LEGISLATIVE DEVELOPMENTS AND THE TOP 20 CASES OF 2019 – 2020

53RD ANNUAL CANADIAN EMPLOYEE BENEFITS CONFERENCE

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LEGISLATIVE DEVELOPMENTS AND COURTS AND TRIBUNALS

LEGISLATIVE DEVELOPMENTS

The past year has been a relatively quiet one in terms of legislative and regulatory developments. The COVID-19 pandemic has led to numerous – often temporary or ad hoc - regulatory responses, but there has not been a great deal of new, permanent legislative change. As part of the response to the pandemic, the federal government has promoted the use of supplemental unemployment benefit ("SUB") plans to supplement employment insurance during this period of increased unemployment. These funds allow for the top-up of employment insurance benefits without a "clawback" for income earned during the period of unemployment. As a result of COVID-19, Service Canada has accelerated the registration of new SUB plans.

There was also a new multi-jurisdictional agreement signed by the Federal Government and the provinces of Alberta, British Columbia, New Brunswick, Nova Scotia, Ontario, Quebec, and Saskatchewan. This new agreement, the 2020 Agreement Respecting Multi-Jurisdictional Pension Plans (the "2020 MJPP"), applies effective July 1, 2020 for the administration and regulation of a multi-jurisdictional pension plan if:

- its major authority is the pension regulator of a jurisdiction that has signed the 2020 MJPP; and

- it has members subject to the pension benefits standards legislation of two or more of the jurisdictions that have signed the 2020 MJPP.

The 2020 MJPP replaces previous agreements for the administration and regulation of multi-jurisdictional pension plans as those agreements applied amongst, or between, the governments that have signed the 2020 MJPP. The only Canadian jurisdictions that have not signed the 2020 MJPP are Manitoba, Newfoundland, and Prince Edward Island (which does not have pension benefits standards legislation).

In British Columbia, the new Financial Services Authority became operative in late 2019 and amendments were made to Plan funding rules with respect to solvency payments and the funding of target benefit plans.

In Alberta, legislation was brought in that made significant changes to the joint governance structure of various public sector plans. New regulations were also issued that, among other things, made amendments to reflect new rules on the division of a pension between pension partners and enabled electronic communications by Plan Administrators.

In Manitoba, *the Pension Benefits Amendments Act* brought in a series of minor changes to The *Pension Benefits Act*, including with respect to unlocking, pension division and ancillary and death benefits.

In Ontario, the new provincial regulator, the Financial Services Regulatory Authority, was quite active in setting up advisory committees and issuing revised policies and guidance documents. The new annuity discharge provisions in Ontario's PBA were also proclaimed in force, and various minor amendments were made to the PBA by Bill 132, the *Better for People, Smarter for*

Business Act, 2019 and Bill 138, the *Plan to Build Ontario Together Act*, 2019. Regulations were also issued amending the nature of Pension Benefits Guarantee Fund assessments, as well as exempting certain university pension plans from the Pension Benefits Guarantee Fund.

In Quebec, Regulations were issued that exempted certain pension plans from the provisions of the provincial legislation and amended the requirements for actuarial reports, fees payable to Retraite Quebec and the target level for stabilization provisions. Legislation was also passed overriding the right to equality provided in the Canadian Charter of Rights and Freedoms for several public sector plans.

In Nova Scotia, the *Pension Benefits Act* was amended to change the funding regime applicable to defined benefit pension plans, following on the consultation paper that was released in 2019.

In New Brunswick, draft regulations were released that are intended to provide plan sponsors with more flexibility in funding their solvency deficits and a new act that addresses the issue of unclaimed property was brought into force.

The provinces of Saskatchewan and Newfoundland and Labrador did not have any legislative or regulatory highlights in the past year, although like the rest of the country, there was a regulatory response to issues impacting pension and benefit plans due to the COVID-19 pandemic.

Finally, in the Federal jurisdiction, the Government of Canada was busy dealing with the Canada Emergency Response Benefit, the Canada Emergency Wage Subsidy and myriad other pandemic-related issues. OSFI also issued new guidance and forms, and the CRA announced temporary relief for pension plans during the pandemic.

COURTS AND TRIBUNALS

The 2019-2020 year has seen a variety of developments in pension and benefits jurisprudence. Some of the themes this year include challenges to unilateral amendments to pension plans, issues in class actions, the jurisdiction of federal and provincial regulators in the context of First Nations, and the continuation of benefits for those who choose to work past their normal retirement ages.

This year, Canada's highest court issued two decisions with significance to the pension and benefits industry. In *Threlfall v. Carleton University*, 2019 SCC 50, the Supreme Court of Canada was asked for the first time to analyze the Civil Code of Quebec ("C.C.Q") regime governing the concept of "absence" with respect to the case of George Roseme, a retired political science professor at Ottawa's Carleton University, who went for a walk near his home from which he failed to return. Under the C.C.Q., if seven years passes without rebuttal of the absentee's presumption of life, a declaratory judgement of death can be pronounced, which establishes the absentee's date of death as seven years from the date of the absentee's disappearance.

The effect of the presumption of life required Carleton University to continue making pension payments under Mr. Roseme's pension plan, which stipulated that payments under the plan would stop upon the death of the beneficiary. However, six years after Mr. Roseme's disappearance, his remains were found and the presumption of life under the C.C.Q. was rebutted. His date of death was determined to have been the day after his disappearance. The

issue to be determined on appeal was whether Mr. Roseme's succession were entitled to keep the pension payments made to him while he was presumed to be alive under article 85 of the C.C.Q but factually dead. Both the Quebec Superior Court and the Quebec Court of Appeal found in favour of Carleton University, holding that the pension payments should be restituted to the Respondent University. A majority of the Supreme Court of Canada, in a 6/3 split, held that the pension plan was unambiguous in its terms, which stipulated that benefits would cease to be due upon the beneficiaries' actual death, and not the date on which his death was officially recognized. Since the legal basis for the payments under the plan extinguished upon Mr. Roseme's actual death, the payments made under the plan in the intervening six years until the date of his death was discovered were made in error.

The Supreme Court, in *Canada (Attorney General) v. British Columbia Investment Management Corp.*, 2019 SCC 63, issued a decision on the taxation of investment management services. The primary issue in that case was whether the British Columbia Investment Management Corporation ("bcIMC") is required to charge and collect GST under the *Excise Tax Act*, R.S.C. in relation to investment management services provided for pooled investment portfolios. The majority of the Supreme Court held that bcIMC was immune from tax pursuant to section 125 of the Constitution Act, but was liable for the tax pursuant to agreements that had been entered into by the Province.

In *Canada Inc. v. SNC-Lavalin Group Inc., et al.*, 2019 ONSC 4423, the Ontario Superior Court issued a decision on the purchase of certain shares of the 407 toll-highway by OMERS, which has helped advance the law on the status of pension funds as investors.

In *Austin v. Bell Canada*, the Ontario Court of Appeal overturned a summary judgment decision of the Superior Court of Justice that had ruled against the plaintiffs in a class action about the interpretation of a post-retirement indexation provision in Bell Canada's pension plan. The sole issue before the Court of Appeal was the proper calculation of the cost-of-living adjustment under the Plan for the year 2017, and turned on the Plan's definition of the words "Pension Index" and how that definition interacted with other plan provisions concerning the calculation of post-retirement indexation. The Court of Appeal rejected the reasoning of the court below, and held that the interpretation urged by the representative plaintiff must be accepted.

In *Unifor v. Ontario (CEO of FSRA)*, the Financial Services Tribunal ("FST") has issued a series of procedural decisions concerning disclosure and production of documents in an ongoing dispute between Unifor and the General Motors of Canada Company, ultimately ordering the disclosure that Unifor requested but permitting an extended timeline due to the impact of the COVID-19 pandemic.

Another case involving a pension class action in Ontario was *Martin v. Barrett*, 2020 ONSC 2272, which dealt with the issue of missing members in the context of a pension plan windup.

In *Ontario Public Service Employees Union (Bartlett) v. Ontario (Solicitor General)*, 2020 CanLII 45601 (ON GSB), the Grievance Settlement Board decision regarding the concept of making a grievor "whole" in the pensions context, ultimately held that "making whole" does not include the Employer buying back service lost due to cashed-out pension contributions.

The final case from Ontario, *United Steel v. Georgia-Pacific LP*, 2020 ONSC 1560, concerned an application for judicial review of a decision regarding "grow-in" benefits. The decision of the Divisional Court is among the first applications of the Supreme Court of Canada's updated guidance on the application of the reasonableness standard as set out in *Canada (Minister of Citizenship and Immigration) Vavilov*, 2019 SCC 65 (Vavilov).

Justice Sachs determined that the appropriate balance in this case is to remit the matter to a *different* arbitrator for a full hearing on the merits, in accordance with the Court's reasons. Her decision states, "I am remitting the matter to a different arbitrator because the Arbitrator took two years to render his decision, a delay that is unacceptable in any context, let alone a context where specialized decision making was put in place to render efficient and timely justice."

After Ontario, the Provinces with the most entries on this year's Top 20 list are British Columbia and Manitoba, which each have three entries.

In *Barker v. Molson Coors Breweries and Another (No. 3)*, 2019 BCHRT 192, the British Columbia Human Rights Tribunal considered whether the reduction or elimination of health and welfare benefits after age 65 was discriminatory. It ultimately found that section 13(3)(b) British Columbia Human Rights Code[1] 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."

The next case out of British Columbia, *UA Full-Time Salaried Officers v. UA of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, Local 170*, 2020 BCSC 422, concerned whether a dispute over the alleged failure of a local union to enrol and make contributions into a pension plan for certain employees was a suitable case for disposition by summary trial.

The final case out of British Columbia, *Trustees of the IWA-Forest Industry Pension Plan v. Log Smart Contracting Ltd.*, 2020 BCCRT 730, concerned personal liability for the directors and owners of a corporation for breach of trust with respect to amounts owing to certain pension and LTD plans for B.C. forestry workers.

In Manitoba, more jurisprudence on pension class actions arose, this time in the decision in *Hall et al v. Canadian National Railway*, 2019 MBQB 125. That case, about unreduced early retirement consent benefits, concerned the possibility of amending pleadings to include allegations of breach of contract and breach of contractual duties of good faith and honest performance. The Manitoba Court of Queen's Bench dismissed the motion to amend for all but one of the plaintiffs, on the basis that the amendments created new causes of action for which the limitation period had expired.

Although not a class action, the decision in *Vogel v. Red River College*, 2019 MBQB 182, also concerned allegations of impropriety – specifically negligence – against an administrator. In that case, which concerned allegations of negligence around the amendment of a beneficiary designation, the Manitoba Court of Queen's Bench held that the employer and administrator had not been negligent and did not owe a duty of care to the Plaintiff.

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

Perhaps the most interesting case out of Manitoba – if not the most widely impactful – was *The City of Winnipeg v. The Winnipeg Police Association and the Winnipeg Police Senior Officer's Association*, (2020). In that case, an arbitrator considered the issue of whether the City could unilaterally change the terms of the Association's pension plan through the amendment of the By-Law that governed the Plan. By amending By-law 99/2019, enacted in December 2019, the City intended to reduce the a number of benefits contained in the Police Associations pension plan, including changes to early retirement rights and bridge benefits. Further, the City's unilateral amendments to the pension plan sought to exclude overtime from pensionable earnings and to increase employee contribution rates. In his decision, Arbitrator Werier ordered the City of Winnipeg to reverse those changes, determining that the City could not unilaterally amend the plan as a result of prohibitive wording in the collective agreement. Instead, such change must be negotiated by the parties. Arbitrator Werier issued a declaration that the City's passing of the By-law amending the pension benefits of plan members was a breach of the collective agreement, and ordered the City to abstain from making any other changes to the pension plan except as negotiated by the parties. Arbitrator Werier also ordered the City to pay damages to the Associations, as well as damages to each individual member of the bargaining unit.

Alberta and Saskatchewan each have one decision in the Top 20. In Alberta, the case of *Stalzer (Estate) v. Stalzer*, 2019 ABQB 658, the Alberta Court of Queen's Bench waded through a complex family and estate law dispute. In Saskatchewan, the Superintendent of Pensions issued a decision on whether certain amendments to a pension plan were prohibited under the relevant pension standards legislation.

The Federal jurisdiction also saw several cases make this year's list.

In *Jost v. Canada (Attorney General)*, 2019 FC 1356, the Federal Court certified a class proceeding on behalf of Reserves members of the Canadian Armed Forces who experienced delays in receiving their pensions.

The Federal Court of Appeal issued two decisions in the past year on the jurisdiction of the federal and provincial regulators. In *Canada (AG) v Northern Inter-Tribal Health Authority Inc.*, 2020 FCA 63, the Federal Court of Appeal considered whether the pension plans of two non-profit corporations that provide health services to First Nations groups should be provincially rather than federally regulated. It ultimately agreed with the Office of the Superintendent of Financial Institution that the plans fall within provincial jurisdiction.

In *Quebec (Attorney General) v. Picard*, 2020 FCA 74, on the other hand, the Federal Court of Appeal came to the opposite conclusion and held that the First Nations Public Security Pension Plan was governed by the federal *Pension Benefits Standards Act*, 1985, and regulated by the federal Office of the Superintendent of Financial Institution.

The final case from the Federal jurisdiction is another in the line of cases concerning the availability of employment-related benefits to those who have reached retirement age but not yet retired. In *Bentley v. Air Canada and Air Canada Pilots Association*, 2019 CHRT 37 (CanLII), the Canadian Human Rights Tribunal considered whether it was discriminatory (and unconstitutional) for British Columbia human rights legislation to permit a long-term disability plan to terminate disability benefits for pilots when they became eligible for an unreduced pension at age 60.

CASE SUMMARIES

SUPREME COURT OF CANADA

1. *Threlfall v. Carleton University,* 2019 SCC 50

In *Threlfall v. Carleton University*, the Supreme Court of Canada was asked for the first time to analyze the Civil Code of Quebec ("C.C.Q") regime governing the concept of "absence". Particularly, the court had to consider the implications of the seven-year rebuttable presumption of life for someone who is an "absentee" within the meaning of article 85 of the C.C.Q. on the receipt of pensions and benefits by the person who is an absentee.

In September 2007, George Roseme, a retired political science professor at Ottawa's Carleton University, went for a walk near his home and failed to return. Despite extensive efforts from family, friends and local first responders, no remains were found. The result of Mr. Roseme's disappearance was that he was declared an "absentee" pursuant to article 85 of the C.C.Q. The current regime surrounding the legal effects of a person's absence in Quebec creates a "presumption of life", whereby absentees are presumed to be alive for seven years after their disappearance unless proof of their death can be established before the seven year mark. If seven years passes without rebuttal of the absentee's presumption of life, a declaratory judgement of death can be pronounced, which establishes the absentee's date of death as seven years from the date of the absentee's disappearance.

The presumption of life created by article 85 of the C.C.Q. raised a salient issue in the context of pensions and benefits, specifically for "life only" pension plans like Mr. Roseme's. The effect of the presumption of life required Carleton University to continue making pension payments under Mr. Roseme's pension plan, which stipulated that payments under the plan would stop upon the death of the beneficiary. However, six years after Mr. Roseme's disappearance, his remains were found; the presumption of life was therefore rebutted. His date of death was determined to have been the day after his disappearance. The issue to be determined on appeal was whether Mr. Roseme's succession were entitled to keep the pension payments made to him while he was presumed to be alive but was in fact dead. Both the Quebec Superior Court and the Quebec Court of Appeal found in favour of Carleton University, holding that the pension payments should be restituted to the Respondent University. A majority of the Supreme Court of Canada, in a 6/3 split, held that the pension plan was unambiguous in its terms, which stipulated that benefits would cease to be due upon the beneficiaries' actual death, and not the date on which his death was officially recognized. Since the legal basis for the payments under the plan extinguished upon Mr. Roseme's actual death, the payments made under the plan in the intervening six years until the date of his death was discovered were made in error.

