

Court File No. CV-22-00685817-00CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**B E T W E E N :**

**GASTON J. PERREAULT and ODETTE DI MURO**

Plaintiffs

- and -

**BELL CANADA** (also known as **THE BELL TELEPHONE COMPANY OF CANADA**), **BELL CANADA INC.**, **BELL MEDIA INC.**, **EXPERTECH NETWORK INSTALLATION INC.**, **BELL MOBILITY INC.**, and **BELL TV INC.**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**STATEMENT OF CLAIM**

**TO THE DEFENDANT(S):**

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the plaintiffs' lawyer or, where the plaintiffs do not have a lawyer, serve it on the plaintiffs, and file it, with proof of service in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your statement of defence.

**IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.**

IF YOU PAY THE PLAINTIFFS' CLAIM, and \$10,000 for costs, within the time for serving and filing your statement of defence you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiffs' claim and \$400 for costs and have the costs assessed by the court.

**TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED** if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date: September 19, 2022

Issued by:

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Local Registrar

Address of  
court office:

393 University Avenue  
Toronto, ON M5G 1E6

**TO: BELL CANADA**  
1 Carrefour Alexander-Graham-Bell A-7  
Verdun, QC, H3E 3B3  
Canada

**AND TO: BELL MEDIA INC.**  
299 Queen St. West  
Toronto, ON, M5V 2Z5  
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**AND TO: EXPERTECH NETWORK INSTALLATION INC.**  
1 Carrefour Alexander-Graham-Bell A-7  
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**AND TO: BELL MOBILITY INC.**  
1 Carrefour Alexander-Graham-Bell A-7  
Verdun, QC, H3E 3B3

**AND TO: BELL TV INC.**  
1 Carrefour Alexander-Graham-Bell A-7  
Verdun, QC, H3E 3B3  
Canada

## CLAIM

1. The Plaintiffs claim:
  - (a) An order certifying this action as a class proceeding and appointing the Plaintiffs as representative plaintiffs for the Class pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.
  - (b) A declaration that for 1998, the Defendants improperly calculated the annual rate of indexation of the Class Members pension benefits under the Bell Canada Pension Plan;
  - (c) A declaration that the Defendants breached their fiduciary and trust duties to the Plaintiffs and Class Members;
  - (d) A declaration that the Defendants breached the terms of the contract set out in the Bell Canada Pension Plan;
  - (e) A declaration that the Defendants were, and continue to be, unjustly enriched by their breach of contract and breach of fiduciary and trust duties to the Plaintiffs and the Class Members;
  - (f) A declaration that the Defendants are liable to the Plaintiffs and Class Members for damages caused by the Defendants' breach of contract, breach of fiduciary and trust duties, and unjust enrichment to the Plaintiffs and Class Members;

- (g) Damages payable by the Defendants for breach of fiduciary and trust duties, breach of contract, and unjust enrichment in the amount of approximately \$30 million or such other amount as may be determined by an actuary or by the court; or
- (h) An order that the Defendants adjust the indexation amounts applicable to the class and pay the Class Members the amounts owing to date, plus interest, and an order that all future indexation or other increases be applied to the adjusted pension amounts such that Class Members are put in the same position as if the 1998 indexation amounts were correctly calculated at first instance;
- (i) Costs of this action on a substantial indemnity basis or in an amount that provides full indemnity;
- (j) Pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1995, c. C.43, as amended;
- (k) Pursuant to section 26 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, the costs of notice and administering the plan of distribution of the recovery of this action, plus applicable taxes; and
- (l) Such further and other relief as this Honourable Court may deem just.

2. The Plaintiffs plead the following:

**The Plaintiffs**

3. The Plaintiff, Gaston J. Perreault, is a resident of Québec City, Québec. He was hired as an employee of Bell Canada around April, 1955 in Drummondville, Québec in the position of Outside Representative and Clerk in the Commercial department. Over the course of a 35-year employment career, he was promoted to various positions including with the Business Office (or Commercial) departments across Québec, Sales functions; and to middle management. His final position prior to his retirement was as District Manager-Business Office in Québec City.

4. As part of his employment compensation, Mr. Perreault participated in the Bell Canada Pension Plan (the "**Bell Canada Plan**") and earned pension benefits for his retirement. Mr. Perreault retired from Bell Canada in 1990 and began receiving his monthly pension benefits from the Bell Canada Plan in 1990.

5. The Plaintiff, Odette Di Muro, is a resident of Montreal, Québec. She was hired as an employee of Bell Canada in July 1960 as a clerk in the printing department. Over the course of a 33-year employment career, she was promoted to various positions including: Manager, Graphic Design; Manager, Service Bureau; Manager, University Recruitment; and Manager of Human Resources. Her final position was as Manager, Recruitment.

