal Court of Appeal determined that the retirees actually consented to the change through its representative on the committee. It further found that the trial judge did not err in finding that this decision was not made under duress. The Court reasoned as follows:

> [43] In my view, there is no reviewable error on this issue. The evidence before the Federal Court falls far short of establishing duress. The retirees' representative on the Partners Committee had a senior position in an association whose mandate was to advocate for their members. The appellants have not pointed to any evidence that the representative was taken advantage of or did not understand the consequences of agreeing to the joint recommendation. The retirees chose to negotiate some concessions in return for agreeing to the new cost-sharing ratio and they chose not to engage the dispute resolution mechanism contemplated in the Renewal MOU.

With respect to the issue around a section 2(d) breach, the Court determined that the structure of the committee allowed the retirees to make representations and have those representations considered in good faith and as such, section 2(d) was not breached. This aspect of the decision mirrored the analysis of the trial judge, who had noted that that even if the National Association of Federal Retirees 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 Trial 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".