Writing for the majority, Chief Justice Wagner and Justice Gascon held that when the presumption of life in article 85 of the C.C.Q. was rebutted, it retroactively extinguished Carleton University's obligation to pay Mr. Roseme beyond his actual date of death. The Supreme Court offered four main reasons for its interpretation. First, the SCC found that article 85 created a legal presumption of fact for a period of seven years, rebuttable by proof of death or by the absentee's return. However, it does not create permanent rights for the absentee, and the juridical presumption falls away and is substituted by reality once it is rebutted. The SCC stated

that in order for the rebuttal of the presumption of life to operate prospectively only, rather than retroactively, the C.C.Q. would have to explicitly say so.

Second, looking to other parts of the legislative regime surrounding "absence" in the C.C.Q., wherever the legislation intends for legal fiction, such as a presumption of life, to prevail over the "true state of affairs", the legislation states this intention expressly. The declaratory judgement of death after seven years of absenteeism is a key point specifically chosen by the legislature where such a legal fiction prevails over reality. Conversely, the presumption of life allows reality to prevail over the presumption of life where there is no longer any hope that the absentee can return. Thus a retroactive interpretation of the rebuttal of the presumption of life is harmonious with the rest of the legislative scheme.

Third, the SCC found that an interpretation of the rebuttal of the presumption of life as retroactive is consistent with the purposes of such a presumption. The purposes of the presumption of life are to create stability in otherwise mysterious and ambiguous affairs and to protect the interests of the absentee. According to the SCC, these purposes are advanced by interpreting the presumption to be rebutted with retroactive effect, while a prospective interpretation would preserve the absentee's interests but also create substantive rights for to the accrual of pension payments for the absentee's successors.

Fourth, the SCC stated that a prospective approach would have the effect of generating windfall gains that were not intended to be created by the "absence" legislative scheme. If the rebuttal of the presumption occurs with retroactive effect, individuals receive only what they are entitled to in accordance with the actual reality of the absentee's situation. A prospective approach would create windfalls, where restitution would be impossible for payments made when the absentee was both factually and legally dead. The SCC acknowledged that windfalls are still possible, such as where a declaration of death has been pronounced after seven years under article 85 of the C.C.Q. However, the Court stated that the legislation deliberately crystalizes the absentee's rights. At that point, the objectives of the scheme shift to prioritize certainty over the "true state of affairs".

The majority of the SCC also held that restitution of the pension payments were due under article 1492 of the C.C.Q., which the SCC also found to apply retroactively. Article 1491 of the C.C.Q. required that there must be a payment, that there must be an absence of a debt between the parties, and the payment must have been made in error or under protest. The SCC reasoned that where a debt existed between the parties but has subsequently fallen away, the existence of the debt must be determined retrospectively in order to be harmonious with the goals of the restitution regime. The SCC pointed out that without retrospectivity in this regard, there would be no way to challenge and recover once valid payments that are later discovered to not have been due, creating the potential for immunized windfalls that fall outside of the protective reach of the resitutionary provisions.

Writing for the dissent, Justices Cote and Brown would have allowed the appeal on the basis that it was the rebuttal of the presumption of life that ended the employer's obligation to continue making the pension payments, and that to allow courts to use articles 1491 and 1492 to find that pension payments made to the absentee were actually made in error would be to allow courts to go back in time and unwind rights and obligations that were valid at the time they were performed.

The dissent argued in favour of a prospective approach to the rebuttal of the presumption of life. The dissent stated that a prospective approach is consistent with the modifications to the "absentee" scheme made by the legislature, which replaced its previous ineffectual absentee regime with the current one, in which the rights and obligations of an absentee benefit from an absolute presumption of validity while the presumption of life is in operation. The dissent also pointed to the fact that the declaratory judgement of death after seven years fixes the date of death prospectively at the expiry of the seven years, and not at the date the absentee disappeared. The dissent also invoked the long standing presumption against retroactivity in statutory interpretation. While the majority stated that in order for a rebutted presumption of life to apply, prospectively clear statutory language is required, the dissent stated that it is retroactivity that must be grounded in clear legislative intent. The dissent also looked to the related absence regimes of France and Germany, and determined that a prospective approach was more consistent with these foreign regimes from which the C.C.Q. draws inspiration. Given that there is no express provision providing for retroactivity, the dissent states that the majority's interpretation would isolate Quebec from the rest of the civil law world. Lastly, the dissent took the view that a retroactive approach breeds uncertainty, one of the very mischiefs that the "absence" provisions seek to avoid. The retroactive approach sacrifices certainty at the altar of accuracy, creating a regime where successors never know if pension income may need to be returned until the absentees rights crystalize after 7 years where the presumption of life remains unrebutted, which in turn undermines the absentees' interests in having their rights preserved until their possible return. This means that the beneficiaries are paralyzed to use the funds to discharge the absentee's duties and obligations as they become due, which is the very purpose of the presumption of life.

The dissent in this case is particularly powerful, and arrives at directly opposite conclusions from the majority of the court. The dissent also disagreed on the point of restitution, finding that the retroactive approach then necessitates an adjustment of the restitution requirements under article 1491 of the C.C.Q., as article 85 makes no express requirement for restitution. The dissent argued that the three requirements for restitution ought to be constructed cautiously and restrictively, and absent any remedy a claim in unjust enrichment could lie, rather than a judicial adjustment to a section of the C.C.Q. In conclusion, the dissent found that the absence of debt requirement was not met, nor was the requirement that the payment was made in error, finding that the enrichment of the beneficiary's successors was justified.

2. *Canada (Attorney General) v. British Columbia Investment Management Corp.*, 2019 SCC 63

The primary issue in this case is whether the British Columbia Investment Management Corporation ("bcIMC") is required to charge and collect GST under the *Excise Tax Act,* R.S.C. 1985, c. E-15, Part IX ("**ETA**") in relation to investment management services provided for pooled investment portfolios. bcIMC originally filed a petition to the Supreme Court of British Columbia to seek declarations that it was immune to taxation under the *ETA*, and that it was not bound by certain intergovernmental tax agreements between the Province of British Columbia and Canada. The case eventually made its way to the Supreme Court of Canada.

Background and Facts

bcIMC was established in 1999 by Part 3 of the *Public Sector Pension Plans Act*, S.B.C. 1999, c. 44 ("**PSPPA**"). Its purpose is to "provide investment management services to the province's public sector pension plans and other Crown entities." On its creation, bcIMC assumed ownership and management of the investment assets held in pooled investment Portfolios. At the same time, the "legislature modernized its public sector pensions by creating a joint trusteeship structure whereby employers and employees would assume greater control over the management of pension monies."

By virtue of two separate intergovernmental tax agreements (the "**Agreements**"), the governments of British Columbia and Canada agreed to pay the other's sales taxes in certain circumstances.

The first of the Agreements is the Reciprocal Tax Agreement ("**RTA**"). Under the RTA, Canada agrees to pay certain provincial taxes and fees and British Columbia agrees to pay the taxes imposed under the *ETA*. Certain provincial entities listed in Schedule A of the RTA can apply for a rebate of GST paid. bcIMC was added to Schedule A in November 1999, but removed in April 2003.

British Columbia and Canada also entered into the Comprehensive Integrated Tax Coordination Agreement ("**CITCA**"), whereby British Columbia and Canada agreed to pay HST on supplies purchased by their respective governments and agents. Similarly, under the CITCA, amounts of HST paid by the Province that would otherwise be constitutionally immune are rebated. The CITCA was in effect until April 2013, when British Columbia returned to a GST/PST model.

Subsequent to bcIMC's removal from Schedule A of the RTA, the Canada Revenue Agency ("**CRA**") questioned whether bcIMC was entitled to claim immunity from the federal Goods and Services Tax ("**GST**") in respect of the expenses it incurred in managing its portfolios. bcIMC, the Province and Canada entered into discussions about bcIMC's GST status. Unable to reach an agreement, a CRA audit began in January 2014 for GST reporting periods April 1, 2010 to March 31, 2013.

bcIMC subsequently filed a petition in the Supreme Court of British Columbia seeking declarations that it is immune from taxation in respect of the assets in holds in the Portfolios, and is not bound by either the RTA or the CITCA or the payment obligations found in those agreements. Canada brought a motion to strike bcIMC's petition, arguing that the dispute should be heard by the Tax Court of Canada. Justice Wong dismissed this motion because bcIMC's pleadings raised a "plausible argument which ought to be heard."

In November 2015, the Minister of National Revenue issued notices of reassessment to bcIMC, which resulted in an amount of GST and HST owing of $40,498,754.94 (plus interest and penalties). In February 2016, bcIMC filed notices of objection to the reassessments.

Judicial History

Supreme Court of British Columbia

The Attorney General of Canada argued that bcIMC was required to collect and remit federal GST on the costs it incurs in making investments on behalf of the public sector pension boards and other Crown entities. The Attorney General of Canada contended that bcIMC was not constitutionally immune because its assets were beneficially owned by private entities (namely, the pension board). Furthermore, the Attorney General of Canada argued that even if bcIMC was constitutionally immune from tax, it was still required to collect and remit GST by virtue of intergovernmental tax agreements entered into by the federal and provincial governments.

bcIMC argued that the *ETA* did not apply to it, as bcIMC is a provincial Crown agent and thus has constitutional immunity on the property it owns, including investment assets. bcIMC also argued that it is not a party to the intergovernmental tax agreements, and therefore, even if British Columbia is subject to such agreements, bcIMC is not.

On the matter of jurisdiction, Justice Weatherill held that while the Tax Court had concurrent jurisdiction over the tax immunity issue, it would not have jurisdiction to determine whether the Agreements bind bcIMC. Additionally, since the issues are linked and had been going on for 10 years, judicial economy and fairness militated in favour of deciding the issues together.

Justice Weatherill issued a declaratory order stating that by virtue of being a Crown agent, bcIMC is immune from taxation under the *ETA* on assets it holds in pooled investment portfolios. This is because per the *PSPPA*, bcIMC "stepped into the Minister of Finance's shoes" and legally owns the Portfolio assets. However, the declaratory order also stated that bcIMC is bound by the provisions of the RTA and CITCA respecting those assets. As such, it is liable to GST on that basis.

Canada appealed the holding that bcIMC is immune from taxation to the Court of Appeal for British Columbia, and bcIMC cross-appealed with respect to the binding nature of the Agreements.

Court of Appeal for British Columbia

The Court of Appeal first held that there was no reason to interfere with Justice Weatherill's decision to take jurisdiction and to consider the claim for declaratory relief.

Regarding constitutional immunity, the Court of Appeal held that bcIMC was immune from tax as an agent of the Crown. However, the Court of Appeal held that the Agreements were binding on bcIMC, as they intended to create mutually binding obligations. The Court of Appeal held that subsection 16(6) of the *PSPPA* establishes that the extent of bcIMC's immunity from taxation mirrors that of the provincial Crown. Additionally, the phrase "liability to taxation" contained in s. 16(6) of the *PSPPA* is broad enough to capture the contractual liability of the Province under the Agreements.

Canada appealed to the Supreme Court of Canada on the basis that bcIMC was not constitutionally immune from tax under s. 125 of the *Constitution Act*. bcIMC cross-appealed on the question of whether the Agreements were legally binding on it such that it was liable to tax.

Decision

The majority of the Supreme Court of Canada, in a decision written by Justice Karakatsanis, held that bcIMC was immune from tax pursuant to section 125 of the *Constitution Act*. However, both the Province and bcIMC are subject to the tax obligations set out in the Agreements.

I. *Jurisdictional Considerations*

The majority first dealt with the decisions made in the lower court levels regarding jurisdiction. The majority held that the chambers judge made no reversible error in exercising his jurisdiction. More specifically, bcIMC's petition was not an attack on the GST assessments *per se*, but rather whether the Canada could tax bcIMC in the first place. This question was more appropriately characterized as a question of constitutional immunity. The majority also noted that at the time the petition was filed, not only had the reassessments not been issued, but an audit had not yet commenced. Since the declaratory relief sought by bcIMC could not be granted by the Tax Court, bcIMC filed its petition in the only manner possible to deal with the dispute at the time.

II. *Applying the ETA to a Statutory Trust*

While the lower courts did not focus on the operation of the *ETA* in significant detail, the majority provided an analysis of the *ETA* and its applicability to a statutory trust. There was no dispute that bcIMC's portfolios are taxable supplies for the purposes of the *ETA.* The issue, however, was whether the portfolios are the Recipients of taxable supplies, which turned on whether the portfolios are a "person" (which is defined in the *ETA* to include a trust).

Since no submissions were made by the parties on this point, the majority did not have to consider whether the portfolios were trusts for the purposes of the *ETA.* However, the majority did comment that if the portfolios were not trusts, bcIMC would be managing the assets on its own account, and GST would not be applicable. In order to determine what is meant by the term "trust" used in a statute or legal document, the majority stated one must turn to definitions contained in the relevant provincial law (in this case, British Columbia common law[2]). The majority proceeded on the notion that bcIMC's portfolios are a trust for the purposes of the *ETA* and for the benefit of the unitholders.

III. *Section 125 of the Constitution Act: Constitutional Immunity from Taxation*

The majority held that bcIMC was subject to constitutional immunity by virtue of s. 125 of the *Constitution Act*. Pursuant to s. 125 of the *Constitution Act*:

> No Lands or Property belonging to Canada or any Province shall be liable to Taxation.

The majority explained that section 125 of the *Constitution Act* grants constitutional immunity from taxation when two requirements are met: the "pith and substance" of the impugned charge must constitute "taxation", and the subject matter of the tax must be property belonging to the

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[2] In British Columbia common law, a trust is established when (1) there has been an express or implied declaration of a trust; and (2) an alienation of property to a trustee to be held for a specified beneficiary.

federal Crown in the case of a tax imposed by the provincial legislature and to the provincial Crown in the case of a tax imposed by Parliament.

In this particular case, the majority held that the two conditions were met. First, there was no question that GST falls squarely within the meaning of a "tax." Second, as a statutory Crown agent, bcIMC has the same constitutional immunity in relation to its property as the provincial Crown. The pivotal question became whether the property in question "belonged" to bcIMC. The majority relied on s. 4(1) of the *PSPPA Regulations* and s. 18.1(3) of the *PSPPA* to conclude that as a trustee, bcIMC legally owned the assets in its Portfolios. The *ETA* in this case imposes GST on the assets of which bcIMC holds legal title. In the context of the pension fund in this case, therefore, section 125 of the *Constitution Act* operates to create tax immunity for bCIMC on a distinct private beneficial ownership interest.

The majority did not accept the Crown's argument that section 125 of the *Constitution Act* only applied if British Columbia (or bcIMC) was the beneficial owner of the portfolio assets.

IV. *Are the Intergovernmental Agreements were Binding on bcIMC?*

The majority dismissed the cross-appeal and agreed that the language of the Agreements demonstrated that the Province and Canada intended to create mutually binding legal obligations. Despite the fact that bcIMC would otherwise be constitutionally immune from the *ETA*, bcIMC was equally bound by the Province's obligations under the Agreements by virtue of s. 16(6) of *PSPPA*, which states:

> (6) The investment management corporation, as an agent of the government, is not liable for taxation except as the government is liable for taxation.

The majority held that the language in s. 16(6) of the *PSPPA* is broad enough to encompass the liability assumed by the Province under the Agreements.

The majority stressed that while intergovernmental agreements can often be political or aspirational in nature, they are capable of binding government parties. The majority pointed to various factors which may demonstrate an intention to create legal obligations:

- The subject matter: does the agreement deal with discrete commercial matters rather than broad questions of public policy?

- The language used: do the terms of the agreement resemble a private law contract? For example, does it use mandatory language such as "shall" or "binding," set out the duration of the agreement, or require audits or the publishing of financial statements?

- The mechanism for resolving disputes: did the parties agree to refer disputes to arbitration or a designated court rather than resolving them by purely political means?

- Subsequent conduct: did the parties treat the agreement as binding, rely on it to their detriment or derive clear benefits from it?[3]

The majority then turned to each particular factor and applied them to the facts of the case. With regard to the subject matter, the Supreme Court of Canada held that the Agreements deal with taxation, which is "undoubtedly a question of public policy."[4] However, the Agreements deal solely with each government's commitment to pay sales taxes levied by the other government – they do not involve the implementation of a new tax regime or other broad policy goal and were narrow in scope.

The majority then noted that the language contained in the contract suggested an intention to agree.

Regarding the settlement of disputes, bcIMC argued that there must be a binding dispute resolution system in order to give rise to liability. While it may create a "strong presumption" that the parties intended to create legal relationship, the majority held that it was not a necessary condition.