6. As part of her employment compensation, Ms. Di Muro participated in the Bell Canada Plan and earned pension benefits for her retirement. Ms. Di Muro retired from Bell Canada in 1996 and began receiving her monthly pension benefits from the Bell Canada Plan in 1996.

**The Defendants**

7. Bell Canada (or, the “**Plan Administrator-Defendant**”) is a corporation incorporated pursuant to the laws of Canada. It is a subsidiary of BCE Inc., a publicly-traded corporation that carries on business in communications and media and has its headquarters in Verdun, Québec.

8. Bell Canada is the administrator of the Bell Canada Plan. The Bell Canada Plan has substantial surplus assets.

9. Expertech Network Installation Inc. is a corporation incorporated pursuant to the laws of Canada. Expertech Network Installation Inc. maintains its headquarters in Verdun, Quebec at the same corporate address as Bell Canada.

10. Bell Mobility Inc. is a corporation incorporated pursuant to the laws of Canada. Bell Mobility Inc. maintains its headquarters in Verdun, Québec at the same corporate address as Bell Canada.

11. Bell Media Inc. is a corporation incorporated pursuant to the laws of Canada. Bell Media Inc. maintains its headquarters in Toronto, Ontario.

12. Bell TV Inc. is a dissolved corporation which was incorporated pursuant to the laws of Canada. It maintained its headquarters in Montreal, Québec, and previously employed some of the Class Members. Upon dissolution in 2006, its pension obligations to the Class Members were assumed by Bell Canada, which continues to contribute to the Bell Canada Plan on behalf of the former employees of Bell TV Inc.

13. Bell Canada Inc., Bell Media Inc., Expertech Network Installation Inc., Bell Mobility Inc., and Bell TV Inc. (collectively, the “**Employer-Defendants**”), are participating and contributing employer companies in the Bell Canada Plan.

**The Class**

14. The Class consists of all persons who are or were members of the Bell Canada Plan, or otherwise entitled to benefits under the Bell Canada Plan, pursuant to section 8.7 of the Bell Canada Plan, or a predecessor section, as of January 1, 1998, together with the spouses, estates, heirs, beneficiaries, and representatives of any of such persons who have died.

**Background**

15. The Defendants created the Bell Canada Plan as part of the employment contract with their employees to provide a monthly payment to employees upon their retirement, as well as to certain other beneficiaries. The monthly pension benefit amount varies from individual to individual, and the amount is determined based on various factors, including the retiree's salary history and length of employment.

16. Under the terms of the Bell Canada Plan, the pension benefit paid to retirees is required to be increased annually by Bell Canada as a form of partial inflation protection. This is known as indexation, or a cost-of-living (“**COLA**”) adjustment.

17. Under the terms of the Bell Canada Plan, the annual COLA increase to be applied by Bell Canada, as the administrator of the Bell Canada Plan, to retirees' pension benefits is “the annual percentage increase of the Consumer Price Index (“**CPI**”), *as determined by*



Statistics Canada" (emphasis added), which figure is then to be rounded to the "nearest whole number", to a maximum of 2%.

18. The applicable CPI as determined by Statistics Canada for the annual indexation increase to be applied by Bell for the year 1998 was 1.5%, which, under the terms of the Bell Canada Plan, should then be rounded to the nearest whole number, or *up* to 2%. Bell Canada incorrectly used *its own* calculation of the CPI to arrive at 1.47%, which Bell then rounded *down* to 1%, thereby depriving the Class members of their correct indexation increase, which error continues and compounds for each subsequent year to the present.

19. The difference between the 1% indexation increase that Bell incorrectly applied and the 2% indexation increase that was owed is significant for the Class Members.

20. Bell Canada's indexation error for 1998 continues to compound in each subsequent year because future indexation increases are applied to a constantly incorrect lower pension benefit amount from the previous year for each of the Class Members. These errors thus continually and annually deprive the Class Members from receiving their correct monthly pension benefits that they earned while employees of Bell Canada.

21. In addition, the 1998 indexation error and its subsequent compounding enable Bell Canada to make lower contributions to the Bell Canada Plan each year. Bell Canada thereby saves significant money, and is continually unjustly enriched at the expense of the Class Members.

**The Austin v. Bell Canada decision of the Ontario Court of Appeal confirms Bell's Error**

22. On February 21, 2020, the Court of Appeal for Ontario decided same COLA error issue in *Austin v Bell Canada*, 2020 ONCA 142 ("*Austin*"), a copy of which is attached hereto as **Appendix "A"**.

23. In *Austin*, the plaintiff brought a class action against Bell Canada for making the same substantive error described above for the 2017 indexation increase. In its decision released on February 21, 2020, the Ontario Court of Appeal held that under the terms of the Bell Canada Plan, Bell Canada should have used the CPI figure *as determined by* Statistics Canada of 1.5% and then rounded that *up* to 2%. The Court of Appeal required Bell Canada to correct its error, implement the 2% indexation increase for the year 2017, and pay compensation to the affected class members in that case.

24. Excerpts from the *Austin* decision follow:

**The Bell Pension Plan**

[5] The motion judge's ruling and this appeal turn on two provisions in the plan dealing with the annual indexing of benefits.

[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. [page24]
- (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.
- (iv) 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.

[8] It is common ground that for the relevant period, the Consumer Price Index rose from 127.2 to 129.1 and, as a matter of simple mathematics, that represented a 1.49371 per cent increase. *It is also undisputed that Statistics Canada has a policy of rounding the annual percentage increase to one decimal point. Accordingly, Statistics Canada published the annual percentage increase for the relevant period as 1.5 per cent. Section 8.7(iv) provides that percentage increase for all pensioners other than those who are in their first year of retirement (s. 8.7(iii)), is to be rounded to the nearest whole number. Accordingly, if, as the appellant argues, the Statistics Canada policy governs, the Pension index of 1.5 per cent should be rounded to 2 per cent.* On the other hand, Bell asserts that the words of s. 8.7(iv) apply: "All percentage increases shall be rounded to the nearest 2 decimal points". If s. 8.7(iv) does apply to s. 1.29, the Pension Index is 1.49 per cent which, when rounded to the nearest whole number, becomes 1 per cent.

...

[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.

[22] This brings us to the next stage, namely reading s. 1.29 in the context of the Plan as a whole. We agree with the motion judge that this is an important part of the interpretive exercise. We also agree that when a pension scheme should be interpreted as a whole and that the meaning of a particular clause should be

considered in conjunction with other relevant clauses: *Dinney v. Great-West Life Assurance Co.*, [2009] M.J. No. 116, 2009 MBCA 29, 236 Man. R. 299 (C.A.), at paras. 61-62; Geoff R. Hall, *Canadian Contractual Interpretation Law*, 3rd ed. (Markham: LexisNexis, 2016), at p. 256. There can be no doubt that the crucial point for the motion judge was his conclusion that accepting the Statistics Canada one-decimal rounding policy would render s. 8.7(iv) "meaningless" or "partly meaningless". In our view, that conclusion rests on either (or both) a palpable and overriding error of fact or an extricable error of law.

[23] The palpable and overriding error of fact is that the motion judge's conclusion ignores the uncontradicted 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.

...

[32] *In our view, the Plan is not ambiguous and, for the reasons above, the appellant's interpretation is the correct one.* [emphasis added]

25. The *Austin* case was not appealed by Bell to the Supreme Court of Canada.

**Despite the Ontario Court of Appeal's decision, Bell Canada refuses to correct the same error it made for the 1998 indexation**

26. Following the release of the *Austin* decision on February 21, 2020, the plaintiffs' pensioner organization, the Bell Pensioners' Group ("**BPG**"), contacted Bell Canada numerous times requesting that Bell correct the same error it made for the 1998 indexation increase.

27. BPG is a not-for-profit association of pensioners and employees of Bell Canada and its affiliates. It was incorporated in 1995, and has approximately 10,000 members., BPG advocates for all Bell pensioners and their beneficiaries in respect of their pensions and benefits that they earned from Bell.

28. Despite numerous requests by BPG, Bell Canada has refused to correct its error for the 1998 indexation increase.

29. On October 31, 2021, Denis Marquis, the president of BPG, wrote to Eleanor Marshall, Bell's Vice-President Pension & Benefits and Assistant Treasurer. He pointed to the 2020 *Austin* decision from the Court of Appeal for Ontario and, given that the same analysis applies to the CPI figures in 1996-1997 for the indexation calculation to be implemented in 1998, that Bell should have rounded the COLA up to 2%, instead of down to 1%. Mr. Marquis asked about Bell's intention to rectify the 1998 error.

30. Ms. Marshall replied on November 5, 2021 stating that Bell Canada had no plans to take any action regarding to correct its 1998 calculation error.