Finally, while the majority did not have a record outlining the extent to which the parties have historically carried out their obligations under the Agreements, it noted that both Canada and British Columbia took the position that the Agreements create binding obligations. This was a "strong indicator" that the parties intended to be bound by the Agreements. The Supreme Court of Canada, therefore, had "[…] no difficulty in concluding that the Agreements at issue in the cross-appeal resemble private law contracts and were intended to create legally binding obligations for Canada and the Province."[5]

The remaining question before the Supreme Court of Canada became, therefore, what impact these obligations had on bcIMC. Section 16(6) of the *PSPPA* establishes that bcIMC's tax immunities and obligations mirror those of the Province and that the language is broad enough to encompass obligations voluntarily assumed by the Province. As a result, bcIMC is subject to the obligations set out in the Agreements to the same extent that the Province would be.

The Supreme Court of Canada issued a declaratory order which stated as follows:

> As a provincial Crown agent, the British Columbia Investment Management Corporation (BCIMC) is immune from taxation by Canada under the *Excise Tax Act, R.S.C. 1985, c. E-15*, in respect of assets BCIMC holds in pooled investment portfolios under the *Pooled Investment Portfolios Regulation, B.C. Reg 447/99.*
>
> Under s. 16(6) of the *Public Section Pension Plans Act*, S.B.C. 1999, c. 44, BCIMC is nevertheless subject to the provisions of the Reciprocal Taxation Agreement and the Comprehensive Integrated

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3 2019 SCC 63 at para 95.

4 2019 SCC 63 at para 96.

5 2019 SCC 63 at para 102.

> Tax Coordination Agreement respecting those assets to the same extent as Her Majesty The Queen in Right of the Province of British Columbia.

Partial Dissent by Wagner J

Justice Wagner provided a partial dissent regarding bcIMC's constitutional immunity. He maintained that merely because bcIMC has legal title to the taxed property does not mean it is property "belonging to" the Province, because the property was entrusted to bcIMC by private parties. Justice Wagner argued that those private parties were neither the provincial Crown, nor agents thereof. In his dissent, Justice Wagner stated:

> Extending immunity under s. 125 to the circumstances of this case does not protect the constitutional values of federalism and democracy that s. 125 exists to promote. Instead, it overshoots those purposes by giving private parties the benefit of immunity from taxation to which they are not entitled, protecting the Province from adverse contractual consequences, and providing bcIMC with an unjustified commercial advantage.[6]

Justice Wagner also held that bcIMC and the pension boards elected not to pay bcIMC directly for its investment management services, but have instead allowing bcIMC to take its payment from the trust funds. Had they paid bcIMC directly for its services, the pension boards themselves would have been liable to pay GST and the portfolios themselves would not have been a "recipient."

ONTARIO DECISIONS

3. *Canada Inc. v. SNC-Lavalin Group Inc., et al.,* 2019 ONSC 4423

4352238 Canada Inc. ("435") sought a declaration that it had validly exercised its right of first refusal ("ROFR") over a proposed sale by SNC-Lavalin Group Inc. ("SNC") of 10.1% of its shares of 407 International Inc. ("407") to OMERS and was therefore entitled to acquire those shares of 407 from SNC on the same terms and conditions of those proposed to OMERS.

The Facts

In 1998, the Province of Ontario privatized Highway 407 ETR through the sale of the corporation it had established to oversee the design, construction, operation, maintenance and financing of the highway. 407 was incorporated to purchase the highway from the Province of Ontario for approximately $3.113 billion. At the time of acquisition 407's was owned as follows:

- Grupa Ferrovial S.A. ("Grupa Ferrovial") and Cintra Concesiones De Infrastructuras De Transporte, S.A. ("Cintra" and, together with Grupa Ferrovial, "Cintra Parties") held 61.29% of the equity in 407;

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[6] 2019 SCC 63 at para 116.

- SNC held 22.58% of the equity in 407; and

- The Caisse de Depot et placement du Quebec ("CPPQ") held 16% of the equity in 407.

In April 1999, the abovementioned shareholders and 407 entered into a unanimous shareholders' agreement that included a right of first refusal ("ROFR") to any offers by third parties to purchase shares of 407 from the existing shareholders.

In 2002, SNC agreed to sell part of its interest in 407 to the Cintra Parties. As part of the consideration for the sale, the Cintra Parties signed a waiver of rights to the ROFR, provided that the sale of shares by SNC was not made to a "Competitor" of the Cintra Parties.

In April 2019, SNC notified 435 that it had reached an agreement to sell 40,300,000 of its common shares in 407 to Somerset Acquisition LP ("Somerset"), a vehicle of OMERS (the "Third Party Offer"). In May 2019, SNC and the CPPIB Respondents notified 435 that they intended to proceed with the sale to OMERS. The Respondents took the position that 435 had waived its ROF on the basis that neither Somerset nor OMERS was a "Competitor" of the Cintra Group.

The issue before the Ontario Superior Court was whether the ROFR was validly exercised by 435 with respect to the Third Party Offer, and relatedly, whether OMERS is a "Competitor" of the Cintra Parties within the meaning of the Cintra Waiver. Justice Hainey also had to determine whether OMERS would hold its interest in 407 "solely as a financial investor" if it acquired the shares from SNC pursuant to the Third Party Offer.

Decision

The Ontario Superior Court held that OMERS fell within the exception contained in the Cintra Waiver, such that it was purchasing its interest in 407 "solely as a financial investor."

The Court determined that on a plain reading of the Cintra Waiver, there were two conditions, both of which must be present in order for the waiver not to apply to the Third Party Offer. Namely:

1. the proposed purchaser must have 'competing interests' with any of the Cintra Parties (including their subsidiaries) in relation to construction, operations, asset management of, and investment in, road or airport infrastructure projects ; and

2. the competing interest must be held 'other than solely as a financial investor such as a pension or superannuation fund.'

Justice Hainey held that on a prima facie basis, a pension fund would constitute an investor holding their interest solely as a financial investor. However, 435 submitted that merely establishing that a third party purchaser is a pension fund is not the end of the inquiry. Instead, a further analysis is required to determine whether the pension fund is holding the investment solely as a financial investor or other than solely as a financial investor. If the pension fund is holding the investment in a manner other than solely as a financial investor, it can be a Competitor and cause the waiver to be inoperative.

435 argued that, since signing the waiver in 2002, large Canadian pension funds became increasingly active owner-managers with respect to their investments, particularly in the infrastructure space. 435 contended that while in 2002, pension funds were good examples of entities holding their investments solely as financial investors, this was no longer the case. 435 maintained that OMERS itself was becoming an increasingly active investor, and often actively managed and operated its infrastructure project investments.

The Respondents submitted that "pension funds" were deliberately excluded from the definition of Competitor, as they were an example of a category of largely "financial investors." Additionally, the Respondents contended that if the Court were to read the waiver provisions as only excluding pension funds that have a passive investment strategy, the court would be "re-writing" the agreement.

Justice Hainey dismissed 435's application and held that it had waived its ROFR with respect to OMERS' proposed purchase of SNC's shares. Specifically, Justice Hainey made following comments at paragraph 49:

"In light of the evidence of Mr. Wisdorf and Mr. O'Reilly, I have concluded that when parties referred to a pension fund as an example of an entity that would purchase shares in 407 'solely as a financial investor', they did not distinguish between pension funds engaged in either a passive or active investing strategy. I find on the evidentiary record before me that it was well known to the parties in 2002, when the Cintra Waiver was executed, that pension funds that invested in infrastructure projects actively managed their investments either directly or indirectly by a third party manager. This would include OMERS both in 2002 and today."

As such, it was known to the parties in 2002 that pension funds investing in infrastructure projects often actively managed their investments either directly or indirectly by a third party manager. Justice Hainey concluded that the parties would have intended that a pension fund, such as OMERS, should be excluded from the ROFR.

As a result, the purchase fell within the purview of the Cintra Waiver and 435 was not entitled to exercise its ROFR.

4. *Austin v. Bell Canada,* 2019 ONSC 4747

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.

Background

The Plaintiff, Leslie Austin, is a pensioner of Bell Canada. Mr. Austin commenced a proposed 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." Bell Canada and the Plaintiff disagreed about who (Bell or Statistics Canada) should be

calculating the annual percentage increase and the manner in which it should be done. Based on Bell Canada's method, 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. This 0.01 per cent difference matters because 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.

Decision

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.

***Austin v. Bell Canada,* 2020 ONCA 142**

In *Austin v. Bell Canada*, the Ontario Court of Appeal overturned a summary judgment decision of the Superior Court of Justice that had ruled against the plaintiffs in a case about the interpretation of a post-retirement indexation provision in Bell Canada's pension plan (the "Plan").

Background

The case concerns a class action brought on behalf of retirees who are beneficiaries of the Plan. The sole issue before the Court of Appeal was the proper calculation of the cost-of-living adjustment under the Plan for the year 2017, and turned on the Plan's definition of the words "Pension Index" and how that definition interacted with other plan provisions concerning the calculation of post-retirement indexation.

At the Superior Court, the Plaintiffs had brought motions for certification of the class action and for default judgment on the common issues. The Motions Judge granted the certification motion, but then dismissed the case on summary judgment. The Plaintiffs appealed the decision on summary judgment, arguing that the motion judge erred by finding that Bell was entitled to round down the annual percentage increase in the Consumer Price Index, which had been mathematically calculated by Bell to be 1.49371%. The Plaintiff argued that Bell was not required to do any calculation, as on its reading, the Plan requires Bell to use the number calculated by Statistics Canada and to thus follow Statistics Canada's policy of rounding to only one decimal point (i.e. 1.5%). The difference has huge implications, as the Plan requires that Pension Index be rounded to the nearest whole number. On the Plaintiff's interpretation, indexation for 2017 should have been 2%. Under Bell's interpretation, pensions would only be increased by 1%. On a present value basis, the actuarial evidence provided on the motions estimated that the loss to the pensioners was $10 million in the first year and more than $100 million over their lifetimes.

The Decision of the Motions Judge

The court noted that "[t]he motion judge's ruling and this appeal turn on two provisions in the plan dealing with the annual indexing of benefits", and then went to on to describe each of those provisions:

> [6] The first is the definition of Pension Index in s. 1.29 of the Plan:
>
> **1.29** "Pension Index" means the annual percentage increase of the Consumer Price Index, as determined by Statistics Canada, during the period of November 1 to October 31 immediately preceding the date of the pension increase;
>
> [7] The second key provision is s. 8.7, which governs the calculation of the annual indexation increase. The case turns on how s. 1.29 and the determination of the Pension Index works in conjunction with the rounding provision in s. 8.7(iv):
>
> **8.7** On every first day of January, the retirement benefits payable to a Member, the surviving Spouse or the Beneficiary under the DB Provisions shall be augmented by a percentage determined as follows:

> (i) If, on the date of the increase, the Member has not reached 65 years of age, or would not have reached 65 years of age in the case of a surviving Spouse or Beneficiary, the Pension Index, limited to a maximum of 2% and calculated on a compounded basis.
>
> (ii) If, on the date of the increase, the Member has reached 65 years of age, or would have reached 65 years of age in the case of a surviving Spouse or Beneficiary, the percentage shall be the greater of:
>
> (a) 60% of the Pension Index, limited to a maximum of 4% and calculated on a compounded basis; or
>
> (b) the percentage determined under paragraph (i) above.
>
> (iii) For the purpose of any increase applicable to a Member, the surviving Spouse or the Beneficiary within the first year of retirement, the applicable percentage shall be prorated, taking into account the number of full calendar months of retirement in the calendar year preceding the date of the increase.
>
> (vi) All percentage increases shall be rounded to the nearest 2 decimal points, except for the percentage increase under paragraph (i) above which shall be rounded to the nearest whole number.

The court explained that the motions judge turned first to s. 1.29, and "held that the proper interpretation of that provision depended upon the importance to be ascribed to the comma after the words “Consumer Price Index”." The motions judge then reviewed numerous cases and academic works dealing with the significance to be attached to commas.

According to the court, the motions judge "appears to have accepted [the Plaintiff's] interpretation but found that it was rebutted by the need to read the Plan as a whole." However, in attempting to read the Plan as a whole, the motions Judge erred. He concluded that while it is true that Statistics Canada uses the one-decimal place approach to rounding, it did so for its own purposes and this did not govern the Plan when read as a whole. The court identified the following as the key passage in his reasons:

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

The Court of Appeal's Reasons

In making this finding, the Court of Appeal determined that the motions judge had made a "palpable and overriding error of fact" as there was uncontradicted expert evidence "that using the Statistics Canada one-decimal rounding policy will frequently produce a three-decimal figure in the calculation of the annual percentage increase for recently retired pensioners under s. 8.7(iii), and that the two-decimal rounding provision on s. 8.7(iv) applies and therefore has meaning." Basically, the Plaintiffs argued and the Court of Appeal accepted, that the motions judge had based his entire reasoning on a faulty understanding of the evidence.

They also agreed with the Plaintiff that "on its face, s. 1.29 states that both the annual percentage increase and the Consumer Price Index are to be determined by Statistics Canada." They further added that there was expert evidence explaining that Statistics Canada's method of rounding to only one decimal place is based on the fact that "the Consumer Price Index cannot be accurately measured to two decimal points" and "to publish more than one decimal point would convey a message about the precision and accuracy of the index that would not be justified." Ultimately, in determining the meaning of "Pension Index", the Court of Appeal reasoned as follows:

> [21] In our view, having regard to the grammatical meaning of s. 1.29 and the evidence regarding accepted statistical conventions for rounding, a strained interpretation of s. 1.29 would be required to make it mean that Statistics Canada determines only the increase in the Consumer Price Index and leaves it to Bell to adopt a different rounding policy to determine the Pension Index.

The court then examined the plain meaning of this provision in the context of the Plan as a whole, and once the Motions Judge error about "meaninglessness" was corrected, the Court determined that a contextual reading of the relevant provisions favoured the Plaintiff's interpretation.

In addition to finding a "palpable and overriding error" of fact, the Court of Appeal also determined that the motions judge had made an "extricable error of law" by failing to consider the *contra proferentem* rule. The court explained its reasoning like this:

> [31] The Plan was drafted by Bell without meaningful participation by the pensioners who are a vulnerable group in relation to Bell. The *contra proferentem* rule of interpretation "applies to contracts … on the simple theory that any ambiguity … must be resolve against the author if the choice is between him and the other party to the contract who did not participate in its drafting"…*Contra proferentem* is regularly applied to resolve ambiguities in pension documents in favour of pensioners".

As the court did not find the Plan's terms to be ambiguous, it did not need to rely on *contra proferentem*, but it did find that "it is a very short step to take from the motion judge's observation that the wording of the Plan is 'awkward' to finding that the wording is ambiguous" and that once the motions judge determined the wording was awkward, he should have "taken that step, applied the *contra proferentem* doctrine, and ruled that given the ambiguity, the interpretation favouring the pensioners should prevail."

5. *Unifor v. Ontario (CEO of FSRA),* 2019 ONFST 19, 2020 ONFST 7, 2020 ONFST 8, 2020 ONFST 9

The Financial Services Tribunal ("FST"") has issued a series of procedural decisions in the last year concerning disclosure and production of documents in an ongoing dispute between Unifor and the General Motors of Canada Company ("GM"), ordering the disclosure that Unifor had requested but permitting an extended timeline due to the impact of the COVID-19 pandemic.

Background

Unifor brought a motion seeking documents relating to GM's decision to make retroactive credited service adjustments impacting approximately 600 members of the General Motors Canadian Hourly-Rate Employees' Pension Plan (the "Plan").

GM had made the adjustments as the Plan's administrator to correct certain administrative errors uncovered in 2017. In response, Unifor wrote to the Superintendent of the Financial Services Commission of Ontario (the "Superintendent") on July 11, 2018, alleging that GM was acting in its self-interest as plan sponsor and contrary to its duties as administrator under the *Pension Benefits Act*, RSO 1990, c P8 (PBA). Unifor requested an order from the Superintendent to prevent GM from making the adjustments until each affected member was afforded an opportunity to contest the adjustment and a final decision was made in their case. On September 25, 2018, the Superintendent issued a Notice of Intended Decision stating that he intended not to intervene because GM was administering the Plan in accordance with the PBA, its regulations, and the Plan text, the Plan text complied with the PBA and its Regulations, and GM had not contravened the PBA (the "NOID").