31. On May 17, 2022, Koskie Minsky LLP, counsel to BPG, wrote to Bell Canada and requested that Bell Canada correct its 1998 indexation error, *inter alia*, in accordance its fiduciary duty as the administrator of the Bell Canada Pension Plan which requires Bell to act in the best interests of the Bell Canada Plan members

32. On July 21, 2022, Koskie Minsky LLP received a response from Bell Canada's external counsel, McCarthy Tétrault LLP. The letter stated that *inter alia* Bell Canada is not required to take any further action regarding the error for the 1998 indexation error.

33. Bell Canada's refusal to correct its error for the 1998 indexation increase, despite the decision of the Ontario Court of Appeal, continually deprives the Class members of the correct amount of the monthly pension benefits that they earned while employees of Bell

Canada and as such, is a breach of trust, breach of contract, and breach of fiduciary duty under both the common law and the *Pension Benefits Standards Act, 1985*, R.S.C., 1985, c. 32 (2nd Supp.). As a result of this error, the Plaintiffs and the Class members have suffered damages and are continually suffering damages.

**Compensating the Class members would not imperil the Bell Canada Plan, nor Bell**

34. The Bell Canada Plan is in a strong financial position and has significant surplus assets. Compensating the Class Members for the COLA 1998 error in compliance with its fiduciary duty and obligations under trust and contract would not cause the Bell Canada Plan nor Bell Canada financial hardship.

35. In its 2021 Pension Information Committee Report, the Bell Canada Plan reported a funded ratio of 116% on a going-concern basis. This valuation considers the Bell Canada Plan's funded status on the basis that it will operate indefinitely. It also reports that the Bell Canada Plan has a going-concern actuarial surplus of \$2,557.8 million as of December 31, 2020. The Bell Canada Plan also reported a solvency ratio of 103%. This valuation assumes (hypothetically) that the Bell Canada Plan will stop operating on a set date. That is, if the Bell Canada Plan paid out all benefits earned by members as of December 31, 2020, it would *still* have a surplus remaining of \$599.8 million.

36. The Plaintiffs propose that this action be tried in the City of Toronto.

September 19, 2022

**KOSKIE MINSKY LLP**  
20 Queen Street West, Suite 900, Box 52  
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Lawyers for Plaintiffs

# Appendix A

## **Austin v. Bell Canada et al.** **[Indexed as: Austin v. Bell Canada]**

Ontario Reports

Court of Appeal for Ontario

MacPherson, Sharpe and Jamal JJ.A.

February 21, 2020

150 O.R. (3d) 21 | 2020 ONCA 142

### **Case Summary**

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**Contracts — Interpretation — General principles — Ordinary meaning — Consider the entire contract — Appeal by representative plaintiff, on behalf of beneficiaries of respondents' pension plan, from summary judgment dismissing action allowed — Motion judge found respondents were entitled to round up annual percentage increase in Consumer Price Index to two decimal points, to 1.49 per cent, which rounded to 1 per cent increase for 2017 pension — Plan required parties to adopt Statistics Canada one-decimal policy for both annual percentage increase and Consumer Price Index — Summary judgment was granted to appellant based on Consumer Price Index of 1.5 per cent, and resulting two per cent increase for 2017 pension.**

**Pensions and benefits law — Private pension plans — Pension benefits — Calculation — Appeals and judicial review — Appeal by representative plaintiff, on behalf of beneficiaries of respondents' pension plan, from summary judgment dismissing action allowed — Motion judge found respondents were entitled to round up annual percentage increase in Consumer Price Index to two decimal points, to 1.49 per cent, which rounded to 1 per cent increase for 2017 pension — Plan required parties to adopt Statistics Canada one-decimal policy for both annual percentage increase and Consumer Price Index — Summary judgment was granted to appellant based on Consumer Price Index of 1.5 per cent, and resulting two per cent increase for 2017 pension.**

Appeal by the representative plaintiff from the summary judgment dismissing the class action brought on behalf of 35,000 retirees who were beneficiaries of the respondents' pension plan. The plan provided that to determine the annual pension increase, the Pension Index was to be rounded to the nearest whole number. The motion judge found the respondents were entitled to round up the annual percentage increase in the Consumer Price Index to two decimal points, to 1.49 per cent, which rounded to a 1 per cent increase for the 2017 pension. The respondents had used the two-decimal rounding policy, rather than the Statistics Canada one-decimal policy, since 1998.