Unifor requested a hearing before the FST with respect to the NOID, and proceedings before the FST began with a prehearing conference ("PHC") on January 30, 2019. A timetable for disclosure and production of documents was established at the PHC, and GM was ordered to disclose and produce all relevant documents by April 30, 2019.

Unifor v. Ontario (CEO of FSRA), 2019 ONFST 19 (October 25, 2019) – Production Order

Unifor brought its motion by a letter dated September 19, 2019, alleging that GM had not produced documents in accordance with the timetable and had not produced all relevant documents (the "Production Motion").[7] Unifor's motion sought:

1) Any and all documents that GM Canada relied on in its determination that the credited service of Plan members had not been calculated in accordance with the terms of the Plan and required adjustment;

2) Any and all documents that GM Canada relied on in determining the quantum of adjustment to credited service that it made;

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[7] Note: effective June 8, 2019, the Financial Services Commission of Ontario transitioned into a new regulatory body, the Financial Services Regulatory Authority ("FSRA"). The CEO of FSRA (the "CEO") automatically replaced the Superintendent as a party to this proceeding, pursuant to the *Financial Services Regulatory Authority of Ontario, 2016*, SO 2016, c 37, Sched 8. The CEO did not take a position with respect to Unifor's motion for disclosure.

3) Any and all documents evidencing the basis upon which the credited service was originally granted, which GM Canada subsequently determined had not been calculated in accordance with the terms of the Plan and required adjustment;

4) Any and all service records and personnel file records of Plan members whose credited service was adjusted in respect of the periods of credited service that were adjusted;

5) Any and all letters and records of any other communications sent by GM Canada to Plan members whose credited service was adjusted in respect of those adjustments;

6) Any and all scripts used by GM Canada's Benefit Centre or other GM Canada departments that were in communication with Plan members about the adjustments to their credited service;

7) Any and all notes, documents, or records with respect to communications between Plan members and GM Canada's Benefit Centre or other GM Canada departments that were in communication with Plan members about the adjustments to their credited service;

8) Any and all documents, records, reports or communications with respect to Alight's third-party review of the alleged administrative errors of the Plan in respect of the crediting of service, as referenced in GM Canada's February 22, 2018 submission to the Financial Services Commission of Ontario; and

9) Any and all documents, records, reports or communications with respect to GM Canada's internal record keeping review in respect of its alleged errors in the administration of Plan member's credited service, as referenced in GM Canada's February 22, 2018 submission to the Financial Services Commission of Ontario.

Unifor argued the documents were essential in order to review whether GM's adjustments were made in accordance with the PBA, its regulations, and the Plan text.

GM argued that the documents were not relevant to the proper scope of the hearing, which GM characterized as the question of whether plan administrators have the right to implement changes if they discover administrative errors. GM advised that it was prepared to disclose additional documents regarding its process identifying and resolving errors at a high level, but not on a case-by-case basis. GM did not provide evidence that the requested disclosure was disproportionate.

The FST determined that the applicable threshold for production at the pre-hearing stage was whether the documents sought were "arguably relevant" to the position of the parties, as set out in its decision in *Monsanto Canada Inc. v Ontario (Superintendent Financial Services)*, 1999 ONFST 3. The FST agreed with Unifor that the documents were arguably relevant. Member Paul Farley, Chair of the Panel, wrote:

> 26 […] Indeed, it is, in my view, difficult to see how the Applicant can properly further its case with respect to the seminal issue agreed upon by the parties at the PHC, i.e. "Is the Plan being administered in accordance with the Act, the Regulations thereunder or the terms of the Plan?" without the disclosure requested.

The FST determined that Unifor's request was proportional given (i) the nature, scope, and complexity of the case and (ii) that GM had provided no evidence that the cost, burden, or delay imposed on GM would be unreasonable.

FST issued an order granting the request, dated October 25, 2019 (the "Production Order").

***Unifor v Ontario (CEO of FSRA),* 2020 ONFST 7 (April 15, 2020) – Deadline Order**

Unifor filed a motion on February 18, 2020, requesting that the FST set a deadline of July 10, 2020 for GM to comply with the Production Order. GM filed submissions in response on February 24, 2020, requesting that the FST review its decision to issue the Production Order on the basis that the order was not proportionate. GM projected that it would take 4.4 years for a GM employee to satisfy the Production Order.

In its decision dated April 15, 2020 (the "Deadline Order"), the FST declined GM's request to review its decision, primarily on the basis the Rules of Practice and Procedure for Proceedings Before the Financial Services Tribunal (the "Rules") state that requests for the FST to review decisions or orders must be filed within 10 days of the decision or order being made (Rule 45.01). Although the Rules permit the FST to consider requests that are filed after the deadline, the FST must be satisfied in such cases that there is "a good reason for the delay" (Rule 45.02). The FST determined that there was no good reason for the delay in this case. Unifor had particularized its production request in correspondence dated September 19, 2019 and GM had had ample opportunity to make an argument with respect to proportionality at a PHC on October 18, 2019, in response to the Production Order, or at a subsequent PHC on November 8, 2019.

The FST also rejected GM's projected timetable as "faulty" because it was based on an assumption that one employee would review and reproduce the records, having access to one microfiche reader and one microfilm reader. This was "simply not reasonable" according to the FST, given that GM is "a substantial employer having substantial resources". The FST determined that Unifor's requested deadline of July 10, 2020 was also not reasonable given the scope of the Production Order.

The FST ordered GM to comply with the Production Order "on or before March 15, 2021, approximately eleven months from the date of these reasons and sixteen months from the date the Production Order was made."

***Unifor v Ontario (CEO of FSRA),* 2020 ONFST 7 (April 30, 2020) – Extension Decision**

GM sent correspondence to the FST dated April 24, 2020, requesting clarification as to whether the March 25, 2021 deadline was absolute or whether the FST intended to provide GM eleven months to comply. GM's concern was whether the operation of the order would be suspended while GM lacked normal access to its facilities due to the COVID-19 pandemic.

In its April 30, 2020 decision (the "Extension Decision"), the FST determined that the Deadline Order should be amended to provide GM eleven months to comply. The FST requested that the parties draft an order that would provide GM eleven months to carry out the work but would not leave Unifor entirely at GM's discretion in terms of when the necessary work could reasonably begin. Unifor had not made submissions on this issue prior to the Extension Decision.

***Unifor v Ontario (CEO of FSRA)*, 2020 ONFST 7 (July 22, 2020) – Extension Decision II**

Unifor and GM were unable to agree on a draft order. At a PHC on the issue, held on July 22, 2020, Unifor argued that the eleven-month period should begin immediately. Unifor noted that GM had provided no concrete details as to when it would reopen its Canadian headquarters in the Region of Durham ("CHQ"), where many of the relevant records were kept. Unifor also noted that GM had not provided evidence of health or safety risks to employees beyond the COVID-19 concerns impacting everyone and that GM's automotive plants had resumed production as of May 13, 2020.

GM stated its CHQ was still completely idled, with employees mandated to work from home in compliance with provincial social distancing requirements. GM argued that an FST order requiring workers attend work on site would "fly in the face" of guidelines issued by the Province of Ontario and the Region of Durham to keep employees safe. GM provided no certain dates for reopening the CHQ, stating only that "hopefully the offices will reopen in September."

In its decision dated July 22, 2020 (the "Extension Decision II"), the FST acknowledged that it was unfair to require Unifor to place its advocacy "on hold" while waiting for GM to make a unilateral corporate decision to reopen its offices. On the other hand, the FST acknowledged the seriousness of the COVID-19 pandemic in Ontario, including on schools, daycares, businesses, and courts, and determined that it is difficult to impose standards of compliance on GM that are different from the Province of Ontario's standards that apply generally to businesses and other institutions.

The FST determined that GM should begin taking steps to comply within a reasonable time after the Region of Durham enters Stage Three of the Province of Ontario's *Framework for Reopening our Province* ("Stage Three"). Member Farley wrote:

> 32 With respect to the CHQ, although it is currently closed in compliance with Provincial Guidelines, once Stage Three has been implemented by the Province in the Region of Durham most businesses will be permitted to reopen subject to ensuring the appropriate health and safety measures are in place. It is reasonable to conclude that if the Province, in consultation with its medical experts, is of the view that all businesses, with the exception of specifically excluded businesses, (GM Canada is not an excluded business) are entitled to open in the Region of Durham, it is safe to do so.

The FST determined that "a reasonable time" would be three weeks, in effect extending GM's deadline to comply to eleven months and three weeks after the Region of Durham enters into Stage Three.

6. *Martin v. Barrett,* 2020 ONSC 2272

In its recent decision in *Martin v. Barrett*, 2020 ONSC 2272 ("***Martin***") the Superior Court of Justice (Commercial List) (the "**Court**") addressed the issue of missing members in the context of a pension plan windup.

Background

Martin was a class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 which arose as a result of a serious underfunding of the Participating Co-Operatives of Ontario Trusteed Revised Pension Plan (the "**Pension Plan**"). The plaintiffs sought restitution, or alternatively damages, on behalf of current and deferred vested members, pensioners and beneficiaries of the Pension Plan for significant investment losses to the Pension Plan allegedly caused by the negligence, breach of trust and breach of fiduciary duty of the current and former trustees, current and former Pension Plan custodians, actuaries, former legal counsel, and a former investment consultant and asset manager of the Pension Plan.

The class action was certified and in April 2008 a multi-million dollar settlement was reached. Morneau Shepell was appointed as the Administrator of the Pension Plan in 2008 after already being in the process of being wound up since 2003. A revised wind up report was filed by the Administrator and approved by the Ontario pension regulator. Annuities were purchased and commuted value transfers were completed on behalf of the majority of the 2,421 members.

Unlocated Members

As of January 31, 2020, there remained 106 unlocated members with a total of $454,207 owing but only $39,000 remaining for expenses to complete the wind up. Of the 106, 51 had individual entitlements valued at $2,000 or more. The Administrator has exhausted all methods of locating the missing members except retaining a private investigation agency.

The cost of hiring a private investigation agency for all 106 members was quoted as approximately $212,000. In contrast, hiring the private investigation agency to search of the 51 members with an entitlement of $2,000 or more was estimated to cost between $129,000 and $142,000.

In a motion brought by the plaintiffs, among other relief sought, the Administrator proposed to deal with the unlocated members by transferring the $97,933.20 that was still held by the class action plaintiff's counsel the Administrator to pay for the private investigation agency. The Administrator would direct the private investigation agency to search in phases with the first phase searching for the 51 persons with individual entitlements of $2,000 or more and the second phase searching for members with the next greatest entitlement, to the extent funds remained in the Pension Plan.

Any remaining amounts after applicable withholdings would be paid into Court to the credit of the unlocated member, subject to approval from the Court and the regulator. The Administrator would assist in providing the Court with all the information it had about the unlocated member in case the individual came forward at a future date.

In considering the relief sought with respect to the unlocated members, the Court relied on the decision in *Hawker Siddeley Canada Inc. (Re),* [2009] O.J. No. 5795 (S.C.J.) ("***Hawker***") in which the Court relied on general principles of trust law where the relevant pension legislation was silent. Section 36(1) of the *Trustee Act,* R.S.O 1990, c T.23, provides that a trustee may apply for an order for payment into court and section 36(4) provides for such an order in respect of trust property belonging to a person whose address is unknown in connection with the passing of accounts. In *Hawker,* Justice Wilton-Siegel held that the passing of accounts and a wind-up of a pension plan have the same issues and therefore granted the motion to have the pension benefits of unlocated members paid into court.

Similarly, in *Martin*, Justice Perell granted the motion, noting that "The plan to complete the winding up of the Pension Plan and to complete the administration of the class action is eminently sensible and fair, and I, therefore, grant the motion as requested."

7. *Ontario Public Service Employees Union (Bartlett) v Ontario (Solicitor General),* 2020 CanLII 45601 (ON GSB)

OPSEU (Bartlett) v. Ontario (Solicitor General), GSB# 1000/94; 2018-0648 ("***Bartlett***") is a recent Grievance Settlement Board decision regarding the concept of making a grievor whole in the pensions context.

The Grievor had worked for the Ontario Public Service for nine years when she was terminated in 1994. She grieved the termination, and was re-instated in 1996. The settlement agreement and resulting Board order required the Employer to "make the grievor whole for the period of her discharge".

While terminated, the Grievor had elected to cash out her pension contributions for approximately $23,000. She assumed that because of the settlement agreement, the Employer would restore her pension credits and service date to 1985 upon her reinstatement. In 2018, as she considered retirement, she learned this had not occurred. The Grievor therefore sought to have the Employer buy back her pension credits for the 1985-1994 period, which would cost approximately $280,000.

The Union argued that in not buying back the Grievor's pension credits, the Employer both breached the 1996 settlement agreement and the collective agreement currently in force.

Arbitrator Ian Anderson (the **"Arbitrator"**) found that the union could not make out a *prima facie* case on either matter. Regarding the collective agreement grievance, the Arbitrator pointed to a letter of understanding between the Union and the Employer, which indicated that while pension issues are bargainable, no pension document forms part of the collective agreement. He further noted the Union had "articulated no legal theory" as to how the Grievor's circumstances give rise to a breach of the collective agreement. He therefore dismissed the grievance.

The Arbitrator also rejected the Union's argument that the Employer breached the 1996 minutes of settlement. He found that the term "make whole" is limited to reasonably foreseeable losses. That might have included the right to buy back pension contributions for the two years in which the Grievor was terminated, which would in turn trigger the Employer's duty to match those contributions. That might also have included the right to buy back contributions that had already been cashed out, and have that buy-back matched.

But the Arbitrator is clear that "making whole" does not include the Employer buying back cashed-out pension contributions. No element of the collective agreement, the settlement agreement, or the OPSEU Pension Trust requires this. More fundamentally, when the Grievor chose to cash out her pension, she did not experience a loss: "Rather, the Grievor received the value of those contributions at the time she cashed them out. She was therefore 'whole' in terms of the value of those contributions at the point in time she received them."

The Arbitrator therefore found the Employer had no such duty to ensure the Grievor's pension was backdated to her original date of hire.

8. *United Steel v. Georgia-Pacific LP*, 2020 ONSC 1560

United Steel v. Georgia-Pacific LP, 2020 ONSC 1560 ("***Georgia-Pacific***") concerns an application for judicial review of a decision by labour arbitrator Ken Petryshen regarding "grow-in" benefits. Issued on April 16, 2020, *United Steel v Georgia-Pacific LP* is among the first applications of the Supreme Court of Canada's updated guidance on the application of the reasonableness standard as set out in *Canada (Minister of Citizenship and Immigration) Vavilov*, 2019 SCC 65 (*Vavilov*), to the pension and benefits context.

Grow-in benefits permit older or long-service members of a defined benefit plan who lose their employment before they are eligible for retirement to "grow into" their retirement benefits at the age they would have become eligible if they had continued to work for their employer. Ontario's *Pension Benefits Act* (PBA) provides an entitlement to grow-in benefits under certain circumstances, including the "employer's termination of the member's employment."

Georgia-Pacific arose in the context of Georgia-Pacific LP's (the "Employer") decision to idle the gypsum plant it operated in Caledonia, Ontario. The United Steel Workers, Local 14994 (the "Union") alleged that the Employer had violated the collective agreement by refusing to provide grow-in benefits to six workers who it had put on indefinite layoff. The Employer took the position that it had not terminated the employment of the workers because shortly after the commencement of their layoff, the grievors had *opted* to forego their collectively bargained recall rights and receive severance pay.

Arbitrator Petryshen accepted the Employer's argument. He relied on section 30.1(2)2 of Regulation 909 under the *PBA*, which provides that grow-in benefits will not be triggered when the employee is "only on temporary lay-off within the meaning of section 56(2) of the *Employment Standards Act, 2000*." Section 56(2)(b) of the *Employment Standards Act, 2000* (*ESA*) provides that a layoff is a temporary layoff if it is "less than 35 weeks in any period of 52 consecutive weeks." Further, section 56(4) of the *ESA* provides that "an employer who lays an employee off without a specifying recall date shall not be considered to terminate the employment of the employee, unless the period of the lay-off exceeds that of a temporary layoff." Arbitrator Petryshen held that the grievors were not entitled to grow-in benefits, as they had made a choice to receive severance pay prior to being on layoff for at least 35 weeks. As such, they were only ever on "temporary layoff" and therefore not entitled to grow-in benefits.