**Held**, the appeal should be allowed.

The contract provided that both the annual percentage increase and the Consumer Price Index



were to be determined by Statistics Canada. The words in the plan required the parties to adopt the Statistics Canada policy. The plan did not provide that Statistics Canada determined only the increase in the Consumer Price Index and the respondents could adopt a different rounding policy to determine the Pension Index. The motion judge ignored the uncontradicted evidence that using the Statistics Canada one-decimal rounding policy would frequently produce a three-decimal figure in the calculation of the annual percentage increase for recently retired pensioners, and that the two-decimal rounding provision in the plan would then apply and had meaning. The motion judge's failure to apply the evidence to the interpretation of the plan amounted to a palpable and overriding error of fact. Summary judgment was awarded to [page22] the appellant based on a Consumer Price Index of 1.5 per cent, and the resulting two per cent increase for 2017 pension.

### Cases referred to

*Dinney v. Great-West Life Assurance Co.*, [2009] M.J. No. 116, 2009 MBCA 29, [2009] 8 W.W.R. 30, 74 C.C.P.B. 161, 176 A.C.W.S. (3d) 1162, 236 Man. R. (2d) 299 (C.A.); *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31, 2002 SCC 33, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, J.E. 2002-617, 219 Sask. R. 1, 10 C.C.L.T. (3d) 157, 30 M.P.L.R. (3d) 1, 112 A.C.W.S. (3d) 991, 2002 DFQ 10,056; *McClelland & Stewart Ltd. v. Mutual Life Assurance Co. of Canada*, [1981] 2 S.C.R. 6, [1981] S.C.J. No. 60, 125 D.L.R. (3d) 257 at 258, 37 N.R. 190, [1981] I.L.R. 1-1393, 9 A.C.W.S. (2d) 264; *O'Neill v. General Motors of Canada Ltd.*, [2013] O.J. No. 3239, 2013 ONSC 4654, 6 C.C.P.B. (2d) 257, 230 A.C.W.S. (3d) 413 (S.C.J.); *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633, [2014] S.C.J. No. 53, 2014 SCC 53, 373 D.L.R. (4th) 393, 461 N.R. 335, [2014] 9 W.W.R. 427, J.E. 2014-1345, 358 B.C.A.C. 1, 59 B.C.L.R. (5th) 1, 25 B.L.R. (5th) 1, 242 A.C.W.S. (3d) 266, 2014EXP-2369; *Scanlon v. Castlepoint Development Corp.* (1992), 11 O.R. (3d) 744, [1992] O.J. No. 2692, 99 D.L.R. (4th) 153, 59 O.A.C. 191, 29 R.P.R. (2d) 60, 37 A.C.W.S. (3d) 563 (C.A.) [Leave to appeal to S.C.C. refused [1993] 2 S.C.R. x, [1993] S.C.C.A. No. 62, 102 D.L.R. (4th) vii, 157 N.R. 400n, 64 O.A.C. 320n, 32 R.P.R. (2d) 160n]; *Waxman v. Waxman*, [2004] O.J. No. 1765, 186 O.A.C. 201, 44 B.L.R. (3d) 165, 132 A.C.W.S. (3d) 1046 (C.A.)

### Statutes referred to

*Class Proceedings Act, 1992*, S.O. 1992, c. 6

### Authorities referred to

Hall, Geoff R., *Canadian Contractual Interpretation Law*, 3rd ed. (Markham, Ont.: LexisNexis, 2016)

Sullivan, Ruth, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis, 2014)

APPEAL from the judgment of E.M. Morgan J. (2019), 147 O.R. (3d) 198, [2019] O.J. No. 4159, 2019 ONSC 4757 (S.C.J.).

*Mark Zigler, Jonathan Ptak, and Garth Myers*, for appellant.

*Dana Peebles*, for respondents.

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[1] BY THE COURT: -- The appellant is the representative plaintiff in a class action brought on behalf of retirees who are beneficiaries of the respondents' ("Bell") Pension Plan.

[2] The sole issue for this court to decide is the proper calculation of the cost-of-living adjustment under the Plan for 2017. That turns on the interpretation of the Plan's definition of the "Pension Index" and how that definition works together with the provisions in the plan governing the calculation of the amount of the cost-of-living adjustment. The appellant argues that the motion judge erred by finding that Bell was entitled to round up the annual percentage increase in the Consumer Price Index, mathematically calculated as 1.49371 per cent, to two decimal points, or 1.49 per cent. The appellant says that, properly interpreted, [page23] the Plan requires Bell to follow Statistics Canada's policy of rounding to only one decimal point, or 1.5 per cent. The difference is significant. Another provision in the Plan provides that to determine the annual pension increase for the appellant and most other Bell Pensioners, the Pension Index is to be rounded to the nearest whole number. If the appellant is right, 1.5 per cent is rounded to 2 per cent. If Bell is right, 1.49 per cent is rounded to 1 per cent. The difference to the class members between a 2 per cent and a 1 per cent increase in the 2017 pension is over \$10 million for the first year and, over the long-term, over \$100 million.

### *Background*

[3] The appellant, a longtime Bell Canada employee, brings this class proceeding on behalf of approximately 35,000 pensioners who are all beneficiaries of the common Pension Plan administered by the respondents which are all part of the Bell corporate family.

[4] The motion judge certified the proceeding under the *Class Proceedings Act*, 1992, S.O. 1992, c. 6. It was common ground that the matter was suitable for summary judgment. As we explain below, the motion judge concluded that Bell was entitled to round the Pension Index to two decimal points and accordingly granted summary judgment dismissing the action.

### *The Bell Pension Plan*

[5] The motion judge's ruling and this appeal turn on two provisions in the plan dealing with the annual indexing of benefits.

[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. [page24]
- (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.
- (iv) 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.

[8] It is common ground that for the relevant period, the Consumer Price Index rose from 127.2 to 129.1 and, as a matter of simple mathematics, that represented a 1.49371 per cent increase. It is also undisputed that Statistics Canada has a policy of rounding the annual percentage increase to one decimal point. Accordingly, Statistics Canada published the annual percentage increase for the relevant period as 1.5 per cent. Section 8.7(iv) provides that percentage increase for all pensioners other than those who are in their first year of retirement (s. 8.7(iii)), is to be rounded to the nearest whole number. Accordingly, if, as the appellant argues, the Statistics Canada policy governs, the Pension index of 1.5 per cent should be rounded to 2 per cent. On the other hand, Bell asserts that the words of s. 8.7(iv) apply: "All percentage increases shall be rounded to the nearest 2 decimal points". If s. 8.7(iv) does apply to s. 1.29, the Pension Index is 1.49 per cent which, when rounded to the nearest whole number, becomes 1 per cent.

### *The Motion Judge's Reasons*

[9] The motion judge turned first to s. 1.29. He held that the proper interpretation of that provision depended upon the importance to be ascribed to the comma after the words "Consumer Price Index". He reviewed in some detail case law and academic writing, both Canadian and American, dealing with the significance to be attached to commas that follow a

sequence of items. Ordinarily, if there is no comma, the "last antecedent rule" states that the phrase at the end of the list will modify only the last item. If there is a comma, the "series qualifying rule" states that the phrase will modify all items on the list: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014), at p. 470. Here, there is not a list but there are two items: (1) the "annual percentage increase", and (2) the "Consumer Price [page25] Index". Accordingly, the comma after "Consumer Price Index" suggests that the phrase "as determined by Statistics Canada" modifies both items.

[10] The motion judge appears to have accepted that interpretation but found that it was rebutted by the need to read the Plan as a whole. He focused on the s. 8.7(iv) provision that "[a]ll percentage increases shall be rounded to the nearest 2 decimal points". There was uncontradicted expert evidence that the calculation required under s. 8.7(ii)(a) for pensioners aged 65 or older -- 60 per cent of the Pension Index -- will never yield more than a two-decimal place figure if the Statistics Canada one-decimal place increase is used. The motion judge found, at para. 61, that as using Statistics Canada's one-decimal rounding of the Pension Index "would eliminate the need for any further rounding as set out in s. 8.7(ii)", it would "render meaningless the provision in s. 8.7(iv) that all rounding be to two decimal places". He added that the expert evidence indicated that following Bell's policy of rounding the Pension Index to two decimal places would often yield a three-decimal place figure in the s. 8.7(ii)(a) calculation. The Bell two-decimal point rounding of the Pension Index would therefore give s. 8.7(iv) meaning.

[11] The motion judge concluded that while Statistics Canada uses the one-decimal place approach to rounding for its own purposes, that method did not govern the Plan when read as a whole. The key passage in his reasons is para. 65:

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

[12] At para. 64, the motion judge referred to the *contra proferentem* rule that would favour the pensioners as the non-drafting party, but stated that "there is no rule of interpretation that would implement a version of the Plan that renders it partly meaningless" or "effectively gut" a key aspect of the method of calculation.

### Analysis

[13] The appellant accepts that as the issue in this appeal turns upon the interpretation of a contract, the standard of review is that laid down by *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633, [2014] S.C.J. No. 53, 2014 SCC 53 and *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31, 2002 SCC 33. [page26] To succeed, the appellant must establish either a palpable and overriding error of fact or an extricable error of law.