Justice Sachs writing for the court provides an overview of the key guidance in *Vavilov*. She notes that the SCC has repeatedly emphasized that a reviewing court cannot interfere with a decision because it would have decided the matter differently or because an alternate interpretation would have been open to the arbitrator. However, decisions that contain a

"fundamental gap" cannot be sustained even if the outcome could be reasonable in other circumstances. Justice Sachs writes that a gap "is only fundamental if it could have affected the result."

Justice Sachs held that Arbitrator Petryshen's decision did contain a fundamental gap, in that the decision failed to consider the application of section 4(2) of Regulation 288/01 under the ESA to the facts of the case. Justice Sachs noted that neither party had put this section before the Arbitrator or the court. However, the court had requested written submissions on the issue, which the parties provided.

Section 4(2) provides that if an employer that is bound by a collective agreement will be laying off an employee for a period that may exceed the period of temporary layoff and doing so might be considered a breach of the collective agreement, then that employer "may provide the employee with a written notice of indefinite lay-off and the employer shall be deemed as of the date on which that notice was given to have provided the employee with a notice of termination."

Justice Sachs held that a failure to consider section 4(2) constituted a fundamental gap because a consideration of the section could have affected the outcome. If the section applied, then the Employer would be deemed to have issued notices of termination rather than layoff notices and their PBA entitlement to grow-in benefits could be triggered. Further, based on the record before the court, there is reason to think that the section applies, but this would depend on questions of fact that the Arbitrator did not consider. Specifically, the Arbitrator had not addressed whether the layoffs breached the collective agreement or whether the Employer provided the grievors with "written notice of indefinite lay-off" as described in section 4(2). As such, Justice Sachs allowed the judicial review and set aside Arbitrator Petryshen's decision.

In terms of remedy, the Union had urged the court to exercise its discretion not to remit the matter to the original decision-maker. The Union noted that the Arbitrator had heard the grievance toward the end of 2016 but did not issue a decision until December 2018. In the meantime, the grievors had received a significantly reduced pension. In considering the Union's submissions on this matter, Justice Sachs returns to the SCC's guidance in *Vavilov*. She notes that the SCC held that where a decision cannot be upheld, "it will most often be appropriate to remit the matter to the decision maker", particularly where the decision maker has not had a "genuine opportunity to weigh in on the issue in question." However, this is to be weighed against "concerns related to the proper administration of justice" including the need to ensure access to justice. Justice Sachs writes that she agrees with the Union that there is a "real concern" about delay in this case. However, she holds that this must be balanced against the fact that a specialized decision-maker has not had an opportunity to consider the application of section 4(2) to the facts of the case. Further, she notes that the prejudice suffered by the grievors can be compensated by a retroactive order if their grievances are ultimately successful.

Justice Sachs determines that the appropriate balance in this case is to remit the matter to a *different* arbitrator for a full hearing on the merits, in accordance with the Court's reasons. Her decision states, "I am remitting the matter to a different arbitrator because the Arbitrator took two years to render his decision, a delay that is unacceptable in any context, let alone a context where specialized decision making was put in place to render efficient and timely justice."

BRITISH COLUMBIA

9. *Barker v. Molson Coors Breweries and Another (No. 3),* 2019 BCHRT 192

Complainant John Barker faced significantly reduced healthcare benefits when he turned 65, even though he was still a full-time employee. 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*[8] 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."

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.[9]

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."

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

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

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.[10] 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.

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."[11] 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.[12] 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*[13], 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

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

11 *Barker* at paras 25-26.

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

13 RSO 1990, c. H.19.

Canada's (SCC) decision *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan*.[14]

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".[15] 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 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.[16]

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."[17]

10. *UA Full-Time Salaried Officers v. UA of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, Local 170,* 2020 BCSC 422

The Supreme Court of British Columbia has ruled that a dispute over the alleged failure of a local union to enrol and make contributions into a pension plan for certain employees was not a suitable case for disposition by summary trial.

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[14] 2008 SCC 45 [*Potash*].

[15] *Human Rights Code*, RSNB 1973, c H-11, s. 3(6)(a).

[16] *Barker* at para 37.

[17] *Barker* at para 57.

Background

The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada ("UA International") administers a pension plan (the "UA Plan"). The governing body of the UA Plan is the Board of Trustees of the United Association Full-time Salaried Officers and Employees of Local Unions, District Councils, State and Provincial Associations Pension Plan (the "Board of Trustees"). UA, Local 170 is a local union affiliated with UA International ("Local 170").

The crux of the litigation was whether the UA International Constitution (the "UA Constitution") made it mandatory for Local 170 to enrol and remit contributions into the UA Plan for the organizers it employed. Local 170 had not done so for new organizers since 2006, and instead had remitted contributions for these employees into their local plan (the "Local Plan").

UA International and the Board of Trustees took the position that the UA Plan and the trust agreement which had created it (the "Trust Agreement") were incorporated by reference into the UA Constitution, and Local 170's failure to enrol and remit contributions for its organizers constituted a breach of contract, a breach of its trust obligations under the UA Plan, a breach of provincial legislation, unjust enrichment, negligence, and/or conversion.

Local 170 argued that the UA Constitution had been amended to make the participation of its employees in the UA Plan voluntary. It also submitted limitation period and estoppel defences. The estoppel defence was premised on Local 170's allegation that UA International sent a letter to its local unions expressly advising them that they were no longer required to enrol organizers into the UA Plan (the "UA Representation").

UA International and the Board of Trustees argued that this representation had never been made and brought an application for summary trial, claiming, amongst other things, roughly $1 million in damages.

Decision

The court identified the two main issues to be resolved as follows: (1) whether, without the alleged UA Representation, Local 170 was contractually required to make contributions to the UA Plan for the organizers in question, despite there being no express obligation to make mandatory contributions in the UA Constitution; and (2) if there was such a requirement, whether the UA Representation relieved Local 170 of this obligation.

In regards to the first issue, the court found that there were gaps in the evidence which were important for interpreting the relevant provisions of the UA Constitution. For example, the court held that without the typical language which would serve to incorporate the UA Plan and Trust Agreement into the UA Constitution by reference, the issue was not straightforward to resolve.

The court also found the plaintiffs' arguments on contractual interpretation to be vague and that during oral submissions they seemed to argue that the UA Constitution should be rectified to express the parties' true intentions, despite the plaintiffs' failure to plead rectification. The court held that the plaintiffs' pleadings would have to amended, and that new evidence would have to be tendered, in order for this argument to succeed.

In regards to the second issue, the court found that there was conflicting evidence as to whether or not the UA Representation existed and that filling certain evidentiary gaps would assist in resolving the conflict. For example, there was no evidentiary basis on the record to summarily reject as not credible the defendant's evidence about the existence of the UA Representation.

The court also found a lack of cooperation on the part of the plaintiffs to provide evidence which might assist the defendant in corroborating its evidence. While the court acknowledged that there may be no strict obligation for the plaintiffs to do so, and the defendant could have done more to marshal the evidence it sought, the plaintiffs' failure to cooperate and their failure to put certain witnesses before the court weighed against them when determining whether a summary trial was appropriate.

The court rejected the plaintiffs' argument that they could not be bound by an individual who at the relevant time was the UA International General President and a member of the Board of Trustees, and whom one of the defendant's witnesses deposed authored the UA Representation. The court further held that, based on the record, it would have been reasonable for Local 170 to rely on such a representation if it had been made.

The court found that it was unable to determine based on the record that Local 170 would suffer no harm or detriment from having to make contributions to the UA Plan, as it had already made contributions to the Local Plan, and the court was not in a position to assess the likelihood that it would have these contributions returned.

Finally, the court rejected the plaintiffs' argument that the urgency of the matter weighed in favour of summary determination, as the plaintiffs had not provided any explanation for their own delay in advancing the litigation and there was a lack of evidence that the retirees at issue would suffer prejudice without their pension payments.

11. ***Trustees of the IWA-Forest Industry Pension Plan v. Log Smart Contracting Ltd.*, 2020 BCCRT 730**

Trustees of the IWA-Forest Industry Pension Plan v. Log Smart Contracting Ltd., 2020 BCCRT 730 ("*Log Smart*") is a decision by the British Columbia Civil Resolution Tribunal ("BCCRT") concerning personal liability for the directors and owners of a corporation for breach of trust. The BCCRT is a dispute resolution body, which has jurisdiction over small claims under s.118 of British Columbia's *Civil Resolution Tribunal Act*, with a mandate to provide fast, efficient, flexible and informal dispute resolution.

In *Log Smart*, the applicant Trustees of the IWA-Forest Industry Pension Plan, the administrators of a pension and LTD plan for B.C. Forestry workers, alleged that the Respondent Log Smart Contracting Ltd. breached its trust obligations by failing to pay its contributions to the pension trust and to the LTD trust as required by the plans. The BCCRT held that only one of the two directors and owners were jointly and severally liable, along with the corporation Log Smart Contracting Ltd. to pay the Applicant pension trustees the outstanding pension plan and LTD plan contributions.[18]

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[18] *Trustees of the IWA-Forest Industry Pension Plan v. Log Smart Contracting Ltd.*, 2020 BCCRT 730 at para 35.

The decision of the BCCRT in finding personal liability for the breach of trust of the corporation turned on the knowledge the owners and directors had of Log Smart's breach. After finding that Log Smart did owe the pension and LTD plan trustees outstanding contribution amounts, the BCCRT determined that although the two directors and owners of Log Smart were strangers to the trust agreements that they had signed on Log Smart's behalf, they may still be personally liable if they knew that the trust existed and that Log Smart's breach was dishonest and fraudulent.

The BCCRT relied heavily on the Supreme Court of Canada's decision in *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787 ("*Air Canada*"). In that case, the Court held that "… Whether personal liability is imposed on a stranger to a trust depends on the basic question of whether the stranger's conscience is sufficiently affected to justify the imposition of personal liability." The Court held that strangers to a trust could be found personally liable for breach of trust if they knowingly participate in the breach.

The Supreme Court in *Air Canada* cited the seminal 1874 decision of the English Court of Appeal in Chancery *Barnes v. Addy*, which established two heads of liability in which a stranger to a trust could be held personally liable to the beneficiaries: by being in knowing receipt and "chargeable" with trust property, known as "knowing receipt", or by knowingly assisting in dishonest or fraudulent conduct on the part of the trustees, or the "knowing assistance" head of liability.[19] Additionally, someone can be personally liable as a "*trustee de son tort*", which are individuals who take it upon themselves to act as trustees, and possess and administer trust property without having actually been appointed a trustee.

In *Log Smart*, the BCCRT was concerned with the "knowing assistance" head of liability. The BCCRT tacked personal liability for the breach of trust onto Mr. Gibb, the owner-director and sole employee of Log Smart, while absolving Ms. Gibb, the other of Log Smart's two owners, of any personal liability relating to Log Smart's breach of trust. The BCCRT found that Mr. Gibb had full knowledge of the nature of Log Smart's breach, while Ms. Gibb did not, therefore only the former of the two directors was held personally liable.

What degree of knowledge is required to establish personal liability, though? To answer this question, the BCCRT turned again to *Air Canada*. In *Air Canada*, the Supreme Court adopted a two-pronged test: there must be both actual knowledge of the trust's existence, and actual knowledge (recklessness or wilful blindness would suffice) that what is being done is improperly in breach of that trust.[20] The Supreme Court also addressed a distinction in the knowledge requirement that exists between statutory and contractual trusts, a point which was particularly relevant in the *Log Smart* case before the BCCRT. For the purposes of the first "prong" of the test, which requires actual knowledge of the trust's existence, a person is *deemed* to have knowledge of the trust's existence if the trust is a statutory trust. If the trust is created by contract, then whether the person had knowledge of its existence will turn on their familiarity or involvement with the contract.[21]

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[19] *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787, at paras 35-38.

[20] *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787, at para 39.

[21] *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787, at para 39.

The first prong of the test adopted by the Supreme Court in *Air Canada* is the gatekeeper to a finding of personal liability for breach of trust; a stranger to a trust cannot be held personally liable for knowingly assisting in a breach of trust if they did not have knowledge of that trust's existence. In *Log Smart*, the pension trust at issue was statutory, so Mr. Gibb and Ms. Gibb were both *deemed* to have knowledge of its existence, and the BCCRT did not have to dive into the evidence any further to establish that Mr. Gibb and Ms. Gibb knew of the pension plan trust. However, the LTD benefit trust was contractually created, so the BCCRT had to consider Mr. Gibb and Ms. Gibb's level of familiarity and involvement with the contract that created it. Mr. Gibb signed the participation agreement which contained Log Smart's obligations to hold the LTD contributions in trust for the Applicants, which was the basis for the BCCRT to find that he had knowledge of the existence of the contractual LTD trust. Ms. Gibb had no such familiarity and involvement with the LTD trust participation agreement, and thus was found to have not had any knowledge that Log Smart was obligated to hold the contributions to the LTD plan in trust. Ms. Gibb's status as one of only two owners and directors of Log Smart was not sufficient to establish that she had knowledge of the contractual trust over the LTD plan contributions.

Turning to the second prong of the test for personal liability for "knowing assistance" in breach of trust, that is, whether Mr. Gibb and Ms. Gibb had actual knowledge that what was being done was improperly in breach of trust, the BCCRT again invoked the Supreme Court's decision in *Air Canada*. In that case, the Supreme Court conceptualized a workable standard for determining what conduct by a stranger to a trust would rise to the level of "dishonest and fraudulent", such that the stranger's conscience would be sufficiently affected to justify the imposition of personal liability. That standard is "the taking of a knowingly wrongful risk resulting in prejudice to the beneficiary…".[22] The BCCRT applied this standard to both Mr. Gibb and Ms. Gibb, as although Ms. Gibb was not found to have knowledge of the contractual LTD trust, she was deemed to have knowledge of the statutory pension trust. The BCCRT found that Mr. Gibb was responsible for comingling the trust funds with funds in Log Smart's general account, and also directed that the funds be used to pay for a machine repair in lieu of paying the overdue contributions to the pension and LTD plans.[23] Since there was no indication the Ms. Gibb also directed these improprieties regarding the trust funds owed to the pension and LTD plans, only Mr. Gibb was found to be personally jointly and severally liable along with Log Smart for the breach of trust.

MANITOBA

12. *Hall et al v. Canadian National Railway,* 2019 MBQB 125

In *Hall et al v. Canadian National Railway*, the plaintiffs sued Canadian National Railway ("CNR") after it reversed past practice and denied them unreduced early retirement consent pensions. Nearly five years after filing their original claim, which alleged claims of breach of fiduciary duty and unjust enrichment, the plaintiffs filed a motion for leave to amend the claim and add allegations of breach of contract and breach of contractual duties of good faith and honest performance. Upholding the decision of the Master below, McCawley J. of the Manitoba Court of Queen's Bench dismissed the motion to amend for all but one of the plaintiffs, on the

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[22] *Air Canada v. M & L Travel Ltd*., [1993] 3 S.C.R. 787, at para 60.

[23] *Trustees of the IWA-Forest Industry Pension Plan v. Log Smart Contracting Ltd.*, 2020 BCCRT 730 at para 33.

basis that the amendments created new causes of action for which the limitation period had expired.

Facts

Under the terms of the CNR pension plan, members whose age and service totalled 85 were entitled to an unreduced early retirement pension payout or a deferred pension, subject to the consent of CNR. Prior to the plaintiffs' retirement, CNR informed them in writing that it would no longer consent to unreduced pensions for employees who resigned prior to age 55.

The plaintiffs resigned from CNR prior to reaching age 55 and were accordingly denied an unreduced early retirement pension. Subsequently, the plaintiffs brought suit against CNR on the basis that but for its change in practice they would have been entitled to unreduced pensions. In the original statement of claim, the plaintiffs alleged breach of fiduciary duty and unjust enrichment. They sought declaratory relief or, in the alternative, damages against CNR.

Following lengthy delays and an abandoned motion for summary judgment by the defendant, the plaintiffs filed the motion to amend the statement of claim, nearly five years after the original claim was filed. The plaintiffs sought to add two additional allegations against CNR:

1. First, the plaintiffs sought to add a breach of contract claim, on the basis that CNR was required to provide them with consent pensions under the terms of the pension plan and the vesting provisions in section 17 of the *Pension Benefits Standards Act*, R.S.C., 1985, c. 32 (2nd Supp.) ("*PBSA*"). CNR's written notification of its change in practice did not constitute a valid amendment to the plan because it did not comply with:

    (a) the provision for the vesting of benefits, per section 17 of the *PBSA*;

    (b) the requirement that the Superintendent of Financial Institutions consent to an amendment, per section 10.1(2) of the *PBSA*;

    (c) the rights of information set out in section 28 of the *PBSA*; and,

    (d) the registration and filing requirements, per section 8512(2) of the *Income Tax Regulations*.

2. Second, the plaintiffs sought to add allegations that CNR breached its contractual duties of good faith and honest performance.

Decision

McCawley J. upheld the decision below and dismissed the appeal for all but one of the plaintiffs, finding that the amendments constituted new causes of action that were out of time.

The plaintiffs had argued that the proposed amendments supplemented the claim as originally advanced. In CNR's statement of defence, it made reference to its compliance with "applicable legislation". The plaintiffs asserted that as they were deemed to have denied this allegation, breach of contract had been put in issue. And, the plaintiffs argued that the allegations of breach of contractual duties of good faith and honest performance were implied in the statement of

claim, when it was "read broadly". Further, the underlying material facts were already substantially pleaded, and the duty of good faith was simply a legal conclusion flowing from the contract, per the decision of the Supreme Court of Canada in *Bhasin v. Hrynew*, 2014 SCC 71.

Ultimately, McCawley J. rejected the plaintiffs' arguments and held that the amendments constituted new causes of action. McCawley J. applied the "alternative method" set out by the Manitoba Court of Appeal in *Britton v. Manitoba*, 2011 MBCA 77, wherein there is a new cause of action if "the amendments introduce a new set of facts that provides the basis for an action in court". In the *Britton v. Manitoba* case, the Court of Appeal held that courts should ask whether or not the defendant, if successful in defending against the plaintiff's action as pleaded in the original statement of claim, could still be liable for the claims set forth in the amendments.

Applying the test from *Britton v. Manitoba*, McCawley J. held that the amendments constituted new causes of action. If CNR was successful in defending against the original allegations, it could still be liable for the new claims for breach of contract and breach of contractual duties of good faith and honest performance.

McCawley J. went on to find that the new causes of action were out of time for all but one of the plaintiffs. Per McCawley J., the "general rule" was that amendments that seek to introduce a new cause of action to a statement of claim after the limitation period has expired will not be permitted, unless special circumstances exist or an order is obtained under *The Limitation of Actions Act*, C.C.S.M., c. L150. All but one of the plaintiffs had resigned more than six years prior to the filing of the motion to amend the statement of claim, and these plaintiffs were therefore out of time.

Further, McCawley J. held that there was no evidence of special circumstances that would justify allowing the amendments, and in any event this argument was not vigorously pursued by the plaintiffs.

With respect to the sole plaintiff that was within the limitation period, McCawley J. allowed the motion. McCawley J. declined to dismiss the amendments for this plaintiff on the basis of unreasonable delay, because while there were considerable unexplained delays, it would have been inequitable to bar the timely plaintiff's claim given that it was within the limitation period.

13. ***Vogel v. Red River College,* 2019 MBQB 182**

Facts

Gregory McLachlan had worked as an instructor at Red River College for 33 years when he died on July 24, 2017. He had a life insurance policy through his employer that paid five times his annual salary to his designated beneficiaries. From 2000 until his death, Mr. McLachlan had lived with Tammy-Lee Vogel as common law spouses. Mr. McLachlan had two adult daughters from a previous marriage, Ashley and Amy, whom he had listed as his beneficiaries on the life insurance policy.

Ms. Vogel claimed that Red River College was negligent in not honouring Mr. McLachlan's request to change the beneficiary designation from his daughters to herself, and sought damages equivalent to five times Mr. McLachlan's annual salary.

In June 2017, Mr. McLachlan was diagnosed with terminal cancer. In early July, he was told death was imminent, and focused on getting his affairs in order. Ms. Vogel submitted that this included changing the beneficiaries on his life insurance policy through his employer, and on a privately-held policy.

On July 21, Mr. McLachlan and Ms. Vogel meet with Maria Evaristo, a pay and benefit specialist in Red River College's human resources department. Ms. Evaristo had begun working at the College in 2009, and her role involved explaining leave, benefits, insurance and tax information to new employees, and to respond to inquiries from existing employees about changes to dependants, beneficiaries and life insurance.

The parties met for approximately 45 minutes. The main factual dispute between them is the purpose and events of that meeting.

Ms. Evaristo testified that Mr. McLachlan told her that, because of his diagnosis, he wanted to go over all his forms to make sure his beneficiaries, life insurance and benefit plan were in order. She testified that they went over life insurance information, his health benefit plan, retirement and severance pay. His main question was whether it made sense to use his sick leave and then retire, or to retire straight away. Ms. Evaristo undertook to prepare and mail a retirement estimate, and the pension and group life insurance booklets. She was going to include a change of beneficiary form, which is standard practice an employee requests the booklets. She testified that Mr. McLachlan didn't mention the beneficiary form or ask to change the designation. If he had, she would have gotten the paperwork, which was stored only 15 metres away from where they were sitting, and Mr. McLachlan could have filled it out immediately.

Ms. Vogel testified that the purpose of the meeting was to change the beneficiary designation from Ashley and Amy to her. She testified that Mr. McLachlan told Ms. Evaristo he wanted to change the beneficiary, and that Ms. Evaristo undertook to include this form in a package with retirement documentation.

Positions and Decision

Ms. Vogel argued that but for Ms. Evaristo's negligence, she would have received the proceeds of the insurance policy, and that the College is vicariously liable for that negligence.

Red River College argued that Mr. McLachlan did not ask to change his beneficiary designation. In the alternative, it argued that Ms. Evaristo did not owe a duty of care to Ms. Vogel, there was no breach of any duty of care, and any breach was not a sufficient cause of Ms. Vogel's damages. In the further alternative, it submitted that if there was a finding of liability, Ms. Vogel was contributorily negligent.

Perlmutter A.C.J.Q.B. found that Ms. Vogel had not proven on a balance of probabilities that Mr. McLachlan had told Ms. Evaristo he wanted to change the beneficiary on his life insurance policy. His reasons included:

- It is logical that if Ms. Evaristo had known Mr. McLachlan had wanted to change his beneficiary, she would have had the form ready for him to complete. Alternatively, if he had mentioned this in the meeting, she would have gotten the form, which was located in nearby.

- On July 24, Ms. Evaristo had prepared a payment estimate, which she had undertaken to do. This is consistent with Ms. Evaristo's testimony that the July 21 meeting focused on whether Mr. McLachlan should use his sick days or just retire.

- Ms. Evaristo testified that upon seeing the beneficiary designation form, Mr. McLachlan expressed happiness that Ashley and Amy would be taken care of. Ms. Vogel admitted he could have said this.

- Ms. Vogel is receiving pension benefits from Red River College; Mr. McLachlan did not need to change the beneficiary to ensure she was taken care of.

- Text messages between Ms. Vogel and Mr. McLachlan about the insurance policies are vague. It is reasonable to conclude Mr. McLachlan meant to change the beneficiary on his privately-held policy but not his employer-sponsored policy, or that they hadn't agreed to change the beneficiary.

Perlmutter A.C.J.Q.B. also found that Ms. Vogel had not established Red River College or Ms. Evaristo owed her a duty of care. Ms. Evaristo was not holding herself out as having special skill, judgment or knowledge. Even if Mr. McLachlan had asked to change his beneficiary, he only wanted Ms. Evaristo to perform an administrative task for him.

Finally, Perlmutter A.C.J.Q.B. found that even if there was a duty, there was no breach thereof. To find otherwise would be to impose strict liability, especially since Mr. McLachlan did not tell Ms. Evaristo there was any urgency to change the beneficiary.

Perlmutter A.C.J.Q.B. therefore dismissed Ms. Vogel's action.

14. ***The City of Winnipeg v. The Winnipeg Police Association and the Winnipeg Police Senior Officer's Association,*** **(2020)**

The City of Winnipeg v. The Winnipeg Police Association and the Winnipeg Police and Senior officers' Association is an arbitration award decided by Arbitrator Michael Werier in March 2020. The dispute involved the City of Winnipeg ("the City") and its two police associations ("the Associations"), over the issue of whether the City could unilaterally change the terms of the Associations pension plan and whether the City would be liable for damages to the Associations and its members if it was found that the City did not have a right to alter the terms of the benefits received by Police pension plan members.

By amending By-law 99/2019, enacted in December 2019, the City intended to reduce the benefits contained in the Police Associations pension plan. This included changing early retirement rights and bridge benefits, excluding overtime from pensionable earnings, and increasing employee contribution rates.

The Associations filed a grievance challenging the City's unilateral amendments to the By-law, which Arbitrator Werier upheld. In his decision, Arbitrator Werier ordered the City of Winnipeg to reverse the changes that it had made to the Associations' pension plan, determining that changes to the plan could not be made unilaterally by the City. Instead, such change must be negotiated by the parties. Arbitrator Werier issued a declaration that the City passing the By-law was amounted to a breach of the collective agreement, and ordered the City to abstain from

further changing to the pension plan except as negotiated by the parties. On the issue of damages, Arbitrator Werier ordered the City to pay damages to the Associations, as well as damages to each individual member of the bargaining unit.

The thrust of the Associations' arguments was that there was never an intention in the collective agreement to grant the City power to unilaterally amend the pension plan benefits, and that changes to the pension plan have been negotiated between the parties for decades. The Associations argued that the past practice of negotiating any changes to the pension plan (a practice spanning over 40 years), as well as the fact that the City had never made unilateral changes to the pension plan before, was evidence of a common understanding of the meaning of the collective agreement, and that changes to the pension plan had to be negotiated or realized through interest arbitration. In short, the position of the Associations was that the collective agreement contemplates negotiations concerning issues of modifications to the pension plan, and the parties comported themselves in accordance with this understanding for nearly half a century, and the sudden unilateral changes to the pension plan enacted by the City must be rolled back.

The City in response argued that it, under the By-law, had the right to amend the agreement without the consent of the Associations. This right was incorporated in the agreement between the parties, and there is no express language in the collective agreement that curtails the City's right to do so. As a result, the City argued that there had been no breach of the collective agreement and therefore the Associations had no right to damages.

Arbitrator Werier's decision turned on the interpretation of the By-law and the collective agreement, particularly, whether the collective agreement incorporated the entire By-law dealing with the pension plan, or merely schedule "A", which was the pension plan itself. Arbitrator Werier found that the collective agreement only incorporated schedule "A", which meant that the City had no unilateral right to alter the pension plan. Arbitrator Werier interpreted the language of the collective agreement, particularly that the logical common sense meaning words that the collective agreement incorporated the By-law "*only insofar as it is applicable to each individual member*", to mean that the entire By-law was not being incorporated into the collective agreement. Although the words '"Schedule '"A'" were not expressly used, Arbitrator Werier concluded that there was no other logical reason that the particular words in the provision would have been used if not to only incorporate Schedule "A" and not the entire By-law. Particular weight was given to the fact that express language giving the City a unilateral right to make changes to the pension plan was not included in the agreement. The Arbitrator took note of the fact that sophisticated parties like the ones involved in this case could easily negotiate such language if that was their intention. Arbitrator Werier also held that looking at the long past practice of negotiating such changes between the parties was not akin to using extrinsic evidence to resolve contractual ambiguity. Rather, the conduct of the parties was a tool to better understand the meaning of the agreement.

On the issue of damages, Arbitrator Werier, while not prepared to make a finding of bad faith on the part of the City, held that in light of the lengthy history of negotiating pension plan changes between the parties, the City's conduct was more egregious than a legitimate disagreement of interpretation, and a declaration alone would not be a sufficient remedy. Considering the evidence of stress and harm to individual members with due regard to the importance of a pension to one's life, Arbitrator Werier settled on $40,000 in damages to the Associations and $400 to each individual member of the bargaining unit.

ALBERTA

15. *Stalzer (Estate) v. Stalzer,* 2019 ABQB 658

Facts

Frank Stalzer and Elizabeth Stalzer began cohabiting in 1988, were married in 1990, had three children, and separated on August 25, 2006. Mr. Stalzer died on August 25, 2016. The parties never divorced. This decision concerns the final division of matrimonial property.

Loparco J. found that the parties were permitted to request unequal division of matrimonial property, and that the date of trial should be used as the valuation date. The bulk of the decision was about if and how various assets should be divided. Loparco J. ruled on the division of the matrimonial home, RRSPs, the mobile home, vehicles, bank accounts and certain household items.

As for pension plans, both parties served in the Canadian Armed Forces ("CAF") and were therefore members of the CAF pension plan. Both were active members on the date of marriage; Ms. Stalzer retired from the armed forces in 2000; Mr. Stalzer did so at some point prior to the parties' separation. After leaving the military, Mr. Stalzer became a member of the Local Authorities Pension Plan ("LAPP").

As of December 1, 2011, Mr. Stalzer's entitlement to Ms. Stalzer's CAF pension was valued at $112,973.82. As of December 5, 2011, Ms. Stalzer's entitlement to Mr. Stalzer's CAF pension was valued at $208,332.32. Prior to Mr. Stalzer's death, each party could have applied for a division of the other's pension benefits at source, as per s. 4(1) of Alberta's *Pension Benefits Division Act.*

Ms. Stalzer receives survivor benefits from the CAF pension, as the parties were still married when Mr. Stalzer died. Neither party presented evidence as to the amount of these monthly benefits, the total that Ms. Stalzer has received, or the total that she expects to receive.

The CAF pension also paid a supplementary death benefit of approximately $135,500 to Mr. Stalzer's Estate. The beneficiaries of the Estate are the three Stalzer children. Ms. Stalzer concedes this benefit is not divisible: essentially a life insurance policy, it is exempt from division under s. 7(2)(e) of the *Matrimonial Property Act*.

Mr. Stalzer's Estate also received $127,055.22 net in death benefits from the LAPP.

Positions and Decision

CAF pensions

Ms. Stalzer argued that it is unfair for the court to divide her CAF pension given that Mr. Stalzer's CAF pension is no longer available for division, and that her CAF pension should only be divisible if Mr. Stalzer's LAPP death benefits are divisible.

Loparco J. dismissed these arguments: the legislation permits Mr. Stalzer's pension to be divided after death, with regulations specifically referring to the former spouse of a deceased member applying to a division of pension benefits. Further, the LAPP death benefits must be divided according to statute.

Ms. Stalzer also submitted that her pension is not divisible at source because the CAF won't provide funds to a deceased person. Loparco J. pointed to s. 8(5) of the *Pension Benefits Division Act*, which states that an amount that can't be transferred because the former spouse has died shall be transferred to their estate.

Ms. Stalzer further argued for an inequitable division of her CAF pension, in favour of herself.

Loparco J. considered s. 8 of the *Matrimonial Property Act*, which enumerates factors to consider when making property distributions between spouses:

> 8 The matters to be taken into consideration in making a distribution under section 7 are the following:
>
> (a) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;
>
> (b) the contribution, whether financial or in some other form, made by a spouse directly or indirectly to the acquisition, conservation, improvement, operation or management of a business, farm, enterprise or undertaking owned or operated by one or both spouses or by one or both spouses and any other person;
>
> (c) the contribution, whether financial or in some other form, made directly or indirectly by or on behalf of a spouse to the acquisition, conservation or improvement of the property;
>
> (d) the income, earning capacity, liabilities, obligations, property and other financial resources
>
> (i) that each spouse had at the time of marriage, and
>
> (ii) that each spouse has at the time of the trial;
>
> (e) the duration of the marriage;
>
> (f) whether the property was acquired when the spouses were living separate and apart;
>
> (g) the terms of an oral or written agreement between the spouses;
>
> (h) that a spouse has made
>
> (i) a substantial gift of property to a third party, or

> (ii) a transfer of property to a third party other than a bona fide purchaser for value;
>
> (i) a previous distribution of property between the spouses by gift, agreement or matrimonial property order;
>
> (j) a prior order made by a court;
>
> (k) a tax liability that may be incurred by a spouse as a result of the transfer or sale of property;
>
> (l) that a spouse has dissipated property to the detriment of the other spouse;
>
> (m) any fact or circumstance that is relevant.