[14] The appellant argues that this appeal turns on the plain and ordinary meaning of s. 1.29. The appellant accepts that s. 1.29 must be read in the light of the Plan as a whole. The appellant argues, however, that the definition in s. 1.29 is unaffected by s. 8.7(iv) which deals only with percentage increase in pensions under s. 8.7. The appellant submits that the motion

judge made a "foundational error" by finding that unless s. 8.7(iv) applies to the definition of Pension Index, s. 8.7(iv) would be meaningless. The motion judge failed to take into account the uncontradicted evidence regarding the calculation under s. 8.7(iii) of the annual percentage increase of pensioners who retired during the current year. Those pensioners are not entitled to the full year's cost-of-living increase and their annual percentage increase is prorated according to the number of months of retirement. The expert evidence established that by reason of the prorating, using a Pension Index rounded to one decimal place will often yield an annual percentage increase with three or more decimal places. Therefore, resort must be had to the s. 8.7(iv) two-decimal place rounding rule. That, in turn, means that using the Statistics Canada one-decimal point rounding to determine the Pension Index does not render s. 8.7(iv) "meaningless" and the whole foundation for the motion judge's interpretation collapses.

[15] Bell argues that the motion judge did not err. The evidence regarding the calculations and need to round or not round was uncontradicted and the argument that the motion judge made a palpable and overriding error of fact should be rejected. Bell has used the two-decimal rounding policy since 1998 with no complaint from the pensioners. The motion judge did not err by finding that the Statistics Canada one-decimal policy would render s. 8.7(iv) meaningless in relation to s. 8.7(ii) which governs the annual percentage increase for all but a very small number of pensioners.

[16] For the following reasons, we conclude that the appeal should be allowed.

[17] Our starting point is the language of s. 1.29. We agree with the appellant and the motion judge 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. That conclusion is supported by the comma following the phrase "Consumer Price Index" and the "series qualifying rule" referred to by the motion judge.

[18] We add here that the appellant led evidence to explain the reason for the Statistics Canada one-decimal point rounding policy. An expert testified that the Consumer Price Index cannot be [page27] 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". The one-decimal point rounding is also the convention among most statistical agencies.

[19] We do not accept Bell's submission that adhering to the one-decimal rounding policy is undermined by the expert's admission on cross-examination that Statistics Canada follows the one-decimal rounding policy "for its own purposes" and "is not in the business of telling people how to use [its] data". As the expert explained, the policy Bell adopts for the Plan is matter for negotiation between Bell and its employees. In our view this simply states the obvious. Statistics Canada determines and publishes the annual percentage increase in the Consumer Price Index using what it regards as sound statistical practices. Statistics Canada has no authority to dictate how pensions are to be adjusted for inflation and parties are free to adopt whatever method they wish. However, the question before the motion judge and before us is whether the words in the Plan require the parties to adopt the Statistics Canada approach.

[20] We agree with the motion judge that the language the parties have adopted in s. 1.29 points in the direction of applying Statistics Canada's calculation of the annual percentage increase of the Consumer Price Index. That interpretation is supported by use of the comma

indicating that the phrase "as determined by Statistics Canada" modifies both the phrases "Consumer Price Index" and "annual percentage increase". It is also supported by the evidence of sound statistical methodology supporting the one-decimal rounding policy.

[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.

[22] This brings us to the next stage, namely reading s. 1.29 in the context of the Plan as a whole. We agree with the motion judge that this is an important part of the interpretive exercise. We also agree that when a pension scheme should be interpreted as a whole and that the meaning of a particular clause should be considered in conjunction with other relevant clauses: *Dinney v. Great-West Life Assurance Co.*, [2009] M.J. No. 116, 2009 MBCA 29, 236 Man. R. 299 (C.A.), at paras. 61-62; Geoff R. Hall, *Canadian Contractual Interpretation Law*, 3rd ed. (Markham: LexisNexis, 2016), at p. 256. There can be no doubt that the crucial [page28] point for the motion judge was his conclusion that accepting the Statistics Canada one-decimal rounding policy would render s. 8.7(iv) "meaningless" or "partly meaningless". In our view, that conclusion rests on either (or both) a palpable and overriding error of fact or an extricable error of law.

[23] The palpable and overriding error of fact is that the motion judge's conclusion ignores the uncontradicted 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.

[24] Bell argues that as the evidence was uncontradicted, the motion judge could not have misunderstood or mistaken its effect. However, even if the motion judge understood and did not mistake the effect of the evidence, we have no explanation for why he failed to take it into account in reaching the conclusion that s. 8.7(iv) would be rendered "meaningless". In our respectful view, the motions judge's failure to apply the evidence to the interpretation of the Plan amounts to a palpable and overriding error of fact. In the words of *Waxman v. Waxman*, [2004] O.J. No. 1765, 186 O.A.C. 201 (C.A.), at paras. 296-297, his finding was "made in conflict with accepted evidence" and is "plain to see" and therefore "palpable". The error is also "overriding" as it determined the result.

[25] If we were to accept Bell's submission that the motion judge only meant "meaningless" in relation to s. 8.7(ii), we are left with his conclusion that s. 8.7(iv) would be rendered "partly meaningless". In our view, that reflects an extricable error of law.

[26] It is not apparent what "partly meaningless" means. A contractual provision either has a meaning or it does not. Courts will strive to give all provisions in a contract meaning and to avoid an interpretation of one provision that would render another provision meaningless or redundant. The redundancy rule relied upon by the motion judge was explained by this court in *Scanlon v. Castlepoint Development Corp.* (1992), 11 O.R. (3d) 744, [1992] O.J. No. 2692 (C.A.), at para. 89 (leave to appeal to S.C.C. refused [1993] 2 S.C.R. x, [1993] S.C.C.A. No. 62).

To the extent that it is possible to do so, [a contact] should be construed as a whole and effect should be given to all of its provisions. The provisions should be read, not as standing alone, but in light of the agreement as a whole and the other provisions thereof: *Hillis Oil & Sales Ltd. v. Wynn's Canada Ltd.*, [1986] 1 S.C.R. 57 at p. 66, 25 D.L.R. (4th) 649 at p. 655. The court should strive to give meaning to the agreement and "reject an interpretation that would render one of its terms ineffective": *National Trust Co. v. Mead*, [1990] 2 S.C.R. 410 at p. 425, 71 D.L.R. (4th) 488 at p. 499. [page29]

[27] In this case, as we have explained, the rounding provision in s. 8.7(iv) would not be rendered ineffective by giving s. 1.29 its plain grammatical meaning. It will be frequently necessary to round to two decimal points to determine the annual percentage increase for recently retired pensioners.

[28] Bell asks us to ignore that fact as the recently retired pensioners represent only between 4 per cent and 5 per cent of the class. That number amounts to hundreds of pensioners each year. We fail to see why that category of pensioners should be ignored in the interpretation of the Plan.

[29] Adhering to the Statistics Canada one-decimal rounding policy for the purpose of determining the Pension Index pursuant to s. 1.29 does not strip s. 8.7(iv) of meaning. The plain grammatical reading of s. 1.29 is readily reconcilable with the rounding method specified by s. 8.7(iv) with respect to the other provisions of s. 8.7 and it follows that the plain grammatical meaning should be followed.

[30] Alternatively, the motion judge made an extricable error of law by failing to consider the *contra proferentem* rule. The motion judge found the wording of the Plan to be "awkward" (para. 69). He referred briefly to the appellant's *contra proferentem* argument but did not explain why the doctrine should not apply.

[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 resolved against the author if the choice is between him and the other party to the contract who did not participate in its drafting": *McClelland & Stewart Ltd. v. Mutual Life Assurance Co. of Canada*, [1981] 2 S.C.R. 6, [1981] S.C.J. No. 60, at p. 15 S.C.R. *Contra proferentem* is regularly applied to resolve ambiguities in pension documents in favour of pensioners: see *O'Neill v. General Motors of Canada Ltd.*, [2013] O.J. No. 3239, 2013 ONSC 4654, 6 C.C.P.B. (2nd) 257 (S.C.J.), at paras. 21-22.

[32] In our view, the Plan is not ambiguous and, for the reasons above, the appellant's interpretation is the correct one. We therefore do not find it necessary to resort to *contra proferentem*. However, 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. Having found the wording to be "awkward", the motion judge should have taken that step, applied the *contra proferentem* doctrine, and ruled that given the ambiguity, the interpretation favouring the pensioners should prevail. His failure to do so represents an extricable error of law reviewable by this court under the *Sattva* standard of review. [page30] <\$\*head1>Disposition

[33] Accordingly, we allow the appeal, set aside the summary judgment dismissing the action and in its place award summary judgment in favour of the appellant. The matter is remitted to the motion judge for any ancillary or consequential matters that may arise from our judgment.

[34] The appellant is entitled to costs fixed in the amount agreed to by the parties, namely \$22,500 inclusive of taxes and disbursements.

*Appeal allowed.*

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**GASTON J. PERREAULT and ODETTE DI MURO** v. **BELL CANADA et. al.**

Plaintiffs

Defendants

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***ONTARIO***  
**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act*, 1992

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**STATEMENT OF CLAIM**

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