Loparco J. noted that Mr. Stalzer had superior earning capacity, more financial resources, and he might have underpaid spousal and child support. However, Ms. Stalzer had not contributed to the CAF pension plan post-separation, and there were "lengthy periods" during which she had not paid child support. Therefore, Loparco J. found "little evidence justifying an unequal division". She went on to order that Ms. Stalzer's CAF pension be divided at source, and that a lump sum value of Mr. Stalzer's interest be paid to his Estate.

For the same reasons, along with the fact that Mr. Stalzer didn't contribute to his CAF pension post-separation either, Loparco J. found that his pension should also be divided equally.

However, the Estate submitted that Ms. Stalzer's survivor benefit should be considered when determining the appropriate equalization payment. As noted above, neither party made submissions on how these benefits should be considered.

Loparco J. looked at s. 14(1)(d) of the Regulations of the *Pension Benefits Division Act*:

> 14(1) The accrued pension benefits of a member shall be determined in accordance with the member’s pension plan and, where applicable, the
>
> *Supplementary Retirement Benefits Act*, subject to the following rules:
>
> ...
>
> (d) any benefits that are or may become payable to the member’s spouse, former spouse, common-law partner or children on the death of the member are to be excluded; and

Loparco J. went on to note:

> If the word “excluded” means “deducted”, then any survivor benefits that are payable to Ms. Stalzer or the children will be

> deducted from the calculation of the value of Mr. Stalzer’s pension benefits accrued during the period subject to division.

Loparco J. directed Ms. Stalzer to obtain an estimate of her entitlement to Mr. Stalzer's CAF pension, confirm the gross monthly amount of her survivor benefits, how much she has received to date, and an estimate of the total value of her survivor pension. Once she has obtained that information, the parties are to bring the action back before Loparco J. for a determination on how Mr. Stalzer's CAF pension will be divided at source.

LAPP Death Benefits

The Estate argued that the LAPP death benefits belong to the beneficiaries designated in Mr. Stalzer's will (i.e., the three Stalzer children).

Ms. Stalzer submitted that because Mr. Stalzer commenced his LAPP pension during the marriage, the death benefits should be considered matrimonial property.

Loparco J. considered the definition of surviving "pension partner" in the *Employment Pension Plans Act* ("EPPA") and the repealed *Local Authorities Pension Plan* regulations that was in effect when Mr. Stalzer died. Both defined "pension partner" as a legally married spouse who had not been living separate and apart from the member for a continuous period of more than three years.

As the parties had separated six years before the death of Mr. Stalzer, Ms. Stalzer was not entitled to pension partner survivor death benefits. Similarly, she could not receive the commuted value of the LAPP pension.

The EPPA states if there is no surviving pension partner, the commuted value and any benefits are to be paid in a lump sum to the designated beneficiary or the estate.

The court referenced an earlier Supreme Court of Canada case (*Bugoy v. Donkin*, [1985] 2 SCR 85), which held that the death of a spouse does not play a role in determining whether the presumption for equal distribution should be set aside. The LAPP death benefits were paid to the Estate and not to the children directly. Had Mr. Stalzer not died, the pension would have been included in his matrimonial property. Therefore, Loparco J. found that Ms. Stalzer was entitled to half the pension that accrued during the parties' marriage and before the date of separation.

Loparco J. directed the Estate to ask the LAPP administrator to calculate the value of Mr. Stalzer's pension between the date of marriage and the date of separation, and for the Estate to pay Ms. Stalzer her proportionate share of the net death benefits.

SASKATCHEWAN

16. *Re CCRL Petroleum Employees' Pension Plan,* 2019 (Sask. Superintendent)

Background

On December 19, 2019, Saskatchewan's Superintendent of Pensions provided written reasons with respect to an amendment filed by the Consumers' Co-operative Refineries Limited

("CCRL") to the CCRL Petroleum Employees' Pension Plan regarding members who serve active management roles with the employer.

The amendments in question would make nine key changes to the plan as it applies to active management employees, including partially terminating the plan as of December 31, 2019. The amendments would also freeze earnings growth, continuous service and pensionable service of active management employees, change the way in which indexing is determined and ultimately close the plan to new management employees. The Superintendent registered the amendment, notwithstanding great opposition from many stakeholders, including retirees and current plan members.

Summary

The plan in question was a non-contributory defined benefit plan originally registered in 1971. In February 2007 the plan was amended as a result of collective bargaining to include a provision that the plan may not be amended, modified or terminated without the mutual agreement between the CCRL and the union. This provision was modified to exclude amendments of the plan that solely affect management members.

In deciding whether to register the amendment the Superintendent considered whether the amendments, modifications or the partial termination contravened s.19(3) of the *Pensions Benefits Act* ("PBA"). Section 19(3) of the Saskatchewan PBA reads:

> 19(1) Subject to subsections (2) to (5), a plan or amendment to a plan may be made effective from a date before its registration or the application for its registration.
>
> (3) No amendment to a plan shall reduce a person's benefits that accrued before the effective date of the amendment.

The Superintendent began by noting that there are no court decisions interpreting s.19(3). The Superintendent turned to decisions interpreting similar clauses and the language of "accrued benefits" in other provinces.

The Superintendent first turned to the Supreme Court of Canada decision in *Schmidt v. Air Products Canada Ltd.*, (1994) 2 SCR 611. The Superintendent reviewed the findings of Justice Cory writing for the majority and gleaned a "common principle" being that a potential right or interest of plan members that has not yet crystalized or become definite because some prerequisite is still unfilled has not "accrued". In order for a benefit or interest under a pension plan to have accrued, the right to obtain that benefit or interest must be complete. There must be no further contingencies. According to the Superintendent, subsequent cases are quick to distinguish Schmidt and apply it narrowly to the issue of the right to pension surplus or to the right to take contribution holiday, but in his view, the decision should be viewed with a broader lens.

The Superintendent then turned to the *Alcan Smelters*, 2001 BCCA 303 decision of the British Columbia Court of Appeal. In *Alcan*, the Court of Appeal considered whether amendments relating to the definition of earnings contravened the pension plan provision that prohibited amendments that "adversely affect any right with respect to benefits which have accrued under

the plan prior to the time such action is taken". In *Alcan*, Justice Levine confirmed that the certain non-contingent right of the employees provided in the plan to receive the value of their pre-1990 years of service based on earnings that included overtime would be preserved by the amendment but any future service or earnings included in determining their retirement benefits has not accrued because the future earning has not happened yet.

The Superintendent went on to review case law from other provinces, turning next to a Manitoba Court of Appeal decision regarding whether Great West Life could amend the way indexing benefits were calculated for retirees.

In *Dinney v. Great West Life*, 2005 MBCA 36, Justice Scott distinguished *Schmidt* on the grounds that the case was on the narrow issue of the right to surplus. According to the Superintendent, the Manitoba Court of Appeal followed *Schmidt* and decided that accrued rights mean the same thing as vested rights: those that have matured or are fixed and unconditional. To determine a fixed benefit he turns to the wording of the plan, ultimately concluding that the right of employees to receive future indexing based on the formula set out in the plan vested on the date of retirement and could not be altered.

The Superintendent noted that the one decision that is truly distinguishable from the preceding line of cases is the Alberta Court of Appeal decision in *Haliburton Group Canada Inc. v. Alberta*, 2010 ABCA 254. The Court of Appeal considered whether an amendment to freeze earnings under a defined benefit pension plan as a result of a conversion to a defined contribution plan contravened the *Alberta Employment Pensions Act*. The Superintendent noted that key to the decision in Haliburton was the specific provisions of the Act and wording of the plan. The Court of Appeal concluded that the right to the specific formula for calculating final average monthly earnings was a protected right not capable of modification, even if the modification only related to future years of service that had not yet occurred.

The Superintendent noted that although *Haliburton* appears to contradict the decision of Justice Levine in *Alcan*, the decisions are distinguishable as the wording of the relevant legislation and plans were different. The decision in Haliburton was decided on the basis of the language in section 81(1)(a) of the *Alberta Employment Pensions Act* which does not qualify the benefits protected by the word "accrued" or "vested" or any similar concept.

The Superintendent also turned to the Financial Services Tribunal of Ontario decision in *ROM v Ontario*, 2013 ONFST. In *ROM* the Financial Services tribunal considered whether an amendment to change final average earnings ("FAE") violated the amendment clause of the plan and the *Pension Benefits Act*. Prior to the amendment, the FAE formula took into account the employees' best three consecutive years ("FAE3") prior to retirement in order to calculate the retirement benefit. The amendment would utilize a combination of a FAE3 formula up to the date of the amendment, then a best five consecutive year formula up to the date of the retirement ("FAE5"). The amendment was challenged before the Ontario Deputy Superintendent of Pensions on the basis that the amendment resulted in a reduction of accrued benefits. Ultimately, the Tribunal determined that s.14(1)(a) of the PBA protects the amount of pension past service would generate at the time the plan is amendment. The amendment did not reduce that amount and therefore did not violate the statute. The plan was also determined to itself permit this type of amendment. The Tribunal made further comments regarding the intent of the legislature in

choosing to only offer limited protection against plan amendments, specifically prohibiting those which reduce accrued benefits, not those which relate to benefits not yet accrued.

The Superintendent highlighted key takeaways from the *ROM* decision, namely that the Tribunal followed the broad approach set down in *Schmidt* and applied in other cases. Ultimately, the plan member's right to include future service and earnings in the formula was contingent and not guaranteed. According the Superintendent, this is all the Tribunal had to deicide as a result of *Schmidt* and *Alcan*, which indicate that a contingent right to include certain future service an earnings in determining the calculation of the ultimate retirement benefit is not an accrued right.

Then applying these principles to the question before the Superintendent he looks first to the *Pensions Benefits Act* itself. The express wording itself in s. 54(1)(b)(ii) indicated that accrued is being used to mean payments that are legally required, but not necessarily due and payable, consistent with the case law.

The Superintendent gleaned from the case law that in order to determine whether a benefit is accrued, one must look to the plan and identify the nature of the promise. Ultimately the Superintendent determined that the amendment would not reduce benefits of plan members that accrued before the date the amendments were scheduled to become effective. As a broad policy note, the Superintendent reminded plan members that the line in the sand drawn by the current act broadly benefits all workers by promoting fiscal stability of plans.

The Superintendent then turned to the question of whether there was a violation of the Act as a result of section 14.02(1) the Plan, which provides that no amendment could have the effect of reducing then existing entitlements under the plan. The Superintendent noted *Schmidt* was not determinative on this point as the question turns on the specific wording of the specific amendment clause in a particular plan. After reviewing the Plan text, the context and the common meaning of the words, the Superintendent determined "entitlements" was intended to refer to benefits. The words were determined to refer to non-contingent entitlements or accrued benefits. As such, the amendment did not contravene s.14.02(1) of the Plan as all changes concerned future or contingent entitlements that had not yet fully crystallized.

FEDERAL JURISDICTION

17. *Jost v. Canada (Attorney General)*, 2019 FC 1356

In *Jost v. Canada (Attorney General)*, O'Reilly J. of the Federal Court certified a class proceeding on behalf of Reserves members of the Canadian Armed Forces ("CAF") who experienced delays in receiving their pensions.

Facts

This class proceeding was brought by Mr. Douglas Jost ("Mr. Jost"), a retiree of the CAF and member of the Reserve Force pension plan who waited several months to receive his pension. Prior to his retirement, Mr. Jost was given the choice of receiving his pension in the form of an Annual Allowance, a Deferred Annuity, or a Transfer Value (i.e. lump sum). Mr. Jost elected the Transfer Value option, and was informed that his Transfer Value was worth $859,980.00 and that his pension payments would commence eight to 12 weeks after his release. Mr. Jost was released from the CAF shortly thereafter.

The pension that Mr. Jost ultimately received was both delayed and of a lesser value than originally promised. Some weeks after his release, he was informed that his Transfer Value had been reduced. Some months following that, he was again informed of a further reduction, to $703,180.00. And, Mr. Jost did not receive payment until 29 weeks after his release, rather than eight to 12 weeks as promised.

Subsequently, Mr. Jost commenced the putative class proceeding alleging negligence, breach of fiduciary duty, and breach of contract against the Attorney General of Canada ("AG") as a result of the delays. The proposed class included all members of the CAF Reserve Force and Regular Forces pension plans who were entitled upon release to an Immediate Annuity, Transfer Value, Annual Allowance, or Bridge Benefit during the relevant period.

Decision

O'Reilly J. of the Federal Court certified Mr. Jost's class proceeding, finding that there was a reasonable cause of action, an identifiable class, and common issues, a class action was the preferable procedure, and Mr. Jost was an appropriate representative plaintiff.

First, O'Reilly J. held that all three of the causes of action pleaded by Mr. Jost had a reasonable prospect of success. With respect to the negligence claim, the AG argued that policy considerations negated the existence of a duty of care, as the CAF's pension plan was "the product of a policy decision by the Government of Canada". The AG's position was that the delay was justified because it was in the public interest that the CAF take the necessary time to ensure that pension payments were accurate. In addition, the AG argued that the statutory remedies under the *Canadian Forces Superannuation Act*, R.S.C. 1985, c. C-17 displaced the common law cause of action.

O'Reilly rejected the AG's arguments and found that the negligence claim had a reasonable prospect of success. The fact that the pension scheme was the product of a policy decision did not alleviate the duty of care owed toward the members of the plan, and the statutory remedies were "no substitute" for the negligence claim. Mr. Jost had pleaded the required elements of a negligence claim and the AG had not established that it was plain and obvious that those elements could not be proved.

Similarly, O'Reilly J. found that the claims for breach of fiduciary duty and breach of contract had a reasonable prospect of success. As with the negligence issue, Mr. Jost had pleaded the essential elements of these causes of action, and the merits of the claims were matters of evidence and proof to be determined later in the proceedings.

Second, while it was found that Mr. Jost's claim satisfied the identifiable class requirement, O'Reilly J. restricted the class to Reserve Force members only, as there was no evidence before the court of any problems experienced by the Regular Forces members. However, O'Reilly J. rejected the AG's argument that the class should be limited to those whose benefits were calculated and their option form signed within six years limitation period set out in the *Federal Courts Act*, RSC 1985, c F-7. Any claims falling outside the limitation period could be dealt with on an individual basis.

Ultimately, O'Reilly J. certified the class proceeding, finding that the remaining elements of the test for certification were also met. The third requirement, common issues, was satisfied as the claims in negligence, breach of fiduciary duty, and breach of contract constituted common legal issues and the liability of Canada for damages and interest on delayed payments were common issues of fact and law. Fourth, a class proceeding was the preferred procedure; the complexities in the law and facts would persist even if the matter were to proceed as individual claims. The AG had also not identified an alternative remedy to a class action that would be more efficient or provide equivalent relief. Fifth, Mr. Jost was an appropriate representative plaintiff, as he had personally incurred a delay and demonstrated an intention to vigorously pursue the action through able counsel.

18. *Canada (AG) v Northern Inter-Tribal Health Authority Inc.*, 2020 FCA 63

In *Canada v. Northern Inter-Tribal Health Authority Inc.*, the Federal Court of Appeal ruled that the pension plans of two non-profit corporations that provide health services to First Nations groups are provincially regulated.

The case concerned two decisions released by the Office of the Superintendent of Financial Institutions of Canada ("OSFI"), the federal pension regulator. In each decision, OSFI directed an Indigenous health organization to register its pension plan with the provincial regulator. The health organizations filed a joint application for judicial review that was initially granted by the Federal Court but dismissed on appeal.

Background

The applicants in this case were Peter Ballantyne Cree Nation Health Services ("PBCNHS") and Northern Inter-Tribal Health Authority ("NITHA"), two non-profit corporations incorporated to provide various health services to certain First Nations groups in Saskatchewan.

Each organization had entered into various agreements with the federal government. Through these agreements, the organizations accepted responsibility for the providing certain services to various Indigenous groups while the federal government committed to funding those services. PBCNHS, for example, provided direct services to the Peter Ballantyne Cree Nation, including primary health care, mental wellness, and healthy living programs. NITHA, on the other hand, provided healthcare coordination and advisory services to the Peter Ballantyne Cree Nation, the Prince Albert Grand Council, the Meadow lake Tribal Council, and the Lac La Ronge Indian Band.

Legislative Framework, History, and the Decisions of the Regulator

Initially, the pension plans of both PBCNHS and NITHA were registered under the federal *Pension Benefits Standards Act, 1985*, which applies to the pension plans of workers employed on or in connection with any work, undertaking or business that falls within the legislative authority of the federal government. The *Constitution Act, 1867* (the "*Constitution*") sets out which businesses fall within the jurisdiction of the federal government and which fall within the legislative authority of the provinces. The *Constitution* provides that while the federal government has legislative authority over matters concerning "Indians, and the Lands reserved for the Indians," provinces have exclusive jurisdiction over hospitals and healthcare. Originally, PBCNHS and NITHA's pensions were registered under the federal pension statute because of

their connection to Indigenous affairs. In 2010, however, the Supreme Court of Canada released *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union* ("*NIL/TU,O*"),[24] which suggested that such a connection was not adequate to bring an employer within federal jurisdiction.

OSFI applied *NIL/TU,O* and determined that PBCNHS and NITHA were similarly provincially regulated. In *NIL/TU,O*, the Supreme Court considered whether an employer that provided child welfare services to various First Nations fell under the provincial labour legislation. The Court held that labour relations are presumptively provincially regulated. To displace that presumption, the Court found, one must apply the "functional test" to examine the nature, operations and habitual activities of the entity to determine whether it falls within the federal jurisdiction. In *NIL/TU,O*, the Court ultimately found that the essential nature of the employer was to provide child and family services, a matter within the provincial sphere. The fact that the services were designed for First Nations recipients did not shift the organization into the federal jurisdiction.

OSFI applied this reasoning to PBCNHS and NITHA and directed the organizations to register their pension plans with the provincial authority. Instead, the organizations filed a joint application for judicial review.

The Decision of the Federal Court

The Federal Court noted that, as per *NIL/TU,O*, labour relations are presumptively fall within the provincial sphere, and applied the "functional test" set out in *NIL/TU,O* to determine whether the organizations' activities nonetheless fell within the federal sphere. Unlike OSFI, however, the Court held that various historical Treaties between the federal government and First Nations groups were crucial to the "functional test" analysis.

In order to examine the nature and activities of PBCNHS and NITHA, the Court looked to the agreements between the organizations and the federal government. These agreements referenced various historical Treaties in which the Crown undertook to provide health services to the First Nations signatories. The Court held that these Treaty promises rested on the federal jurisdiction over Indigenous affairs. Accordingly, the Court found, the federal government's modern-day agreements with PBCNHS and NITHA enabled First Nations groups to take over delivery of federal health services.

OSFI, the Court held, had failed to consider this essential factor concerning the nature of the organizations' activities. The Court found that the application for judicial review should be granted, and OSFI appealed the decision.

The Reasons of the Federal Court of Appeal

The Federal Court of Appeal found in favour of OSFI, for two main reasons.

First, the Court held that the lower court failed to strictly follow *NIL/TU,O*. PBCNHS and NITHA both submitted that their functions had a distinct Indigenous component that affected the analysis of their activities under the "functional test." As the Court noted, however, this was

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[24] 2010 SCC 45.

the exact submission rejected in *NIL/TU,O*. There, the organization providing child welfare services had argued that the distinctly Aboriginal component of its services altered the nature of its operations to bring the organization within the federal sphere of authority. The Supreme Court had rejected that submission, and the Federal Court of Appeal held that the same reasoning applied to PBCNHS and NITHA. The organizations provide healthcare services, which fall squarely within the provincial sphere. The fact that their services are tailored for Indigenous communities does not shift the organizations' activities into the federal sphere.

Second, the Court found that the lower court erred by focussing on the Treaties. The fact that the federal government has, through these Treaties, accepted responsibility for ensuring that First Nations received healthcare services is not relevant to whether an employer providing healthcare services to Indigenous groups is federally or provincially regulated. The Treaties, the Court held, simply do not have the legal significance that the lower court attributed to them.

Ultimately, the Court held, OSFI was correct: PBCNHS and NITHA are provincially-regulated employers and their pension plans must be registered with the Saskatchewan pension regulator.

19. ***Quebec (Attorney General) v. Picard,* 2020 FCA 74**

In this decision, the Federal Court of Appeal ("FCA") held that the First Nations Public Security Pension Plan (the "Plan") was governed by the federal *Pension Benefits Standards Act, 1985,* RSC 1985, c 32 (2nd Supp) ("PBSA") and regulated by the federal Office of the Superintendent of Financial Institution ("OSFI"). The decision joins a growing body of recent cases addressing the constitutional question of whether the labour relations associated with providing certain publicly-funded services to Indigenous communities are governed federally or provincially.

The Plan

The Plan’s members are police officers and special constables of police forces of First Nations member communities and serving Indigenous communities. The Plan covers police forces under the responsibility of 14 band councils in Quebec. Each police force is subject to a tripartite agreement reached by the Crown, the Government of Quebec, and one of the band councils. The federal government covers 52% of the cost and the provincial government covers 48%. The tripartite agreements set out the mission and obligations of the parties and the duration of the agreement. Among other things, the agreements establish that:

- The band council is the employer of the members of the police service;
- The band council is responsible for hiring police officers;
- The band council is responsible for the administration of the police service;
- The band council may establish internal policies and procedures specific to the administration of its police service;
- The police service exercises its powers in the territory under the responsibility of the band council;
- The band council manages the budgets and purchases of its police service;

- Government funding contributions are paid to the band council, and the band council manages the budgets and purchases of its police service;

- The mission of the police service is to maintain peace, order and public safety in accordance with section 93 of the Province of *Quebec's Police Act* (CQLR, c P 13.1) (*Police Act*);

- Only candidates who meet the required qualifications and conditions set out in section 115 of the Police Act may be hired to serve as police officers;

- The police officers are subject to the *Code of Ethics of Québec Police Officers* (CQLR, c P 13.1, r 1);

- The persons employed under the agreement are providing services to the council and that none of the provisions shall have the effect of conferring upon the council, its members or its employees the status of employee, servant or agent of Canada or Quebec.

Although the Plan had been supervised by OSFI since its inception in 1981, OSFI determined that it was necessary to transfer supervision of the Plan to the provincial regulatory following the FCA's decision in *Nishnawbe-Aski Police Service Board v Public Service Alliance of Canada*, 2015 FCA 211 (*Nishnawbe-Aski*). In that case, the FCA had concluded that the labour relations of the Nishnawbe-Aski Police Service fell under provincial jurisdiction, to the extent that the essential nature and function of First Nations police forces is to provide services in the same manner as other provincial and municipal police forces.

Case History

Mr. Sylvain Picard, the Plan's Administrator, applied to the Federal Court for a judicial review of OSFI's decision. The Federal Court granted the judicial review and set aside OSFI's decision, after which the Attorney General of Quebec appealed the Federal Court decision. The Assembly of First Nations and the Assembly of First Nations Quebec-Labrador were granted leave to intervene in support of the respondents in the FCA proceedings.

Decision

Labour law falls primarily under provincial jurisdiction, pursuant to the provinces' jurisdiction over property and civil rights under section 92(13) of *The Constitution Act*, 1867, 30 & 31 Vict, c 3. Labour relations are governed federally by way of exception in circumstances where the federal government exercises exclusive jurisdiction, such that labour relations form an "integral part of its primary competence."

The FCA affirmed that the correct approach to determine whether labour relations were governed federally was the approach applied in *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45 (*NIL/T,UO*). In that case, the Supreme Court of Canada ("SCC") held that the labour relations in a child welfare agency providing services to Indigenous communities were governed provincially. The first step in the approach is to apply a "functional test" to determine whether the relevant entity constitutes a federal undertaking. This determination is made by examining the nature, operations, and activities of the entity the relevant employees work for. If the functional test is inconclusive, then

the presumption will be that the labour relations are governed provincially, unless it is determined that provincial regulation would infringe the federal power at issue.

The SCC explicitly noted in *NIL/TU,O* that the question should not be approached differently solely because the entity is controlled or operated by Indigenous peoples or because it operates on a territory or a reserve. This clarification was consistent the SCC's decision in *Four B Manufacturing v United Garment Workers*, 1979 CanLII 11 (SCC) that the labour relations in a band-owned shoe manufacturing business operating on a reserve was governed by provincial labour laws. In that decision, the SCC had applied the functional test and determined that manufacturing footwear was "an ordinary industrial activity" that falls under provincial jurisdiction, irrespective of the ownership of the business, its location on a reserve, or that it operated under a federal permit.

The FCA's decision in the present case turned primarily on its determination that the entity to be considered was the band council. This distinguished the case from *NIL/TU,O* and *Nishnawbe-Aski*, as the employer in those cases was an independent body and not the band itself.

Having made this determination, the FCA relied on its decision in *Francis v. Canada Labour Relations Board*, [1981] 1 FC 225 (CA) (*Francis*) relating to jurisdiction over the labour relations of band council employees engaged in a range of activities including education administration, the administration of housing, public works, maintenance of roads, garbage collection, etc. on a reserve. In *Francis*, the FCA in that case had determined that the band council was a federal undertaking for labour relations purposes because the nature of the work was activity that was the responsibility of local government in the context of a reserve. In the present case, the FCA determined that maintaining peace and enforcing the law clearly also fell with the responsibility of local government. As a result, the FCA followed *Francis* and concluded that the labour relations of the police forces fell under the federal jurisdiction, including the administration of the Plan.

Addressing an argument advanced by the appellants, the FCA stressed that the fact that the police forces exercised power delegated by the province was not determinative. The FCA observed that, for example, federal government employees are subject to a variety of provincial requirements for occupational certification. The proper question under the functional test is the normal and habitual activities of the entity for which the employee works. The FCA also noted, however, that activity carried out under a band council will not necessarily fall under the federal jurisdiction if it not truly assimilated to or associated with the governance of a First Nation.

CANADIAN HUMAN RIGHTS TRIBUNAL

20. *Bentley v. Air Canada and Air Canada Pilots Association,* 2019 CHRT 37 (CanLII)

Bentley v. Air Canada is a 2019 Canadian Human Rights Tribunal decision notable for considering the application of the recent *Talos* decision to a long-term disability plan that terminated disability benefits for pilots when they became eligible for an unreduced pension at age 60 with 25 years of service.

Background and *Talos* Decision

Pension and benefit plans have generally enjoyed unique treatment when it comes to making distinctions on what would otherwise be prohibited grounds such as age, sex and family status. The law generally recognizes that in certain circumstances it is appropriate or even necessary for benefit plans make these distinctions, particularly if supported by actuarial considerations. As a result, determining the point at which such distinctions become illegal is a challenging area of human rights and constitutional law.

The recent *Talos* case was a significant decision in this area. In *Talos*, the complainant was a secondary school teacher who had his extended healthcare benefits cut off at 65 despite continuing to work. Mr. Talos claimed that an exception in the Ontario Human Rights Code that allowed the employer to terminate health, dental, and life insurance benefits at age 65 violated his rights under the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

In a somewhat unexpected decision, the OHRT agreed with Mr. Talos and found that the distinction was *prima facie* discriminatory and that exemptions permitting the distinction were not "saved" by s. 1 of the *Charter*.

The *Talos* decision focused on health, dental and life insurance benefits. Actuarial evidence was presented to suggest there was no cost-based rationale for cutting off benefits at age 65. However, the decision explicitly stated it did not address LTD, pension plans and superannuation funds. As a result, there has been substantial uncertainty as to how *Talos* would be applied going forward.

The Issue in *Bentley*

The claimant in *Bentley* essentially sought to apply the reasoning in the *Talos* decision to Air Canada's LTD Plan, which terminated LTD benefits for pilots when they became eligible for an unreduced pension at age 60 with 25 years of service.

The claimant alleged that sections 3(b) and 5(b) of the *Canadian Human Rights Benefit Regulations SOR 80/68* violated section 15(1) of the *Charter* on the basis they permitted discrimination based on age. These provisions allow an LTD plan to terminate LTD coverage at the "normal pensionable age" which, under the *Regulations*, is defined as the earliest date on which an employee can retire with an unreduced pension.

As the distinction in Air Canada's LTD Plan was permitted under the *Regulations*, the question was whether the *Regulations* violated Canada's *Charter* and, if so, whether such violation was saved by section 1 as a reasonable limit demonstrably justified in a free and democratic society.

The Tribunal heard evidence from a variety of witnesses including two union members who had continued working past their unreduced retirement age of 60. Both of these witnesses had suffered a medical event that would have allowed them to receive LTD, but for the cut-off. Because these workers were no longer eligible for LTD, one had chosen to use remaining sick days, vacation days and unpaid leave until their return to work. The other had chosen to retire and receive their pension, which was less than their LTD entitlement would have been.

The Tribunal also heard evidence from a consulting actuary as to why it might make sense from an actuarial standpoint to restrict access to LTD after an employee had attained a particular age. In the opinion of the witness, it would be appropriate to replace LTD with retirement benefits at a reasonable age – generally around ages 61 to 65. The witness estimated that the cost of LTD at age 65, if there was no limiting age, could be more than 18 times the cost of LTD for an employee of average age.

The Decision in Bentley

In considering whether the *Regulations* permitting the cut-off of LTD were unconstitutional, the Tribunal applied the test described by the Supreme Court of Canada ("SCC") in *Withler*, a similar case dealing with age based distinctions in a benefit plan.

Under the test described in *Withler* the Tribunal was required to, first, determine whether the law created a distinction based on an enumerated or analogous ground and, second, determine whether the distinction created a disadvantage by perpetuating prejudice or stereotyping. The Tribunal accepted the LTD cut-off based was at least partly based on age, which is an enumerated ground. The analysis therefore focused on the second part of the test.

In considering whether the distinction created a disadvantage, the Tribunal commented that it was important to consider the *Regulations* on a contextual basis. The Tribunal remarked that in *Withler*, the SCC held that the benefits could not be viewed in isolation but must be considered in the context of the other benefits the individual was entitled to. In *Withler*, the SCC's conclusion was that the benefits at issue operated within the context of a much larger benefit program, and, within this larger context, reducing these benefits at a certain age did not treat the plaintiffs unfairly.

The Tribunal appeared to view the circumstances in *Bentley* similarly, noting that the purpose of the LTD plan was to provide a measure of income loss to plan members who became disabled and unable to work. Members who became disabled after age 60 would have the option to use their sick days, vacation days and unpaid leave, or could retire under the pension plan which would provide similar income replacement. The Tribunal commented that while the benefit program did not perfectly correspondence to the members' situations, the law did not require perfect correspondence, and that the impugned distinction should be viewed in the context of the allocation of resources and the overall goal of the legislation.

The Tribunal therefore found the *Regulations* did not produce an unconstitutional result on the basis that the cut-off was part of a larger benefit scheme. The Tribunal distinguished *Talos* on a number of grounds including that, in *Talos*, the termination of health, dental and life insurance benefits was not off-set by an alternative suite of benefits. While *Talos* would have been entitled to a pension, he was not entitled to benefits "sufficiently equivalent" to the benefits that were being cut-off. Ultimately, the Tribunal characterized the key finding in *Talos* as being that the loss of benefits at issue was not ameliorated or set-off by any other benefit upon attaining age 65. However, the Tribunal concluded that in this case, the termination of disability benefits was "generously set off with retirement benefits..."

In addition, the Tribunal relied heavily on the evidence of the consulting actuary with regard to the cost increase associated with providing LTD to older workers. In contrast, the evidence in *Talos* had not shown not there was a steep increase in the cost of providing health and dental benefits that would justify an age cut off to protect the financial viability of the plans. Presumably, the Tribunal viewed the actuarial evidence as supporting that the cut-off was part of a reasonable and co-coordinated benefit scheme to transition LTD benefits to pension entitlement.

Ultimately, the Tribunal found the circumstances failed to show a violation of section 15(1) of the *Charter.*